

Towards a 'Justice Agenda' for Restorative Justice

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In an essay published in 2003, Paul H. Robinson commends restorative processes, but argues that for all their benefits these processes do not deliver justice in the aftermath of crime (Robinson, 2003). To achieve justice, he claims, it is necessary to inflict upon offenders the punishment they deserve. Hence, he concludes, restorative processes should be seen and used as a useful supplement to, but not as a substitute for, punishment of the guilty (ibid.: 377). Robinson then presents a scathing critique of 'leaders of the restorative justice movement' for whom, he contends, giving offenders the punishment they deserve is never an appropriate goal of interventions in the aftermath of crime. By seeking to abolish or marginalise punishment and to *replace* it with restorative processes, these leaders are – according to Robinson - pursuing an 'anti-justice agenda' which is objectionable, odd and dangerous (ibid.: 378).

This is a serious challenge to the restorative justice movement and demands a response.² There are, however, a number of different ways in which advocates of restorative justice might reply. Hence, in this editorial, I will outline and seek to clarify two quite different ways in which restorative justice advocates could - and to some extent have - answered such challenges. These represent fundamentally different ways of positioning restorative justice with regard to more traditional conceptions of criminal justice. I want to draw attention to this difference and encourage debate, in this journal, about which stance the restorative justice movement should adopt. At the moment, the second of these responses seems to be the preferred one amongst leading restorative justice scholars and personalities. However, I will go on to suggest that there is something lacking in it, before indicating – very briefly - a third response that might be fruitful.

¹ I am grateful to Lode Walgrave for his comments on an earlier draft. Whilst I very much doubt that I've responded satisfactorily to all of the issues he raised, the piece has improved significantly as a result of his advice.

² John Braithwaite, who is clearly one of the leaders Robinson has in mind, does respond to some of Robinson's claims in the same issue of the *Utah Law Review* (Braithwaite, 2003).

One way of responding to Robinson would be, not to dispute his claim about the requirements of justice in the aftermath of crime, but to insist:

- (i) that achieving justice is not the goal of restorative interventions; and
- (ii) achieving justice in the aftermath of crime is either an illusory goal or else far less important, relatively, than some suppose.

This seems to be the stance of Nils Christie in his invited essay on restorative justice terminology, used to launch this journal (Christie, 2013). In ‘Words on words’ Christie argues that, as a name for the field of alternative conflict solutions, ‘restorative justice’ is a bad choice; and, the worst part of the name is the word ‘justice’ (ibid.: 15). He suggests that using the word ‘justice’ to name the field creates the impression that it is part of the institution of penal law, an institution which exists to impose pain upon criminal wrongdoers. However, for Christie, the purpose of alternative conflict handling is to create understanding – to bring the parties to conflicts closer to each other. Alternative conflict handling seeks solutions that satisfy both parties, but does not claim that these solutions are ‘just’ (ibid.: 16). The field should be absolutely clear about this and not create confusion and misleading expectations by using words such as ‘justice’ and other terms associated with penal law.

So, Christie’s position seems to be that it is not the goal of restorative interventions to deliver justice. It would of course be possible to adhere to this position without denying that justice is an important goal to pursue in the aftermath of crime. This is in fact the position which Robinson (2003) urges: he encourages the use of restorative processes provided they are not presented as a *substitute* for punishment or used in a way that conflicts with efforts to deliver justice by punishing offenders. However, at certain points, Christie seems to go further than this by insinuating that, in pursuing justice, our penal institutions are pursuing something that is either illusory or of little value. He persistently engages in sideswipes at ‘penal law’, creating the impression that restorative interventions are not just a supplement but are in fact an alternative to, and superior to, the so-called ‘just’ solutions provided by criminal justice institutions.

There is another – perhaps more subtle and nuanced - position that could be adopted by those who adhere to this first response. Without denying that justice is an important goal to pursue in the aftermath of crime, one could question whether it ought to be the *primary* goal. Justice is, after all, only one of many important social values (see Campbell, 2010: 8). It is plausible to argue that, when it comes to responding to crime, our societies tend to over-

estimate the importance of achieving justice relative to achieving other goals (such as reconciliation, the discovery of truth, and a peaceful future). Where efforts to achieve these other goals *do* potentially conflict with efforts to deliver justice, it is by no means obvious that justice should always and automatically take priority. This more subtle position is suggested by Lode Walgrave in his response to Christie's 'Words on words'. Whilst disagreeing with Christie's rejection of justice as a goal of restorative interventions, Walgrave points to a more subtle point which Christie may be making: 'I do agree with Nils Christie that justice should not be promoted as a primary social value. Respect, solidarity and taking active responsibility are primary values' (Walgrave, 2013: 79).

