

ARTICLE

RESTORATIVE PROCESSES & DOING JUSTICE

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I. INTRODUCTION

Restorative processes include a wide variety of mechanisms, such as sentencing circles and victim-offender remediation, that can be quite valuable in bringing victims and offenders together.¹ Such processes provide something that nothing else in the traditional criminal justice can provide. Restorative processes can provide offenders with a better understanding of the real impact of their offenses and can put a human face on their victim. They also can give offenders an important insight into the norms they violated: during the process offenders see people they know and respect openly expressing disapproval of the offending conduct. The potential influence of this kind of social interaction should not be underestimated. This will be discussed further at a later point.

Restorative processes also have a special benefit for victims. Consider the case of an elderly woman whose house was burglarized by a neighborhood youth.² The emotional cost to her was devastating. She was afraid to go out, yet afraid when she stayed in. The incident caused the woman to

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1. See e.g. Leena Kurki, *Restorative and Community Justice in the United States*, 27 *Crime and Just.* 235, 280–81 (2000) (explaining that sentencing circles involve victim, offender, and key community members, that they are also open to the public, and that the agreements reached in the circles are either recommendations for the judge or the final sentence); Ilyssa Wellikoff, Student Author, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 *Cardozo Online J. of Conflict Resolution* 2 (2004) (explicating that for victim-offender mediation the victim is able to question his or her offender and discuss how the crime affected his or her life). Other mechanisms include conferencing, victim assistance, ex-offender assistance, restitution, and community service; see *Restorative Justice Online – Introduction*, <http://www.restorativejustice.org/intro/> (last updated June 22, 2005); Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of “Restorative Justice,”* 2003 *Utah L. Rev.* 375, 375–76.

2. See Kathy Elton & Michelle M. Roybal, *Restoration, A Component of Justice*, 2003 *Utah L. Rev.* 43, 53 n. 57 (2003) (citing Mark S. Umbreit with Robert B. Coates & Boris Kalanj, *Victim Meets Offender: The Impact of Restorative Justice and Mediation* 160 (Willow Tree Press, Inc. 1994)) (highlighting the case of an elderly woman whose home was burglarized by a neighborhood youth as one where restorative processes were used appropriately and successfully).

have a generalized fear of everything around her. As part of the offender's reparations, the youth agreed to do some house chores for her and, by design, came to know her better, and her him. That contact let her better understand what had happened and how and, with that understanding, her generalized fear faded.

But here is where I want to quarrel with some of the "restorative justice" advocates: victims and offenders are not the only people who have a stake in how we deal with offenders. The adjudication of criminal wrongs is not a private affair, which is why we treat these cases as state prosecutions and not civil trials. There are important societal interests at stake.

Let me give just one case illustration that brings the issues into focus: the *Clotworthy* case,³ a case from New Zealand about which John Braithwaite, one of the major proponents of "restorative justice," speaks in admiring terms.⁴ During a vicious robbery, Clotworthy stabbed the victim six times, puncturing the victim's lung and diaphragm and seriously disfiguring his face. It was the disfigurement that had the most devastating effect on the victim, for the result was sufficiently repulsive to people that it interfered with his normal social interactions. In the mediation session, it was agreed that Clotworthy would not go to prison; instead he would work to earn money to pay the fifteen thousand dollars needed for the surgical operation to diminish the victim's disfigurement. Braithwaite thought this a wonderful disposition, an example of a restorative justice success. I think it an example of what is wrong with his vision of "restorative justice." I can understand why the victim would agree to such a disposition: he was desperate to reestablish his social relationships. And I can understand why Clotworthy thought this was a great disposition: it was as if he was just paying civil compensation, and not even fair compensation at that since there was no compensation for the horrors that the victim had been put through.

