The Vagaries of Restorative Justice: Borders Between Restorative Justice and Justice as Punishment[*]

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This paper explores the complex interplay between restorative justice and traditional punitive justice systems. While proportional and rationalistic justice focuses on establishing some kind of disturbed equilibrium between crime and a normal state of affairs in society, or on preventing future crimes by increasing the costs of committing it for the offender, restorative justice focuses on the actual restoration of the type of social capital that has been degraded by time. Restorative justice thus works on healing and reconciliation, and tends to contrast sharply with punitive justice, which emphasizes retribution and deterrence. One of the main obstacles to a broad implementation of restorative justice is connected with community expectations. Most communities have been habituated to expect punitive justice and have internalized these expectations as their psychological way to achieve "closure" after a crime has victimized some members of the community or, indirectly, the community as a whole. Thus one of the challenges of modern restorative justice in practice is how to integrate it with more traditional views on punitive justice, which is the preoccupation of this brief paper.

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Punitive Versus Restorative Justice

Punitive justice is exemplified in most modern legal systems, where courts assign prison sentences, fines or other penalties based on legal statutes and precedents. In the retributively conceptualized systems, the primary goal is to impose penalties proportionate to the crime, serving both as a deterrent to the individual offender and as a warning to society (von Hirsch, 1993). Retributive thinking sees punishment as a morally necessary response to a crime, meant to restore balance by "paying back" the harm done (Feinberg, 1970)

On utilitarian accounts, punishment is seen as a deterrent both for the individual (special prevention) and for others in society (general prevention), with the aim of preventing future crimes (Republic of Serbia, 2019).[3] Utilitarianism, pioneered by Jeremy Bentham, posits that the morality of an action is determined by its contribution to overall happiness (Bentham, 2007). John Stuart Mill expanded on Bentham's ideas by emphasizing the quality of happiness, not just its quantity, in his work *Utilitarianism* (Mill, 2001). More recently, philosophers like Peter Singer have applied utilitarian principles to contemporary ethical dilemmas, advocating for actions that maximize well-being and minimize suffering on a global scale (Singer, 2011).

The prevention theory of crime in the strict sense is a sub-type of utilitarian reasoning on punishment, and it implies that offenders are removed from society through imprisonment, which isolates them and reduces immediate threats to the community.

The severity of the punishment is usually proportionate to the seriousness of the crime, based on the idea that the punishment should "fit the crime (Kant, 2002, p. 7). The focus is on upholding the law and delivering justice through structured, institutional processes. This last point is exactly the crucial starting point for restorative justice, which has traditionally been associated with the abolitionist movement, in works of British theorists perhaps most ardently championed by Barbara Hardson (Hudson, 2003). Restorative justice does not consider institutionalism or procedure as key conveyors of either justice or reconciliation,

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[3] Republic of Serbia, *Criminal Code* (2019):
Article 1 - Basic Provisions: This article defines criminal law as a system of legal norms that prescribe criminal offenses, penalties, and other measures. It is governed by the principles of legality and justice.
Article 2 - Principle of Legality: Emphasizes that there can be no crime or punishment without law, ensuring that no one can be prosecuted without a prior legal provision.
Article 3 - Principle of Responsibility: This article states that criminal responsibility can only be determined by the law and that anyone who has committed a criminal offense must be held accountable.
Article 4 - Principle of Proportionality: Penalties must be proportional to the gravity of the criminal offense and the circumstances under which the offense was committed.

but rather considers the culture that underlies the community, particularly the culture of the treatment of use of pain, as key to understanding how the community will approach crime and deviance (Christie, 1981).

Restorative justice is a theory and practice of restoration of community values that emphasizes reparations of the harm caused by crime. Instead of focusing on punishment, restorative justice seeks to bring together the victim, offender, and community in a dialogue that encourages accountability, healing, and restitution. The central idea of restorative justice is that crime causes harm to people and relationships, and justice should aim to mend those harms rather than just punish the offender. Rather than isolating offenders, restorative justice seeks to reintegrate them into the community, often through reconciliation with the victim. Communities are seen as stakeholders in the justice process, with a role in supporting both victims and offenders.

Potential Integration of Restorative and Punitive Thinking on Punishment

This examination of the boundaries and integration of restorative and punitive justice systems draws on the contributions of several key authors who have significantly influenced contemporary discourse on this topic. Howard Zehr's pioneering work lays the foundation for understanding restorative justice principles, while Nils Christie's emphasis on the personal dimensions of crime challenges traditional punitive approaches (Christie, 1977; Zehr 2002). Additionally, the perspectives of David Van Ness and Karen Heetderks Strong (2014) provide crucial insights into the role of community and relationships in the justice process. All these ideas collectively inform a more holistic understanding of justice that prioritizes healing, accountability, and community involvement.

Traditional punitive justice (including the retributive, utilitarian, semantic, reformative and any other type of theoretical conceptualization of punitive responses to crime) is grounded in the belief that crime should be met with punishment, serving as a mechanism for societal control and maintaining order. While these elements have been integral to the functioning of justice systems, they often fall short of addressing the underlying causes of crime and can lead to cycles of reoffending. As a result, contemporary discussions increasingly consider alternative approaches, such as restorative justice, which prioritize healing and community engagement over punishment alone. In this, theorists often recall practices by organic communities throughout history, which involved primarily restorative sentiments and values, rather than the institutionalized, detached approaches that are distant to the ordinary member of a community.

