Responding to wrongdoing – what justice needs

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> *'I have a dream,' says the bespectacled man at the podium. 'I have a dream that when we talk about justice, we will no longer have to prefix it with words such as 'restorative' ….that we won't have to talk about 'restorative justice', because it will be understood that true justice is about restoration, and about transformation.'*
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> Report of Howard Zehr's closing comments to the 4th International Winchester Restorative Justice Conference, UK, October 2007[1]

Introduction

This paper is concerned with the requirements of a response to wrongdoing. My premise is that there are moral demands that call for justice to be part of any such response. I suggest that the response is best informed by restorative rather than retributive notions of justice.

Criminal justice has clear notions of the requirements of a response to wrongdoing. In the main these are centred upon establishing culpability and determining punishment. Over the past twenty years or so an alternative justice response with a different perspective has become commonplace in a number of jurisdictions. This 'restorative justice' approach operates from a non-retributive perspective and most commonly as a supplement to traditional legal justice responses.

A little bit about justice

As I said my premise is that a response to wrongdoing must of necessity have a justice aspect. To gauge the 'justness' of any such response requires a clear notion of what justice means in such a context and I want to talk a little about that.

Justice in a broad sense defines 'a morally right act' in a way which is different from acts judged against other moral criteria, such as utility or efficiency. The distinctive aspirational essence of justice sees a moral act as one which 'gives each person his or her due'. This concern is inclusive of both 'social justice' and 'corrective justice', which includes the criminal law. So a justice response should give the wrongdoer his or her 'due' for committing wrong and give each person harmed by that wrong his or her due by restoring in some way their loss of a sense of safety or security.

I want to concentrate on what it means when we talk about giving each affected person their 'just deserts'– both in a positive and negative sense – in a response to wrongdoing.

Legal justice responses to wrongdoing reflect most obviously the negative desert sense of providing distributions of burdens based on assumptions of individual responsibility. But

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[1] Available at http://www.churchtimes.co.uk/content.asp?id=46680

it seems to me legal justice provides little or no scope for a consideration that such responses should also look to distribute (or re-distribute) positive benefits in terms of restoring affected persons.

So that is the notion of justice I am presenting here – giving each person their due.

A little bit about restorative justice

Restorative practices have a much narrower application than legal justice. With restorative processes attention is turned to the harm caused and the responsibilities of the 'persons affected' to remedy that harm. Restorative justice claims to deliver justice not by the imposition of sanctions but rather through a process that generates the emotions and behaviours necessary to effect restoration.

Restorative justice is not a form of ADR, just as criminal law is not primarily a standard 'dispute resolution' process. Each is a response to *wrongdoing*, that is, a moral wrong (which the law has also criminalised) rather than an incident of interpersonal dispute or conflict.

My discussion here is to use the lens of this fundamentally difference approach to justice to re-examine the practices currently given prominence in justice responses to wrongdoing.

Three key elements

There are a number of what could be described as 'essential justice elements', that is things seen as important in responding to wrongdoing such as censure, denunciation, deterrence, proportionality of response etc. I want to concentrate on just three of these elements normally considered as being *required* by our traditional notions of justice.[2] These are:

- Holding the offender accountable,
- Acceptance of responsibility, and
- Punishment.

Holding the offender accountable

The key principle here is that a justice response to wrongdoing should look to hold an offender accountable in some meaningful way.

What is accountability? Part of the notion of accountability is requiring persons affected to give an account of what happened and having that account subject to scrutiny. A definition of accountability that captures this meaning is:

> *By accountability I mean the offender giving a public account of what happened which has been accepted by the stakeholders in the injustice.*

[2] It is well to remember that there may be other important requirements in a response to wrongdoing such as the maintenance of public safety, deterrence, the regulation of unwanted conduct and the rehabilitation of the offender but these are separate issues from the justice of a response.

