

# Restorative versus Retributive Justice

Kathleen Daly reviews the discourse that has framed restorative justice as the antidote to punishment.

In 'Restorative justice: the real story' (Punishment and Society 2002), Kathleen Daly draws on her experience of restorative justice conferencing and an extensive survey of academic literature to refute four myths that she says have grown up around restorative justice. These are that: (1) restorative justice is the opposite of retributive justice; (2) restorative justice uses indigenous justice practices and was the dominant form of pre-modern justice; (3) restorative justice is a 'care' (or feminine) response to crime in comparison to a 'justice' (or masculine) response; and (4) restorative justice can be expected to produce major changes in people. She says that "simple oppositional dualisms are inadequate in depicting criminal justice, even in an ideal justice system", and argues for a 'real story' which would serve the political future of restorative justice better than myth and metaphor.

In the extract below, just one part of the much longer article, Daly addresses what she identifies as the first myth, and argues that advocates of restorative justice have painted a dichotomous, oppositional picture of restorative versus retributive justice. Her view is that despite what advocates say, there are connections between retribution and restoration.

## Myth 1. Restorative justice is the opposite of retributive justice

When one first dips into the restorative justice literature, the first thing one 'learns' is that restorative justice differs sharply from retributive justice. It is said that

- (1) restorative justice focuses on repairing the harm caused by crime, whereas retributive justice focuses on punishing an offence;
- (2) restorative justice is characterised by dialogue and negotiation among the parties, whereas retributive justice is characterized by adversarial relations among the parties; and
- (3) restorative justice assumes that community members or organizations take a more active role, whereas for retributive justice, 'the community' is represented by the state.

Most striking is that all the elements associated with restorative justice are *good*, whereas all those associated with retributive justice are *bad*. The retributive-restorative oppositional contrast is not only made by restorative justice advocates, but increasingly one finds it canonized in criminology and juvenile justice textbooks. The question arises, is it right?

On empirical and normative grounds, I suggest that in characterizing justice aims and practices, it is neither accurate nor defensible. While I am not alone in taking this position (see Barton, 2000; Duff, 2001; Miller and Blackler, 2000), it is currently held by a small number of us in the field. Despite advocates' well-meaning intentions, the contrast is a highly misleading simplification, which is used to sell the superiority of restorative justice and its set of justice products. To make the sales pitch simple, definite boundaries need to be marked between the *good* (restorative) and the *bad* (retributive) justice, to which one might add the *ugly* (rehabilitative) justice.

Advocates seem to assume that an ideal justice system should be of one type only, that it should be pure and not contaminated by or mixed with others. [Even when calling for the need to "blend restorative, reparative, and transformative justice ... with the prosecution of paradigmatic violations of human rights", Drumbl (2000: 296) is unable to avoid using the term 'retributive' to refer to responses that should be reserved for the few.]

Before demonstrating the problems with this position, I give a sympathetic reading of what I think advocates are trying to say.

Mead's (1917-18) 'The Psychology of Punitive Justice' contrasts two methods of responding to crime. One he termed "the attitude of hostility toward the lawbreaker" (p. 227), which "brings with it the attitudes of retribution, repression, and exclusion" (pp. 226-27) and which sees a lawbreaker as "enemy". The other, exemplified in the (then) emerging juvenile court, is the "reconstructive attitude" (p. 234), which tries to "understand the causes of social and individual breakdown, to mend ... the defective situation", to determine responsibility "not to place punishment but to obtain future results" (p. 231). Most restorative justice advocates see the justice world through this Meadian lens; they reject the "attitude of hostility toward the lawbreaker", do not wish to view him or her as "enemy", and desire an alternative kind of justice. On that score, I concur, as no doubt many other researchers and observers of justice system practices would. However, the 'attitude of hostility' is a caricature of criminal justice, which over the last century and a half has wavered between desires to 'treat' some and 'punish' others, and which surely cannot be encapsulated in the one term, 'retributive justice'. By framing justice aims (or principles) and practices in oppositional terms, restorative justice advocates not only do a disservice to history, they also give a restricted view of the present. They assume that restorative justice practices should exclude elements of retribution; and in rejecting an 'attitude of hostility', they assume that retribution as a justice principle must also be rejected.