But the victim should never have been put to a choice of getting justice or getting his life back. To take advantage of his desperate situation in order to get him to agree to such a disposition is simply to victimize him again—this time with official institutions approving the dirty deed. The result is appalling; to see it as a desirable disposition is even more so. But it nicely illustrates how unfortunately indifferent restorative justice proponents can be to the importance of doing justice not just to victims but to the rest of society. Society has an important interest at stake here—doing justice, in the sense that the offender receive deserved punishment for his wrongdoing—and dispositions like *Clotworthy* undermine that interest. Justice

3. *The Queen v. Clotworthy*, T.971545 (N.Z. Dist.Ct. Apr. 24, 1998) (available at <http://www.restorativejustice.org.nz/Judgements%20Page.htm>; *select* Sentencing Notes (accessed Sept. 15, 2006); *but see infra* n. 9 (reversing disposition in *Clotworthy*).

4. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 *Crime and Just.* 1, 87–88 (1999).

would have been Clotworthy staying out of prison long enough to make the money needed for the operation, then going to prison, or suffering some other form of punishment.

II. JUSTICE'S VALUE TO OUR CRIMINAL JUSTICE SYSTEM

Why should we care about doing justice? Why should justice be a value? The standard retributivist argument, of course, is that doing justice—that is, giving the offender the punishment he deserves—is a value in itself and requires no further justification.⁵ But more recently a new set of arguments has been added. These arguments arise from social science research suggesting that there are utilitarian crime control arguments in favor of distributing punishment according to desert—the extent of an offender's blameworthiness—not just the abstract notion of retributive justice as an end in itself.

These "utility of desert" arguments might be briefly summarized this way:⁶ deviating from a community's intuitions of justice inspires resistance and subversion among participants—juries, judges, prosecutors, and offenders—when effective criminal justice depends upon acquiescence and cooperation. Furthermore, some of the criminal justice system's power to control conduct derives from its potential to stigmatize violators. For some persons this control mechanism, which is essentially cost-free, is more powerful than imprisonment. Yet the system's ability to stigmatize depends upon the moral credibility it has with the community: for a conviction to trigger stigmatization, the criminal law must have earned a reputation for accurately assessing which violations do and do not deserve moral condemnation. Liability and punishment rules that deviate from a community's shared intuitions of justice undercut a system's reputation as a moral authority.

Perhaps the greatest utility of desert comes through a more subtle but potentially more influential form. The real power to gain compliance with society's rules of prescribed conduct lies not in the threat of official criminal sanctions, but in the influence of the intertwined forces of social and individual moral control. The networks of interpersonal relationships in which people find themselves, the social norms and prohibitions shared among those relationships and transmitted through those social networks, and the internalized representations of those norms and moral precepts control people's conduct. The law, however, is not irrelevant to these social and personal forces. Criminal law, in particular, plays a central role in creating and maintaining the social consensus necessary to sustain moral norms. In

5. See Michael S. Moore, *The Moral Worth of Retribution in Principled Sentencing: Readings on Theory and Policy* 150, 150 (Andrew von Hirsch & Andrew Ashworth eds. 2d ed., Hart Publg. 1998) ("Retributivism is a very straightforward theory of punishment: we are justified in punishing because and only because offenders deserve it.").

6. The following paragraphs summarize the arguments in Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. Rev. 453 (1997).

fact, in a society as diverse as ours, the criminal law may be the only society-wide mechanism that transcends cultural and ethnic differences. Thus, the criminal law's most important real-world effect may be its ability to assist in the building, shaping, and maintaining of these norms and moral principles. By doing so, it can contribute to and harness the compliance-producing power of interpersonal relationships and personal morality.

The criminal law also can have an effect in gaining compliance with its commands through another mechanism. If it earns a reputation of being a reliable statement of what the community perceives as condemnable, people are more likely to defer to its commands as morally authoritative and as appropriate to follow in those borderline cases where the propriety of certain conduct is unsettled or ambiguous in the mind of the actor. The importance of this role should not be underestimated; in a society that is characterized by complex interdependencies, a society like ours, an apparently harmless action can have destructive consequences.⁷ When an action is criminalized by the legal system, one would want a citizen to "respect the law" in such an instance, even though he or she does not immediately intuit why that action is banned. Such deference will be facilitated if citizens are disposed to believe that the law is an accurate guide to appropriate prudential and moral behavior.

