Restorative Justice: Moving Past the Caricatures

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Preface

This paper builds on several papers I've written (with Russ Immarigeon), [1] and it draws from my research on conferencing practices in Australia (in the ACT and South Australia) during 1995-1996, as well as my ongoing research on restorative justice in South Australia.[2] I began the fieldwork in South Australia in March of this year, and we'll be gathering data through June. The project is called South Australia Juvenile Justice Research on Conferencing -- SAJJ for short. We are observing conferences, gathering survey data on the police and coordinators at the conferences, and interviewing the victims and young people (offenders) who were associated with the conferences. I'll be returning to South Australia in 1999 to conduct follow-up interviews with the victims and young people

It's too early to report on that research. But my experience of undertaking the research, of talking with the many people associated with it, and seeing the routine day-to-day practices of "restorative justice" from the ground level -- has informed some points I'll be making.

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My argument is that we need to move past several caricatures of restorative justice, which featured in the "first phase" of work in the area. These caricatures are

- a restricted history of restorative justice
- an oppositional framing of retributive and restorative justice

By the first phase of work on restorative justice, I refer to all the practices, political work, and publications that emerged from the mid-1980s to the present, throughout the world -- but especially for my purposes in Australia, New Zealand, Canada, and the United States. First-phase work contains a euphoric, religious headiness, and it sings the many praises of the promise of restorative justice. Simultaneously, first-phase work contains critical views of restorative justice, and especialy how it will work in practice.

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[1] See Immarigeon and Daly (1997); Daly and Immarigeon (1998).

[2] See Daly (1996, 1997).

Common to both the euphoric and critical positions is a dirth of empirical research on what is happening "on the ground."[3] Claims that are broadly optimistic or pessimistic are precisely that -- claims. There is large space, yet to be occupied, of research that examines how and why the concept of restorative justice moves (or has moved) into legislation (or, more generally, the politics of reform), how practices "work" in the organisations within which they are based, conflicts that arise within organisations over who "owns" this new justice idea, how participants view the process, and what citizens make of the idea. In short, it is time that researchers move from the comfort of their offices and libraries and into the field. I call that the "second phase" of work on restorative justice

The problem in talking about "restorative justice" is that it is a large concept with many referents. It can refer to an alternative process for resolving disputes in organisations, to alternative sanctioning options, or to a distinctively different, “new” mode of criminal/juvenile justice organised around principles of restoration to victims, offenders, and the communities in which they live. It is used in juvenile justice, criminal justice, and family welfare/child protection cases.

In Australia and New Zealand, "restorative justice" is tied to a particular set of practices -- variously termed diversionary conferences, family group conferences, family conferences, community accountability conferences, and juvenile justice teams. While taking different forms and having different institutional or legislative histories in the six states and two territories, conferences are set in motion as a diversion from court for youthful offenders, and in the ACT for a short while, also for adults.

Although restorative justice means many things to people, there is a general sense of what it stands for. It emphasises the repair of harms and of ruptured social bonds resulting from crime or other kinds of conflict. It focuses on the relationships between disputants, or between crime victims/offenders, and the families, communities, and societies in which they live.

Caricature #1: Restricted History of Restorative Justice

In looking around the world, one finds many histories of restorative justice; most are ethnocentric. For example, the "history" of restorative justice as reported by Australians and New Zealanders begins where? In the Antipodes. The "history" as reported by North Americans begins, where else? In North America. The "history" as reported by some Christian-oriented North Americas begins in biblical texts.

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[3]The major published studies to date include Maxwell and Morris (1993) on New Zealand conferencing, McCold (1997) on conferencing in Bethlehem, Pennsylvania; Umbreit (1995) on a comparison of mediation programs in the U.S.; and Wundersitz (1996) on the early phases of conferencing in South Australia. The RISE Project has produced some occasional papers and many conference papers, but the project is still underway.

I do not want to dwell on this problem. Rather, I want to suggest that we begin to frame (and to imagine) a different history -- which depicts the multiple streams of activism and social thought that have fed into -- and have been part of -- this global entity called restorative justice.

One crucial starting point are the social movements of the 1960s and 70s, and especially the black civil rights and indigenous social movements, and the women's movements. (As soon as one nominates a "start point," others will find even earlier ones, so this will be an on-going revisionist history.)

The U.S. civil rights movement was based, in part, on critiques of racism and racial domination in police practices, in courts, and in prisons. This critical analysis was central to political activities, including prisoners' rights and alternatives to confinement. Indigenous groups in the U.S., Australia, Canada, New Zealand, among other nations, challenged the legacy of white colonialism, which included segregation and overimprisonment of native populations. The women's movement also figured prominently. During the 1970s, campaigns around violence against women and children were a central element of feminist organising, and feminist groups were among the first to call attention to the mistreatment of victims in the criminal justice process. Feminist activists were also involved in prisoners' rights campaigns.