On the other hand, there are powerful arguments around to the effect that a society which did not prioritise justice – which did not regard the achievement of justice in the aftermath of crime as an urgent moral priority and establish institutions to do so - would not be a good society and would have little to commend it to anyone other than moral lepers (e.g. Moore, 1987). The issues here are complex and require sustained attention from restorative justice scholars.

A second and very different response to Robinson's challenge is to agree with his assumption that in the aftermath of crime society has a duty to ensure that justice is done – and even that this should be society's primary concern – but to question his claim that to achieve justice it is necessary to punish offenders.

This second type of answer is illustrated by Desmond Tutu's defence of the South African truth and reconciliation process. Faced with the criticism that the South African state acted immorally by not punishing perpetrators of gruesome atrocities when it had the power to do so, allowing them to 'get off scot-free', Tutu retorted:

retributive justice – in which an impersonal state hands down punishment with little consideration for victims and hardly any for the perpetrator – is not the only form of justice. I contend that there is another kind of justice, restorative justice ... Here the central concern is not retribution or punishment but, in the spirit of *ubuntu*, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. Thus we would claim that justice, restorative justice, is being served

when efforts are being made to work for healing, for forgiveness and for reconciliation (Tutu, 1999: 51-2).

Here Tutu is affirming, rather than denying, that need to pursue justice in response to crimes. But, he suggests, there is more than one way to achieve justice. State punishment of offenders is one way. But justice can also be achieved by making efforts to achieve healing and restoration of broken relationships.

This second type of response is also suggested by Howard Zehr (2005). Zehr suggests that the 'retributive model of justice' is in fact peculiar to the modern West; before modernity (and beyond the West) other conceptions of justice prevailed:

The retributive model of justice is not the only way we have envisioned justice in the West. In fact, other models of justice have predominated throughout most of our history. Only within the past several centuries has the retributive paradigm come to monopolize our vision (Zehr, 2005: 97).

Zehr goes on to question the assumption that the victory of the retributive paradigm of justice represents progress. To the contrary, he goes on to show that two alternative ways of imagining justice – which for shorthand he calls 'community justice' and 'covenant justice' - had (and have) much of value to teach us. Both envision justice in a more holistic way than the retributive paradigm, with an emphasis on making things right and fostering peaceful and right relationships between people. From this perspective, our assumption that punishment of offenders in the aftermath of crime is necessary to achieve justice is not, *pace* Robinson, the result of a discovery of the 'independent meaning' of justice (see Robinson, 2003: 378). Rather, it is the product of a limited imagination – an imagination stunted by a lack of proper historical and cultural knowledge.

This second way of answering critiques such as Robinson's seems to be the preferred direction of many of the restorative justice movement's major thinkers. We can see this if we consider how those who were invited (for the first issue of this journal) to respond to Nils Christie reacted to his suggestion that the word 'justice' should be expelled from the vocabulary of the restorative justice movement.

Shadd Maruna expresses deep disagreement, saying that justice is 'the sort of ideal for which one would fight to the grave' and 'one of the few words ... that have the power to give life itself meaning' (2013: 48). Christie's mistake, according to Maruna, is to assume that

justice in the aftermath of crime must mean penal or legal justice. Maruna insists that what restorative justice practices should be seeking to promote is indeed justice, and not something 'limp and uninspiring' such as 'conflict handling' (ibid). But, for Maruna, justice clearly means something different – and more expansive – than righting wrongs through punishment. Josep Sumalla (2013) argues that people have a natural need for justice and this need is triggered when people suffer harms that they consider unjust. If they are to be acceptable and if they are to work, restorative processes must meet these needs for justice. Again, Sumalla suggests that these needs for justice can be met through something other than punishment. They can be met through processes which hold aggressors accountable for the harm they cause and responsible for compensation and reparation. John Braithwaite also insists that the restorative justice movement should pursue justice, but justice *correctly conceived* (2013: 21). And he goes on to state that justice should not be conceived narrowly as punishing people through criminal trials. Rather, Braithwaite states, 'Properly conceived, justice is a holistic concept that includes procedural justice, distributive justice, social justice, and restorative justice, alongside last resort to punitive justice' (2013: 21).