The extent of the criminal law's effectiveness in all these respects—in avoiding resistance to and subversion of an unjust system, in bringing the power of stigmatization to bear, in facilitating, communicating, and maintaining societal consensus on what is and is not condemnable, and in gaining compliance in borderline cases through deference to the law's moral

7. Instances in which people may not immediately perceive the full wrongfulness of the conduct—"grey area" cases—might include such conduct as drunk driving, domestic violence, business disclosures, and disposal of trash and other waste. *See e.g.* Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. Ill. U. L. Rev. 403, 423 (2005) ("Abusers frequently claim that their victims have provoked their violence. In this way, batterers present themselves as the true victims of the violence. This both minimizes the wrongfulness of their own violence and reinforces a culture in which victims feel responsible for bringing the violence upon themselves."); Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U. Cal. Davis L. Rev. 1061, 1072–73 (2006) (pointing to the fact that domestic violence laws were virtually non-existent thirty years ago because domestic violence was not openly perceived as wrongful); Student Authors, *A Look Inward: Blurring the Moral Line Between the Wealthy Professional and the Typical Criminal*, 119 Harv. L. Rev. 2165, 2166–77 (2006) ("[I]ntoxicated drivers choose to act . . . not because they desire to impose . . . harm[] on others. . . . [T]he driver imposes the risks or harms of serious injury or death, usually for the sake of far lesser personal benefits—the driver may have wanted another drink at the bar to continue having fun with his friends . . . [D]runk drivers want to 'party it up' . . ."); Michael P. Richman, *Disclose (Publish) or Perish, Revisited: Disclosing Business "Connections" between Bankruptcy Counsel and Other Professionals*, 25 Am. Bankr. Inst. J. 18, 64–65 (2006) ("[T]here is an enormous gray area of 'connections' that lend themselves equally to rationales for disclosure as well as nondisclosure, creating an ethical tension between the duty to disclose and the subconscious desire to conceal (or simply ignore) information. . . . [T]he costs of failing to disclose are often high because they implicate the professional's judgment and provide litigation opportunities for disgruntled parties in interest to exploit the failure.").

authority—is greatly dependent on the degree to which the criminal law has gained moral credibility in the minds of the citizens it governs. Thus, the criminal law’s moral credibility is essential to effective crime control and is enhanced if the distribution of criminal liability is perceived as “doing justice,” that is, if it assigns liability and punishment in ways that the community perceives as consistent with its shared intuitions of justice.⁸ Conversely, a distribution of liability that deviates from community perceptions of just desert undermines the system’s moral credibility, and therefore its crime control effectiveness. Thus, intentional deviations from justice by “restorative justice” dispositions, as in cases like *Clotworthy*, undercut the law’s crime-control effectiveness.⁹

The crime-control benefits of doing justice may help explain the recent ascendance of desert as a principle for distributing criminal liability and punishment. A number of sentencing guidelines have adopted desert as the dominant criterion for sentencing.¹⁰ Indeed, the American Law Institute, which drafted the Model Penal Code—the foundation for criminal codes in probably three quarters of the states¹¹—has for the first time in forty-five years proposed a change to the Model Code: to set the guiding purpose in sentencing as that of doing justice—of giving offenders the punishment they deserve.¹² Standing in a quite obvious contrast to this desert trend is

8. For documentation and discussion of shared intuitions of justice among lay persons, see Paul H. Robinson & Robert Kurzban, *Intuitions of Justice*, Research Paper No. 06–20 in Pub. L. and Leg. Theory Research Paper Series, U. Pa. L. Sch. (forthcoming 2006-07) (draft available at the Soc. Sci. Research Network Elec. Paper collection: <http://papers.ssrn.com/abstract=887958>).