Thus, while offenders and victims are often viewed as adversaries in the justice system, they increasingly came to see themselves as having common experiences of unfair and unresponsive treatment.

As a consequence, in part, of these social movements, new programs and practices emerged in the 1970s and 1980s in North America, Scandinavia, Europe, and the Antipodes. Among them are the following:

- *Prisoner rights and alternatives to prisons*[4] (advocacy to minimise prison use or to abolish prison)

- *Conflict resolution* (the development of community justice boards and neighbourhood justice centres; a general demand for "access to justice" by all citizens).[5]

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[4] During the 1970s, some scholars and practitioners argued that offenders were also victims of societal neglect and impoverished communities. Accordingly, advocates wanted to change prison conditions, minimise the use of incarceration, and even abolish jails and prisons. In this context, Fay Honey Knopp (1976) and others hoped to build "a caring community" that addressed victims and victimisers.

[5] Emphasis was placed on negotiation, exchange between disputants, and a less central role for legal professionals (see Pavlich 1996: 161, notes 4-6, for references to developments in Britain, the U.S. and Canada during the 1970s and 1980s).

- *Victim-offender reconciliation programs (VORPs)*[6] (meetings with victims and offenders, usually after sentencing)

- *Victim-offender mediation VOMs)*[7] (meetings with victims and offender, but more broadly applied to juvenile cases)

- *Victim advocacy work*[8] (a variety of "victim's rights" groups which focused on restitution for crime and on victims having a voice in the court process)

- *Family group conferences (FGCs)* [9] (emerging from political struggles in the 1980s in New Zealand on the over-representation of Maori youth in the juvenile and welfare system; first adapted in modified form in Australia in 1991 in Wagga Wagga; subsequently legislated in different forms

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[6] First introduced in Canada in 1974 and in the U.S. in 1977, VORP's were founded on Mennonite principles of exchange and dialogue. They involved meetings between crime victims and offenders, usually after sentencing, in the presence of a neutral third party.

[7] Victims (and their advocates) increasingly preferred the term *mediation* rather than reconciliation. The program model for VOMs was similar to that for VORPs, although other people affected by an offence could be brought to meetings, particularly when more serious crimes were being addressed. VOMs were introduced to England, Scandinavia, and Western European countries in the late 1970s and 1980s, primarily in the handling of juvenile cases.

[8] In the 1970s and 1980s, feminist activists and socio-legal scholars focused attention on making the police and courts more accountable to women and children who had been sexually or physically abused. In 1982 in the U.S., the Reagan administration issued a task force report on crime victims that stimulated the growth of victim's rights groups. Alliances between victim advocacy groups and criminal justice reform groups began to grow in the 1990s, as members recognised some common interests.

[9] During the 1980s, New Zealanders began reassessing the Treaty of Waitangi, a constitutional document, and its implications for Pakeha (white) and Maori (indigenous) relations. A report submitted in 1986 by the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare (published in 1988) recommended changes in government policies and practices toward Maori people. Legislation in 1989 established major changes in the handling of youth justice and family welfare matters; this action was taken in response to the over-representation of Maori youth in detention facilities and Pakeha-dominated family welfare decision-making processes. FGCs differ from VORPs or VOMs because they bring more community people into discussions about the offence, acknowledge a wider range of victimised people, and emphasise participation by the family members of offenders (Maxwell and Morris 1993; Umbreit and Zehr 1995-96).

FGCs were first introduced into Australia in 1991 as part of police operations in one jurisdiction (the "Wagga" model of diversionary conferences in New South Wales). Police-run conferences were also established in the Australian Capital Territory and on a trial basis in other states and the Northern Territory. Conferencing was established legislatively in the handling of juvenile cases in South Australia and Western Australia in 1993 and 1994, respectively, where non-police professionals convene and run conferences. Legislation has recently passed in New South Wales and Queensland to employ conferencing in juvenile cases; and it is being used in schools in Queensland. The conferencing model has been introduced in other countries, including Canada, the U.S., and England (Hudson et al. 1996).

in South Australia, Western Australia, New South Wales, and Queensland).