But accountability also has additional meaning in the sense of 'being held to account'. This requirement can be satisfied objectively by a guilty plea, but pleading guilty can still fall well short of any 'internalised acceptance of responsibility'. I'll say more about accountability shortly.

Acceptance of responsibility

It also seems to be common ground that a core part of a justice response to wrongdoing should be offender responsibility.

What is 'responsibility'? The allocation or taking of responsibility can be used either in a passive sense ("taking responsibility for something done in the past") or actively ("taking responsibility for putting something right into the future") (Bovens 1998). A definition of responsibility which captures these elements is:

> *By responsibility I mean having the offender actively accept responsible for their wrongdoing by confronting them with the consequences of their offending.*

'Active' acceptance of responsibility can be extremely important for the substantial effect it has on the offender from his/her voicing of responsibility and also for the effect it can has on the victim in terms of their satisfaction.

Of course, accountability and the related concept of responsibility are both central to retributive responses. Accepting responsibility constitutes an admission by which the wrongdoer is held publicly to account (Cane 2002:32-4). But such accountability is *imposed* and looks back in the sense of holding someone responsible for something they did in the past.

This traditional criminal justice response focuses upon determining and ascribing 'legal liability-responsibility' for some action (Hart 1968). This emphasis on testing conduct against established criteria of culpability (intention, liability, mens rea) has the effect that responsibility remains essentially passive or imposed. Even where an offender admits the offence the emphasis remains on holding him or her responsible rather than having the offender actively take responsibility. While an offender is held to account in the 'classic sense of accountability' this rarely extends to providing a direct and full personal account of what occurred (Roche 2003:42-3).

Restorative justice, on the other hand, involves a deliberate shift towards an active conception of responsibility (Braithwaite and Roche 2001; Braithwaite 2002:156). Restorative responsibility is seen as the most likely way to promote restoration of victims, offenders and communities. Accepting responsibility as part of a deliberative process means the offender is still accountable publicly (or at least to the public of 'persons affected'). Roche (2003) suggests that the deliberative nature of restorative practices does the work of accountability more effectively, because of the immediacy of the account to the 'persons affected'. There is some empirical support for this. Evidence of compliance with orders and agreements as an objective measure of responsibility suggests acceptance is significantly higher in restorative processes (Latimer, Dowden et al. 2001). As well, evidence suggests victims are significantly more likely to perceive

offenders as being 'held accountable' following restorative processes (Maxwell and Morris 1993; Bonta, Wallace-Capretta et al. 1998; Poulson 2003). Why is this so? One explanation is that what restorative justice processes do well is sort out the meaning of what happened (for instance, in the case of an assault, they unravel the question 'what does it mean that I hit you?') in order to try and begin the process of restoration for both offenders and victims.

Punishment

If the core elements of a justice response to wrongdoing are to ensure that the offender is held accountable and that he/she actively accepts responsibility, where does that leave punishment?

In traditional justice terms, punishment is also seen as essential to doing justice because it is performs the expressive function of censure. A simple definition of punishment captures this:

> *By punishment I mean a sanction imposed with the intention of expressing censure for harm done.*

Punishment and the calculation of the amount of such punishment are fundamental to a retributive response to wrongdoing (von Hirsch 1993:9). On this view, punishment is essential to the expression of censure for three reasons. Firstly, because it is communicative (to both victim and offender) that a wrong has been done. Secondly, because it induces in the offender 'the pain of condemnation and of recognized guilt' and thirdly, because it is forward looking in aiming to start the process of reform and restoration (Duff 1992:53-4). But it does not follow necessarily that punishment is needed to express blame. Accepting that wrongfulness needs to be censured, does not mean it is best expressed by punishment calibrated by reference to the degree of blameworthiness. Censure conveyed through punishment deals with the person externally and does not attempt to elicit 'moral sentiments of repentance' (von Hirsch 1993:7). Some critics go so far as to say that delivering to victims 'a credible guarantee of future right-doing' in a form which equates to a message that 'this will not happen again' performs the key function of censure just as well. My conclusion is that certainly you need censure and the expression of blame in response to wrongdoing, but it does not then follow that it is necessary to deliver these via punishment.