9. Happily, the restorative justice disposition in *Clotworthy* was rejected by the court upon review, to the disappointment and disapproval of the restorative justice advocates. *The Queen v. Clotworthy*, CA 114/98 (N.Z. Ct. App. June 29, 1998) (available at <http://www.restorativejustice.org.nz/Judgements%20Page.htm>; *select* New Zealand Court of Appeal).

10. See e.g. David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 *Crime and Just.* 71, 71–72 (2001) (“[Washington’s] Sentencing Reform Act of 1981 rejected many core tenets of indeterminate sentencing, putting into place a sentencing system based on principles of just desert and accountability.”); Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 *Am. Crim. L. Rev.* 1313, 1356 (2000) (“California endorsed retribution as ‘the’ purpose for its punishment in 1977 and Pennsylvania identified it as the ‘primary’ purpose in 1982”); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense*, 68 *B.U. L. Rev.* 821, 874 (1988) (“Minnesota’s sentencing guidelines for adult offenders . . . [are] expressly designed to achieve ‘just deserts’”); cf. Michael Tonry, *U.S. Sentencing Systems Fragmenting*, Table 1.1 in *Penal Reform in Overcrowded Times* 21, 28 (Michael Tonry ed., Oxford U. Press 2001) (showing that desert is a highly expressed value in comprehensive structured sentencing jurisdictions such as Minnesota and Washington).

11. See ALI, Annual Rpt. 61, app. *Status of Substantive Penal Law Revision*, 20–21 (1984) (listing the states that have replaced their criminal codes since the promulgation of the Model Penal Code). The Code also is an influential source of authority even in those states without modern criminal codes, where courts regularly cite and follow its provisions.

12. See ALI, *Model Penal Code: Sentencing, Report* 28, 41 (ALI Apr. 11, 2003) (available at <http://www.ali.org>; *select* ALI Projects Online, *select Model Penal Code: Sentencing, Report* (April 11, 2003)) (“[B]road support has been voiced for the theory of limiting retributivism as the philosophical cornerstone of sentencing decisions under the revised Model Penal Code.”).

the “restorative justice” movement, at least that portion of it advanced by academics like John Braithwaite, who use it in their anti-desert campaign.

III. JUSTICE AND RESTORATIVE MEASURES CAN COEXIST

For these academics, it may be the potential of restorative processes to undermine deserved punishment that makes them attractive.¹³ I see their anti-desert attitude as being both odd and unfortunate. It is odd because there is nothing in the use of restorative processes themselves that is necessarily in conflict with desert. On the contrary, we have every reason to believe that persons participating in the restorative process have shared intuitions of justice that shape punishment determination. As social science research has confirmed, the criterion that drives people when assessing appropriate punishment is desert—an offender’s blameworthiness.¹⁴ Thus, when members of a sentencing circle are sorting out an appropriate disposition for a case, what is driving their thinking is in large measure their intuitions of justice, in other words, desert. Studies suggest that these intuitions are quite strongly held and widely shared.¹⁵ It seems quite odd, then, that “restorative justice” proponents approve of restorative processes that commonly run on the participants’ shared intuitions of justice, yet at the same time claim that desert is to be opposed as a basis for assessing punishment.

Nor is desert as a distributive principle inconsistent with the common use of non-incarcerative sanctions that are encouraged in restorative processes. Distributing punishment consistent with the degree of an offender’s blameworthiness can be done through punishment in any form.