When observing conferences, I discovered that participants engaged in a flexible incorporation of *multiple* justice aims, which included:

- (1) some elements of retributive justice (that is, censure for past offences),
- (2) some elements of rehabilitative justice (for example, by asking, what shall we do to encourage future law-abiding behaviour?), and
- (3) some elements of restorative justice (for example, by asking, how can the offender make up for what he or she did to the victim?).

When reporting these findings, one colleague said, "yes, this is a problem" (Walgrave, personal communication). This speaker's concern was that as restorative justice was being incorporated into the regular justice system, it would turn out to be a set of "simple techniques", rather than an "ideal of justice ... in an ideal of society" (Walgrave, 1995: 240, 245) and that its core values would be lost. Another said (paraphrasing), "retribution may well be present now in conferences, but you

wouldn't want to make the argument that it *should be present*" (Braithwaite, personal communication).

These comments provoked me to consider the relationship between restorative and retributive justice, and the role of punishment in restorative justice, in normative terms. Distilling from other papers (e.g., Daly and Immarigeon, 1998: 32-35; Daly, 2000a, 2000b) and arguments by Barton (2000), Duff (1992, 1996, 2001), Hampton (1992, 1998), and Zedner (1994), I have come to see that apparently contrary principles of retribution and reparation should be viewed as dependent on one another. Retributive censure should ideally occur before reparative gestures (or a victim's interest or movement to negotiate these) are possible in an ethical or psychological sense. Both censure and reparation may be experienced as 'punishment' by offenders (even if this is not the intent of decision-makers), and both censure and reparation need to occur before a victim or community can 'reintegrate' an offender into the community. These complex and contingent interactions are expressed in varied ways and should not be viewed as having to follow any one fixed sequence. Moreover, one cannot assume that subsequent actions, such as the victim's forgiving the offender or a reconciliation of a victim and offender (or others), should occur. This may take a long time or never occur. In the advocacy literature, however, I find that there is too quick a move to 'repair the harm', 'heal those injured by crime' or to 're-integrate offenders', passing over a crucial phase of 'holding offenders accountable', which is the retributive part of the process.

A major block in communicating ideas about the relationship of retributive to restorative justice is that there is great variability in how people understand and use key terms such as punishment, retribution, and punitiveness. Some argue that incarceration and fines are punishments because they are *intended deprivations*, whereas probation or a reparative measure such as doing work for a crime victim are not punishment because they are *intended to be constructive* (Wright, 1991). Others define punishment more broadly to include anything that is unpleasant, a burden, or an imposition of some sort; the intentions of the decision-maker are less significant (Davis, 1992; Duff, 1992, 2001). Some use retribution to describe a *justification* for punishment — i.e., intended to be in proportion to the harm caused — whereas others use it to describe a *form* of punishment — i.e., intended to be of a type that is harsh or painful. [Drawing from Cottingham's (1979) analysis of retribution's many meanings, restorative justice advocates tend to use retributivism to mean 'repayment' (to which they add a punitive kick) whereas desert theorists, such as von Hirsch (1993), use retributivism to mean 'deserved' and would argue for decoupling retribution from punitiveness.]

On proportionality, restorative justice advocates take different positions: some (e.g., Braithwaite and Pettit, 1990) eschew retributivism, favouring instead a free-ranging consequentialist justification and highly individualized responses, while others wish to limit restorative justice responses to desert-based, proportionate criteria (Van Ness, 1993; Walgrave and Aertsen, 1996). For the form of punishment, some use retribution in a neutral way to refer to a censuring of harms (e.g., Duff, 1996), whereas most use the term to connote a punitive response, which is associated with emotions of revenge or intentions to inflict pain on wrong-doers (Wright, 1991). The term *punitive* is rarely defined, no doubt