- *Sentencing circles*[10] (alternative to sentencing emerging in Canada in the 1980s, part of First Nation groups' challenges to the white justice system and sentencing practices)

- *Other practices* (including, for example, reparation boards and victim impact panels)[11]

Along with social movement activism and alternative programs/practices was academic research and theories. Some suggest that the practice of restorative justice came first, born of the exigencies of needing to do justice differently, and that the theory came later (Marshall 1996). In fact there was a good deal of theoretical work undertaken by socio-legal and critical legal scholars in the 1970s and 1980s. Some of the major streams of academic work in the area are as follows:

[10] Ross (1992) suggests that the objectives of sentencing circles are conflict resolution, restoration of order and harmony, and offender, victim, and community healing. Sentencing circles are a consensus process (Stuart 1997), which involves “a broad holistic framework [that includes] crime victims and their families, an offender’s family members and kin, and community residents in the response to the behaviour and the formulation of a sanction which will address the needs of all parties” (Griffiths 1996: 201) (but see critiques by some feminist commentators, e.g., Razack 1994). Sentencing circles are now being tried by non-Aboriginal groups in Canada and the U.S., including African-Americans in Minnesota.

[11] In the U.S. State of Vermont, reparation boards are composed of community members who fashion penalties for juvenile offenders; the penalties are typically community service and occasionally victim-offender mediation. Victims are not normally present at these meetings. Victim impact panels, originally established by Mothers Against Drunk Driving, allow victims and their families to express their feelings about the consequences of drink driving to those offenders who have been court-ordered to attend.

- *Informal justice* (Abel 1982 and contributors; Harrington 1985; Matthews 1988; more recently, Pavlich 1996; and the special issue of *Social and Legal Studies* [Santos 1992])

- *Abolitionism* (Mathieson 1974; Bianchi and Van Swaaningen 1986; more recently, Carlen 1990; de Haan 1990).

- *Reintegrative shaming* (Braithwaite 1989)

- *Psychological theories of emotions* (affect and script theories, see Moore 1993; disputants' senses of procedural justice in the legal process, see Tyler 1990)

- *Feminist theories of justice* (building on or criticising Gilligan 's 1982 construct of “care” and “justice” in moral reasoning and decision-making; see Daly 1989; Harris 1987; Heidensohn 1986; Pennell and Burford 1994)

- *Peacemaking criminology* (Pepinsky and Quinney 1991)

- *Philosophical theories on criminal justice* (arguments by Braithwaite and Pettit 1990; von Hirsch and Ashworth 1992; Ashworth and von Hirsch 1993; Ashworth 1993; Pettit and Braithwaite 1993, 1994).

- *Religious and spiritual theories on justice practices* (informed by Christian and indigenous groups' merging of spiritual and cultural elements; see Burnside and Baker 1994; Consedine 1995)

In describing where restorative justice "comes from," I propose that we take a wider and more global view, including the major streams of social activism, practice, and social thought that have contributed to its varied and disparate forms.

Australia's story of the history of restorative justice goes something like this: "Wagga-style" conferencing (or a "more effective" formal caution with a police-run conferences) were trialed in 1990. Although they began without knowledge of New Zealand conferencing or of Braithwaite's theory of reintegrative shaming, they evolved into a "type" of family conferencing, which was eventualy structured around the ideas of "shaming." Unfortunately, today, many commentators assume that conferencing in Australia is largely police-run and based on shaming -- when it is not. The history of conferencing in Australia seems to end in 1993, with the publication of a key text (Alder and Wundersitz 1994), ust when evolving forms of restorative justice were emerging in South Australia and Western Australia, and now in New South Wales and Queensland. Another problem with the story is that it gives the impression that there's only one theory in town -- that of reintegrative shaming. The theory's architect, John Braithwaite, would be the first to say that a *medley* of theories (and practices),

not just one, should be brought to bear in the development and analysis of restorative justice.

Caricature #2: Oppositional Framing of Retributive and Restorative Justice

A common device, used by restorative justice advocates, is to draw contrasts between “retributive,” “rehabilitative,” and “restorative” justice models (see Bazemore 1996; Walgrave 1995; Zehr 1990). These models are respectively associated with punishing the crime, treating the offender, and repairing the harm. In making these contrasts, restorative justice advocates try to demonstrate the superiority of their model over the other two, and especially over the retributive model. The exercise is self-serving in that everything in the “retributive” column is depicted as nasty and brutish, whereas everything in the “restorative” column is nice and progressive. It also forecloses a discussion of the merits of restorative and traditional modes of justice, how the principles in each might be linked in a hybrid model, and how each could operate alongside each other in a justice system.