For this reason punishment has a much less central position in restorative justice. Punishment is not its primary 'justice delivery mechanism'. That is not to say it has no role in any justice response to wrongdoing. One NZ judge, a champion of restorative justice, I spoke to said:

> *I think we've moved on from the view that punishment has no part in restorative justice. Punishment should be one – but one only - of the elements of a justice process. Punishment has a part to play.*

But restorative practices eschew punishment as the primary means of reshaping relationships in the aftermath of wrongdoing (Kiss 2005:15). While Daly is a strong

proponent for the view that restorative processes and sanctions should be seen, as 'alternative punishments' not as 'alternatives to punishment' (Daly 2000a:34), many others do not see things this way. The key difference is that in a restorative justice process the punishment is not the vehicle for justice, nor is justice only done when punishment is delivered.

A Canadian restorative justice practitioner I spoke to expresses this view well:

> *My take on punishment involves two conversations. Firstly, is punishment the goal of restorative justice? Secondly, is punishment a mechanism? Punishment is not the goal of restorative justice; the goal is to restore relationships. Can punishment still be a mechanism to achieve that goal? In my view no, because punishment is not merely a descriptor for something unpleasant, but for something imposed on someone with the intention of inflicting pain. In this sense a 'just punishment' would be a deserved punishment, but no less a punishment because it is an imposition. [But because] punishment involves an imposition, that is problematic because imposition is antithetical to restorative justice.*

In the view of restorative justice if an offender accepts that s/he must seek to repair the harm caused by their wrongdoing then the external imposition of a sanction is not necessary to do justice. This, of course, is a marked departure from criminal justice.

Is anyone 'doing' justice in this different way?

Some brief details of a couple of programs which have similar features to the Victorian model of being jurisdiction-wide, dealing with young offenders and being subject to moratoria with respect to certain classes of offences can illustrate the position.

There are three of these, one at home and two overseas.

ACT Restorative Justice (ACTRJ)

The ACT has a population of approximately 300,000 and its *Crimes (Restorative Justice) Act 2004* applies to young persons territory-wide. The explicit focus of the Act is victims of crime and the repair of the harm caused to them. The key vehicle to achieve these aims is a facilitated conference between the victim and the offender to discuss the offence, its impact and what can be done to repair the harm. There are two points of interest. The Act explicitly separates the concepts of 'accepting responsibility for the offence [in order] to take part in restorative justice' from a plea of guilty. Secondly, the focus for the young person is explicitly forward-looking, namely 'what can I do to make things right?'.

Nova Scotia Restorative Justice (NSRJ)

Nova Scotia is a province on the Atlantic coast of Canada with a population of approximately one million. Its *Nova Scotia Restorative Justice Initiative* has operated since 1999 and also applies to all young persons province-wide with the same type of offence moratoria.

Two features are worth noting. The backbone of the initiative is not-for-profit community agencies which combine paid staff who manage referrals and 'high calibre volunteers at the facilitator and board levels' (Clairmont 2005:5). From the outset these programs were 'clearly [and deliberately] rooted in the communities which they serve' (Archibald and Llewellyn 2006:311).

Secondly, the NSRJ is not fundamentally directed at diversion. Its underlying philosophy is to see 'restorative justice as a part of a larger community development strategy' (Archibald and Llewellyn 2006:329), so that formal intervention may in fact be 'beneficial for both the youth and the larger community'(Clairmont 2005:13). This larger community 'involvement' is consistent with 'judges seeing fewer young people aged 12 to 17 in their courtrooms' and substantially less young persons entering custody (Statistics Canada 2006) but the 'requisite attention to the needs of victims, offenders and communities' still being met via restorative processes (Archibald and Llewellyn 2006:329).