13. See John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian?*, 46 UCLA L. Rev. 1727, 1746 (1999) (classifying restorative justice as competing with punitive justice); Burt Galaway & Joe Hudson, *Introduction: Towards Restorative Justice*, in *Criminal Justice, Restitution, and Reconciliation* 1–2 (Burt Galaway & Joe Hudson eds., Crim. Just. Press 1990) (“The central notion [of restorative justice] is to reject traditional justifications, both retributive and utilitarian . . . and to suggest instead that the purpose of state intervention in criminal matters should be to bring about peace among the participants and to restore losses.”); Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* 209–10 (Herald Press 1990) (“If there is room for punishment in a restorative approach, its place would not be central.”); see also Steven P. Garvey, *Punishment as Atonement*, 46 UCLA L. Rev. 1801, 1843–44 (“Put bluntly, restoratists really don’t much care for punishment. . . . Missing from [their] agenda . . . is the idea of punishment as moral condemnation.”).

14. See e.g. Kevin Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. Personality & Soc. Psychol. 284, 296–97 (2002) (available at <http://ssrn.com/abstract=678981>) (accessed Sept. 15, 2006) (concluding that lay persons are highly sensitive to factors uniquely associated with just desert principles and that their individual sentencing decisions are exclusively driven by just desert concerns); John M. Darley, Kevin Carlsmith & Paul H. Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 L. & Hum. Behav. 659, 676–79 (2000) (available at <http://ssrn.com/abstract=678963>) (accessed Sept. 15, 2006) (deducing that just desert was the primary sentencing motive since research participants increased punishment as the seriousness of the offense increased and did not alter punishment based upon variations in the likelihood of committing future offenses).

15. Robinson & Kurzban, *supra* n. 8.

Prison is one possibility, but there are many other possibilities, including the full range of punishments that might be agreed upon during the restorative process. All that desert demands is that the sum of all punishment add up to a total that matches the amount of punishment that the offender deserves according to the degree of his blameworthiness. In a penal code I just helped draft under the sponsorship of the United Nations Development Program, the sentencing guidelines have a punishment method equivalency table that encourages sentencing judges to use non-incarcerative sanctions by letting them “translate” a prison term under the guidelines into a non-incarcerative sentence using the conversion table.¹⁶ So, for example, a prison term of X amount might be “converted” into a fine of Y amount or Z hours of community service, and so forth. The goal is to provide as much flexibility as possible in the selection of sentencing method, while at the same time ensuring that offenders get the amount of punishment they deserve: no more, no less.

So, if there is nothing in restorative processes that is inconsistent with desert, why is it that Braithwaite and other “restorative justice” proponents are so opposed to desert? I think it is in part a misunderstanding of modern notions of desert. These desert opponents may assume that desert means harsh punishment. Certainly the biblical phrase, “an eye for an eye,” which they regularly repeat,¹⁷ has the connotation of harsh, if not barbaric, punishment. And it is true that politicians sometimes talk about “desert” as if it means being more harsh. But no modern desert theorists would intend this meaning of desert when they propose using it as a principle for the distribution of criminal liability and punishment. On the contrary, to be “harsh” is to suggest that a person get more punishment than he deserves, which clearly would violate the principle of desert.

Indeed, desert typically has little interest in assuring punishment of any particular severity; more important to it is the proper ordinal ranking of cases along the continuum of punishment according to the relative degree of blameworthiness of the offenders. Different societies take different views about what should be the endpoint of the punishment continuum: some set it at the death penalty, some at life imprisonment, some at twenty years, some lower still. What desert says is that once that endpoint on the continuum of punishment is marked, offenders should be set on that continuum according to the relative degree of their blameworthiness. Thus, the amount

16. Paul H. Robinson with the U. of Pa. L. Sch. Crim. L. Research Group, *Final Report of the Maldives Penal Law & Sentencing Codification Project*, vol. 1, 129-30, 138-40 (2006) (available at <http://www.law.upenn.edu/fac/phrobins/draftislamicpenalcode/>; *select* Volume 1).