Part of the problem lies in the different understandings of the term *retribution*. It is used by philosophers to compare retributivist (backward-looking) and consequentialist (or utilitarian, forward-looking) justifications for punishment. Unfortunately, in common usage, many people use "retributive" and even a "just deserts" response to mean "punitive" or "harsh treatment." That is mistaken, and it leads to many misunderstandings.[12]

Ways Forward

I propose that we stop comparing and opposing "retributive" and "restorative" models of justice. There are other contrasts and justice dilemmas we should be engaged with. Pursuing those will prove more productive for theory, research, and policy.

First, we should compare the merits of retributivist and consequentialist responses to harm. Recall that a retributivist response (using a "just deserts" model) does not try to change a person. Rather, the emphasis is on redressing

[12] First, restorative justice advocates unify the punishment goals of just deserts, incapacitation, and deterrence under one heading of the “retributive” model. This is inappropriate and misleading. Second, advocates do not describe the justification for restorative justice. Is it consequentialist, retributivist, a combination? Third, advocates seem unaware of changes in retributivist ideas. For example, retribution is understood as “channelling revenge” (Walgrave 1995: 236), the assumption being that “incarceration [is] the primary means of sanctioning offenders” (Bazemore 1996: 50). These views are not held a leading retributivist, who says that “a decent society should seek to keep the purposeful infliction of hurt to a minimum” and who is interested in how fines and community service might be scaled on desert grounds (von Hirsch 1993: 4).

or responding to the harm in proportion to its seriousness. A consequentialist response aims to achieve some desired future action (e.g., changing a person' behaviour). (There are, of course, hybrid models that combine the two.). An important investigation would be to explore the merits of consequentialism and retributivism within a restorative justice frame.[13]

It is quite logical to use retributivism as the justification for a restorative response, when, for example, a desert-based approach is used to establish the number of hours for community service (Walgrave and Aertsen 1996: 82). Moreover, from my observations of conferences in the ACT and SA in 1995-96, I found that multiple theories of punishment (or response) were present in participants' discussions, including the desire to punish, to rehabilitate, and to restore. Consider too that the theory of reintegrative shaming calls for censuring an act (backward looking and retributivist), which is to be followed by gestures of affirmation toward offenders by those close to them (which, it is hoped, will have an impact on future behaviour). Thus, from a philosophical perspective, one could combine retributivism and consequentialism in restorative justice responses. From an empirical and philosophical point of view, a restorative justice process may permit many theories of punishment to be invoked in decision-making.

Second, we need to revitalise discussions that arose in the 1970s and 1980s over the merits of and interrelationships of informal and formal justice. Roger Matthews struck the right tone in 1988 when he suggested that it wasn't a matter of choosing one or the other, but of examining how they worked together. Increasingly, one finds formal and informal processes becoming more spliced and interwoven. We need research on what happens in these "spliced justice"' forms. One example comes from Belgium where an informal "restorative justice" process was piggybacked on a formal, traditional method of prosecuting and sanctioning "serious" offences. From this research, we can learn what happens when the prosecutors, defence attorneys, and judges engage with the logics of traditional and restorative justice responses.

Third, we need to consider the relationship of a universal justice that all citizens are entitled to, and a network of justice practices or justice systems, which may be more responsive to local conditions or particular disputes. Such sub-justice systems may be only loosely tied to the dominant legal system. What is the optimal relationship between rules, rights, and processes that might be termed "universal" and those that might be understood to be specific to particular communities? (The problem with this "universal" and "specific" framing is that the dominant form is construed as the "universal" one.). There has been some movement on "culturally appropriate" kinds of sanctions in Canada, and

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[13] Recent exchanges between Braithwaite, Pettit, Ashworth. and von Hirsch are over the merits of consequentialism and retributivism, not restorative justice

there continues to be indigenous community justice practices alongside dominant forms in many countries. The questions in this area are large and difficult. What is optimal, who decides, and how will varied justice systems (or sub-systems) relate to one another?

To conclude, I have proposed that we take a wider and more global view of the history and antecedents of restorative justice, and that we move past an oppositional framing of "retributive" or "restorative" justice models.

I have suggested that increasing attention should be given to empirical work on what is happening "on the ground" with various initiatives, including the politics surrounding legislative and reform efforts. Howard Becker's (1973: 189-94) observations assist me here. He said "Sociologists [or criminologists and socio-legal scholars] have generally been reluctant to take a close look at what sits in front of [our] noses," (p. 194) even though "common sense and science enjoin us to look at things closely before we start theorising about them" (p. 192). One consequence is that "we may find ourselves theorising about activities which never occur in the way we imagine" (p. 192).

Such theorising and claims-making have featured in "first phase" work on restorative justice. It was important work. But perhaps now it's time to take a "close look at what sits in front of [our] noses."

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