because everyone seems to know what it means. Precisely because this term is used in a commonsensical way by everyone in the field (not just restorative justice scholars), there is confusion over its meaning. Would we say, for example, that any criminal justice sanction is by definition 'punitive', but sanctions can vary across a continuum of greater to lesser punitiveness? Or, would we say that some sanctions are non-punitive and that restorative justice processes aim to maximise the application of non-punitive sanctions? I will not attempt to adjudicate the many competing claims about punishment, retribution, and punitiveness. The sources of antagonism lie not only in varied *definitions*, but also the different *images* these definitions conjure in people's heads about justice relations and practices. However, one way to gain some clarity is to conceptualise punishment, retribution, and punitive (and their 'non' counterparts) as separate dimensions, each having its own continuum of meaning, rather than to conflate them, as now typically occurs in the literature.

Because the terms 'retributive justice' and 'restorative justice' have such strong meanings and referents, and are used largely by advocates (and others) as metaphors for the bad and the good justice, perhaps they should be jettisoned in analysing current and future justice practices. Instead, we might refer to 'older' and 'newer' modern justice forms. These terms do not provide a content to justice principles or practices, but they do offer a way to depict developments in the justice field with an eye to recent history and with an appreciation that any 'new' justice practices will have many bits of the 'old' in them. [It is important to emphasise that new justice practices have not been applied to the fact-finding stage of the criminal process; they are used almost exclusively for the penalty phase. Some comparative claims about restorative justice practices (e.g., they are not adversarial when retributive justice is) are misleading in that restorative justice attends only to the penalty phase when negotiation is possible. No one has yet sketched a restorative justice process for those who do not admit to an offence.] The terms also permit description and explanation of a larger phenomenon, that is, of a profound transformation of justice forms and practices now occurring in most developed societies in the West, and certainly the English-speaking ones of which I am aware. Restorative justice is only a part of that transformation.

By the *old justice*, I refer to modern practices of courthouse justice, which permit no interaction between victim and offender, where legal actors and other experts do the talking and make decisions, and whose (stated) aim is to punish, or at times, reform an offender. By the *new justice*, I refer to a variety of recent practices, which normally bring victims and offenders (and others) together in a process in which both lay and legal actors make decisions, and whose (stated) aim is to repair the harm for victims, offenders, and perhaps other members of 'the community' in ways that matter to them. [I became aware of the term *new justice* from LaPrairie's (1999) analysis of developments in Canada. She defines new justice initiatives as representing a "shift away from a justice discourse of punitiveness and punishment toward one of reconciliation, healing, repair, atonement, and reintegration" (p. 147), and she sees such developments as part of a new emphasis on 'community' and 'partnership' as analysed by Crawford (1997). There may be better terms than the 'old' and 'new justice' (e.g.,

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Hudson, 2001, suggests 'established criminal justice' for the old justice), but my general point is that the retributive/ restorative couplet has produced, and continues to produce, significant conceptual confusion in the field.]

While the stated aim of either justice form may be to 'punish the crime' or to 'repair the harm', we should expect to see mixed justice aims in participants' justice talk and practices. [Restorative justice advocates speak of the *harm* not of the *crime*, and in doing so, they elide a crucial distinction between a civil and criminal harm, the latter involving both a *harm* and a *wrong* (Duff, 2001).] New justice practices are one of several developments in a larger justice field, which also includes the 'new penology' (Feeley and Simon, 1992) and 'unthinkable punishment policies' (Tonry, 1999). The field is fragmented and moving in contradictory directions (Crawford, 1997; Garland, 1996; O'Malley, 1999; Pratt, 2000).



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**Kathleen Daly** is Professor of Criminology and Criminal Justice, Griffith University (Brisbane). She writes on gender, race, crime and justice; and on restorative justice and Indigenous justice. From 1998 to 2004, she has received three major Australian Research Council grants to direct a program of research on restorative justice and the race and gender polices of 'new justice' practices in Australia, New Zealand, and Canada.

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