New Zealand Family Group Conference Scheme (NZFGC)

The youth justice provisions of the NZ *Children, Young Persons and their Families Act 1989* created a requirement that all young offenders nation-wide attend family group conferences (FGCs), either as a diversionary device or by direction of the Youth Court in the case of arrest.[3] But in fact 'far more young offenders are dealt with by the police without using the conference procedure *at all*' since 76% of young offenders are dealt with by warnings, written cautions or police-organised informal diversion (McElrea 2005:14). For young persons who are not diverted by police the FGC track itself opens. The combination of allowing legislation (which permits but does not require a restorative approach) and 'the practice of youth justice, as experienced by practitioners, that is restorative' has meant a systemic shift so that New Zealand's youth justice system is essentially restorative in approach.

The effect on the legal justice system

What effect has all this had on the criminal justice system?

This alternative justice response to wrongdoing – censure delivered by ways other than by punishment together with an explicit emphasis on accountability and responsibility – has influenced the traditional legal justice response to wrongdoing in varying ways. A quick review working backwards over the three jurisdictions I have covered illustrates this.

In New Zealand its leading decision in *Regina v Clotworthy* (1998) reversed a restorative justice outcome for an adult offender but in doing so says:

> *We would not wish this judgment to be seen as expressing any general opposition to the concept of restorative justice. Those policies must, however, be balanced*

[3] The proportion of FGCs between those which were diversionary and those court-referred was initially about two-thirds diversionary to one-third court-referred. By 2005 this had dropped such that about a half of the approximately 6000 per annum are diversionary (McElrea 2005:14).

> *against other sentencing policies, particularly in this case those …dealing with cases of serious violence. Which aspect should predominate will depend on an assessment of where the balance should lie in the individual case. (Court of Appeal 1998:661)*

This statement has been taken as a direction to develop a jurisprudence which *'balanced sentencing policies'* by giving equal weight to holding offenders accountable and having them reach an acceptance of responsibility in both restorative and retributive terms.

In Canada discrete sentencing reform to the *Criminal Code* in 1996 added new elements as part of the purpose of sentencing:

> *To section 718 were added:*
> *(e) to provide reparations for harm done to victims or to the community, and*
> *(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and the community.*

Its leading case of *Gladue* (1999) where a restorative justice outcome for an adult offender was sought says:

> *Clearly, s.718 is, in part, a restatement of the basic sentencing aims… What are new, though, are paras. (e) and (f)…which focus upon the restorative goals of repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender (para 43).*

So in New Zealand and Canada a restorative sense of justice has entered the mainstream jurisprudence.

And in Australia? Australian jurisdictions lack the authority of a *Clotworthy* or a *Gladue* decision or of far reaching reformist legislation. But the Youth Justice Group Conferencing response allowed for under legislation like the Victorian *Children, Youth and Families Act 2005* provides one clear avenue for this alternative conception of justice to take hold.

Conclusion

From a restorative perspective, prominence is still given to accountability and responsibility in a justice response to wrongdoing. Punishment has a place but is not in the central justice generating role.

The restorative focus gives to justice a new meaning that delivers to people what they 'deserve' both in negative ('deserving' of censure & denunciation) and positive ('deserving' to feel vindicated and apologised to) senses. Suitably fashioned restorative outcomes can provide both this and the 'symbolic, collective statement' of denunciation which wrongdoing requires as well, if not better, than retributive measures.[4]

[4] In recent sentencing remarks in *DPP v Dupas* (2007) the Supreme Court of Victoria lamented the absence of a specific sentencing purpose that covered the 'vindication of the rights of victims'. Such an acknowledgement is a core characteristic of restorative interactions.

Regina v Clotworthy. [1998] 15 CRNZ 651 (CA), Court of Appeal of New Zealand, 29 June 1998.

Regina v Gladue. [1999] 1 SCR 688, Supreme Court of Canada, 23 April 1999.

DPP v Dupas. [2007] VSC 305, Supreme Court of Victoria, 27 August 2007.

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