17. See e.g. Andrew J. Hosmanek, *Cutting the Cord: Ho'oponopono and Hawaiian Restorative Justice in the Criminal Law Context*, 5 Pepp. Dispute Res. L. J. 359, 370 (2004) (insisting that retribution focuses on the “eye for an eye” model where society has the “right or obligation” to injure the offender to the same degree the offender has injured society); Christopher Slobogin, *The Civilization of the Criminal Law*, 58 Vand. L. Rev. 121, 147 (2005) (characterizing retributive punishment as punishment that adopts the biblical “eye for an eye” philosophy).

of punishment that an offender deserves is not a product of some magical connection between that offense and that amount of punishment. Rather, it is simply the amount of punishment that is needed to put that offender in his appropriate rank-order with other offenders. Modern desert is about giving each offender his or her appropriate amount of punishment in relation to other offenders. So you can see how odd it is when restorative justice anti-desert supporters base their anti-desert campaign on a complaint that deserved punishment would be harsh.

IV. RESTORATIVE JUSTICE PROPONENTS LIMIT THEIR MOVEMENT WHEN THEY ADOPT AN “ANTI-DESERT” APPROACH

I said that I thought the anti-desert agenda of the “restorative justice” proponents was both odd and unfortunate. It is odd because it fails to appreciate that the central concern of desert is punishment according to the relative blameworthiness of offenders and that desert is absolutely opposed to harsh punishment (or perhaps the claim that desert means harsh punishment is merely a false straw-man knowingly used by the anti-desert proponents to disparage desert). And it is odd because it is the shared intuitions of desert that are at work in many, if not most, restorative processes—the same restorative processes of which the “restorative justice” proponents claim to approve. Let me speak now to why I think the anti-desert agenda is unfortunate—unfortunate for the future of restorative processes.

The opposition to desert is unfortunate because it inevitably produces both political and public resistance. That is, the anti-desert stance unnecessarily gives restorative processes a bad name—many come to associate them with a failure of justice—which in turn translates into political opposition. Despite all the wonderful things that restorative processes can do, today they typically remain limited to use in juvenile and minor offense cases.¹⁸ But there is evidence to suggest that their greatest benefits may in fact be found in their use in the more serious cases,¹⁹ where there is more at stake for both victims and offenders. But it seems clear that a broader use of restorative processes in these serious cases will not occur so long as they

18. See Kurki, *supra* n. 1, at 240 (“[R]estorative justice initiatives in the United States are typically used as diversion programs for juveniles in minor, nonviolent, and nonsexual crimes.”); Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of “Restorative Justice,”* 2003 Utah L. Rev. 375, 384–85 (reviewing the scope of present programs using restorative processes); Lode Walgrave, *Restoration in Youth Justice*, 31 Crime and Just. 543, 567–75 (2004) (“Several Australian states have incorporated conferencing in their juvenile justice legislation, but always as a diversionary program, leaving more serious youth crime to the traditional proceedings. . . . Statutory language often mentions seriousness thresholds and excludes severe offenses from restorative dispositions.”).

19. See Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 Utah L. Rev. 15, 40 (citing Lawrence W. Sherman et al., *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments*, 12 & figs. 1–2, 7–10 & 14–15 (2000) <http://www.aic.gov.au/RISE/recidivism/report.pdf>) (mentioning recent studies which indicate that restorative justice is more effective in reducing violent crime than property crime).

are trapped by the anti-desert agenda set by the academic proponents of “restorative justice.”

V. RESOLVING THE CONFLICT

My own view is that we ought to be using restorative processes for a wide range of cases, including serious cases, whenever we think such processes can be beneficial. And we ought to provide a wide range of sanctioning methods to decision makers in the restorative process. Every situation is different and each merits its own unique disposition. It may be that some attention needs to be paid to increasing the uniformity of the total amount of punishment among cases of similar overall blameworthiness. Indeed, there are mechanisms available to help achieve this, such as sentencing method equivalency tables and sentencing benchmarks, or provisions that inform decision makers about how other cases of similar blameworthiness have been resolved.

But so long as restorative processes are sold as “restorative justice,” with the agenda of undermining justice rather than achieving it for all parties, it seems clear that we will never see their broader use.