The most developed discussion of justice amongst the responses to Christie's essay is that of Froestad and Shearing (2013). It takes place in the context of their discussion of the Zwelethemba model, which is their name for an approach to the governance of security they helped develop in South Africa involving the use of micro-level institutions to mobilise local capacity to govern security. Froestad and Shearing share Christie's concern to make clear that the aim of the practices was to establish peace in the face of conflict, not to deliver justice where this is conceived as 'just deserts' (ibid). However, drawing upon an earlier discussion (Shearing and Johnston, 2005), they argue that participants in the Zwelethemba practices *did* think of what they were doing as creating justice. However, they operated with a distinctive sense of justice:

The sense of justice was the sense of justice as a better future. For these participants, justice required doing something that would create a better world where the harms that they were experiencing would be less frequent. Justice meant transformation and when, through gatherings, transformation was being shaped, a sense of justice was experienced and celebrated, often through song, prayer and dance. Justice as a better future meant making a difference that would transform people's lives. It meant ... 'repairing the future' and not simply repairing a damaged past: justice as transformation (Froestad and Shearing, 2013: 42).

Elsewhere, Shearing and Johnston are emphatic that it is appropriate to describe this experience as one of justice:

Although this sense of justice is very different from the justice of ‘just deserts’ it fits neatly within a broader conception of justice as fairness, equality and the maintenance of right. People experience justice because they feel a sense of fairness, equality and rightness. The experience is certainly not the same as the experiences people have within the context of the punishment paradigm. This is not a retributive experience ... But it is justice nonetheless (Shearing and Johnston: 2005: 36).

These suggestions about the possibility of there being an alternative way of envisioning justice in the aftermath of crime are, I suggest, amongst the most important contributions the restorative justice movement has to offer to our society’s thinking about crime and justice. Yet, at the same time, I sense something missing from them.

First, it is one thing to suggest that punitive justice is not the only form of justice - that justice can take the form of restorative justice. However, we still need an argument for *preferring* restorative justice. Otherwise, we could conclude that the form of justice we should seek in the aftermath of crime is simply a matter of personal or cultural preference, or even whim. This is not, I am sure, the position that advocates of restorative justice want to adopt. Rather, they want to persuade people that restorative justice is not simply an alternative, but a preferable alternative. In order to achieve this, it is not sufficient simply to point to the virtues of restorative justice, since it is possible to find equally persuasive defences of the practice of punishment, conceived as a necessary element of retributive justice (e.g. Moore, 1987; Morris, 1968; and the essays in White, 2011). Rather, it is necessary to undertake rigorous thinking about the concept of justice itself, and from that basis begin the work of comparing the strengths and weaknesses of punitive and restorative conceptions of justice in the aftermath of crime.

Second, advocates of restorative processes have provided compelling accounts of the capacity of those processes to achieve what are undoubtedly beneficial outcomes. There can now be little doubt that the intended beneficiaries of restorative processes do indeed frequently gain benefits, in terms of healing, reassurance that the future will be better, reintegration into society, and so on. Moreover, as Froestad and Shearing (2013) suggest,

they also tend to *experience* these things as highly beneficial. But what remains unclear is what one gains by describing this experience as an experience of 'justice'. As indicated earlier, justice is not the only important social value and it is not unreasonable to argue that, in the aftermath of crime, there may sometimes be more important priorities than achieving justice. If people experience healing and reassurance that the future will be better, and regard these as valuable, then why not simply say that? Why create confusion by using terms such as 'justice as healing' – which seem to conflate two quite different social values.

For these reasons I will conclude with a very brief pointer towards a third direction that might be taken in responding to critiques such as those of Robinson. This involves distinguishing two questions concerning justice and punishment in the aftermath of crime. The first is whether it is *necessary*, in the aftermath of crime, to punish offenders in order to achieve justice. The second is whether it is *sufficient*, in the aftermath of crime, to punish offenders in order to achieve justice.

Robinson (2003) – like many others – focuses only on the first question. He quite clearly thinks punishment is necessary. He does not, at least in the article discussed here, provide very persuasive arguments to support this contention. However, other retributivists, such as Michael Moore (1987), have provided powerful arguments to the effect that justice requires the punishment of offenders and that society has a duty to punish. Those who wish to argue that it is not necessary to punish offenders in order to achieve justice need to argue with the more sophisticated retributive theorists, rather than attacking viewpoints which are either not really retributivist (ibid.: 178-81) or presenting a weak and easily refuted case against retributive judgements (ibid.: 185-97).³

³ In fact, some restorative justice advocates who have looked more closely at retributivist ideas have ended up *not* rejecting them. Rather, they have reached the very different conclusion: that 'there is much in the retributivist theory that is very close to Restorative Justice' (Brunk, 2001: 39). And leading proponents of restorative justice such as Howard Zehr (2002) have come to reconsider the view that retributive justice and restorative justice are stark opposites and have sought to reconcile retributive and restorative justice. Compare Duff (2003) who reaches a somewhat similar - but not identical - position, whilst coming at this issue from a rather different starting point. For an overview, see Roche (2007).

One fruitful direction may be to question the widespread assumption that retribution itself requires the practice of punishment or intentional infliction of pain; to argue instead for ‘a kind of reversed retribution’ in which restorative justice itself achieves – far better than intentional imposition of pain – the goals of retributive justice (Walgrave, 2004: 47). Hence, Walgrave draws not the familiar distinction between retribution and restoration, but rather a distinction between ‘*punitive* retributivism’ and a ‘reversed, restorative retributivism’ (ibid.: 55-6, italics added). In the former, offenders purportedly pay back for their offences by passively undergoing imposed pain; in the latter, they pay back by actively taking responsibility for repairing the negative consequences of their offences (ibid).

I wonder, however, whether it is necessary nor useful, in order to develop an argument for preferring a restorative conception of justice, to contest the arguments of punitive retributivists concerning the necessity of punishing offenders in order to achieve justice. Rather, even if punishment of offenders is necessary, there is another important question that punitive retributivists tend to neglect: if justice is the goal, is punishment *sufficient*? In order to address this question we need to think less about the merits and shortcomings of different justificatory theories of punishment, more about the requirements of justice in the aftermath of crime.

The power of punitive retributivism derives from its argument that we should punish offenders ‘because, and only because, the offender deserves it’ (Moore, 2007: 179). But, if we concede this point, we can and should still ask ‘is that all that justice requires?’. Such a question is raised by the philosopher and theologian Thomas Talbott (1993).⁴ Instead of asking ‘what justifies punishment?’, Talbott asks ‘what does justice require in the event that somebody commits an offence?’ (ibid.: 161). The answer he suggests is that it requires ‘making amends’:

If one could somehow make amends for the wrong action, that is, undo any harm done, repair any damage, in a way that would make up for, or cancel out, the bad consequences of the action (in one’s own life as well as in the life of others), one would then satisfy justice to the full (Talbott, 1993: 161).⁵

⁴ Whilst Talbott’s focus is mainly on divine justice, much of what he has to say is, in my view, quite relevant to debates about the requirements of justice in human society.

⁵ On ‘amends’ as a key value of restorative justice, see Van Ness and Strong (2010: ch. 5).

Talbott then goes on to suggest that, in the aftermath of most crimes – especially serious crimes – it is very unlikely that anybody will have the power fully to make amends in this sense. Yet, we cannot ignore the demands of justice when somebody commits a serious moral wrong. Hence, Talbott suggests, we try to satisfy *some* of the demands of justice (1993: 162). We typically seek to do this through retributive punishment. Drawing upon Morris (1968), Talbott suggests that this brings us a bit closer to justice, by erasing the criminal's unfair advantage. But, distinctively, Talbott then goes on to look at what else would be required to achieve justice. He suggests that the victim's unfair disadvantage would need to be erased (1993: 162). And, drawing upon theological ideas about atonement for sin, he suggests that perfect justice requires other things such as repentance, reconciliation and forgiveness.

The crucial point here is that, if we take justice seriously, we must acknowledge that our existing way of meeting the requirements of justice in the aftermath of crime, i.e. punishment of the offenders, is quite limited. Such punishment needs to be supplemented – and to some degree modified – by efforts to heal victims and undo or put right all of the harm (including the harm offenders do to themselves) brought into existence by crimes. These are not supplements to our efforts to do justice; they are required by the demands of justice. We might call this richer conception of justice 'restorative justice'.

It is not possible in the space here to do justice to Talbott's rich account and it would be inappropriate, of course, to seek directly to apply Talbott's views about the requirements of Divine Justice to debates about the requirements of justice in secular society. But, what I am interested here is not so much Talbott's theology and substantive views, but rather the structure of his analysis and the questions he poses. I suggest that this provides a useful framework for further development of thinking about the nature and merits of a restorative conception of justice in the aftermath of crime.

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