The tensions between restorative and punitive justice revolve around several key contrasts. Restorative justice focuses on healing and reconciliation among all

parties affected by crime, while punitive justice emphasizes punishment as the primary response to wrongdoing. This leads to a further distinction in their approaches to offender reintegration; restorative justice promotes the reintegration of offenders into the community to support rehabilitation, whereas punitive justice often results in social exclusion and stigmatization, making reintegration more difficult. Additionally, restorative justice emphasizes community involvement in the justice process, advocating for collective responsibility in addressing harm, while punitive justice is primarily state-controlled, marginalizing community voices. Lastly, restorative justice prioritizes repairing relationships and understanding the complexities of crime, whereas punitive justice is rule-based, concentrating on legal violations and enforcement. These fundamental differences highlight the challenges of integrating these approaches within contemporary justice systems, emphasizing the need for more holistic methods that balance healing with accountability.

Restorative justice in practice is increasingly applied in various real-world settings, particularly in youth justice and community-based reconciliation. In youth justice, diversion programs redirect first-time offenders away from formal criminal proceedings and into restorative practices that emphasize accountability and personal growth. Additionally, schools have adopted restorative justice practices to address conflicts among students.

Community-based reconciliation initiatives, such as community mediation, utilize restorative justice principles to resolve local disputes, enhancing social cohesion. Trained mediators facilitate discussions between parties involved in conflicts, allowing them to articulate their needs and reach mutually agreeable solutions. Restorative circles in community settings also enable residents to engage in meaningful conversations about past harms, such as violence or discrimination, promoting healing and reconciliation. In some cases, truth and reconciliation commissions are established in post-conflict societies to address historical injustices (Bachmann, 2014).

Indigenous communities have also integrated restorative justice practices that align with their cultural values. These practices emphasize healing and community involvement, often incorporating ceremonies and storytelling (Daly, 2002; Maxwell & Morris, 2001; McCold, 2003; Sherman & Strang, 2007).

Restorative justice has seen both success and challenges in its coexistence with punitive justice in various settings. One prominent example of success can be found in New Zealand's youth justice system, where restorative justice practices have been integrated alongside traditional punitive measures. In this system, first-time young offenders are often diverted to family group conferences, allowing them to take responsibility for their actions in a supportive environment.

Research by Maxwell and Morris highlights how family group conferences create a space for dialogue among offenders, victims, and their families,

facilitating accountability and healing (Maxwell & Morris, 2001). Additionally, a study by Daly indicates that these restorative practices have led to significantly lower recidivism rates among participants compared to those who underwent traditional punitive measures (Daly, 2002). Furthermore, Sherman and Strang provided empirical evidence that victims involved in restorative justice processes report higher levels of satisfaction with the outcomes, underscoring the effectiveness of these approaches in enhancing victim participation and emotional closure (Sherman & Strang, 2007).

Societal Perceptions of Justice and Implementation of Restorative Practices

Societal perceptions of justice significantly influence the implementation of restorative practices. Public expectations often favor punitive measures, driven by a desire for retribution and the belief that harsh penalties deter crime. This mindset can create challenges for restorative justice. When communities primarily view justice as a means of social control, restorative practices may be seen as insufficient or overly lenient. Victims might worry that these processes won't hold offenders accountable, leading to skepticism about their effectiveness. Additionally, media portrayals of crime can reinforce punitive attitudes, swaying public opinion towards harsher sentencing and diminishing support for restorative approaches.

Also, there are practical challenges like the handling of violent crime, addressing power imbalances, and institutional resistance that need to be carefully navigated to ensure fairness and effectiveness.

In cases of violent crime, the emotional intensity and severity of the offense often make it difficult for victims and their communities to embrace restorative approaches, which may be perceived as too lenient. Victims may feel that restorative justice does not adequately address their pain or provide sufficient accountability for offenders, leading to resistance against using these methods in more serious offenses. The public's perception that violent crimes warrant strong punitive responses further complicates efforts to introduce restorative practices in such cases. However, restorative justice in violent crime cases can be applied effectively by offering victims the choice to participate, ensuring their voices are heard, and providing them with ongoing support throughout the process. This approach needs to be trauma-informed, meaning that it focuses on healing while still maintaining accountability. The option to include restorative justice as a complementary process to traditional punishment—rather than a substitute—could help address victim concerns about the perceived leniency of restorative measures.

Power imbalances between victims and offenders also pose significant challenges. When offenders hold more social, economic, or political power, the restorative process may be skewed, with victims potentially feeling pressured to forgive or reconcile in ways that do not serve their interests. This can undermine the fairness and integrity of the process, leading to outcomes that are neither just nor restorative. To prevent power imbalances from distorting restorative justice processes, safeguards are needed.

Another practical issue is the existing structure of the criminal justice system, which is primarily designed for punitive measures that is deeply entrenched in punitive ideologies. Courts, law enforcement, and even the public are often unfamiliar with restorative principles, leading to inconsistencies in application or outright rejection of these practices. Overcoming institutional resistance requires a cultural shift, alongside education and training for legal professionals and communities alike.

Conclusion

While restorative justice has achieved notable successes in various settings, such as reducing recidivism and enhancing victim satisfaction, its coexistence with punitive justice often encounters challenges rooted in societal perceptions, systemic inequalities, and varying levels of acceptance among stakeholders (Daly, 2002; Sherman & Strang, 2007). Justice is not a one-size-fits-all solution; different circumstances require tailored responses that consider the needs of victims, offenders, and the community as a whole.

Emerging evidence suggests that a hybrid model, which integrates both punitive and restorative justice elements, may be more effective in addressing the complexities of justice (Bazemore & Schiff, 2005; Maxwell & Morris, 2001; McCold, 2003; Latimer et al., 2005; Strong, 2014; Van Ness; Ward & Maruna, 2007). This model facilitates accountability while also promoting healing and reintegration, ensuring that the diverse needs of all parties involved are adequately addressed. By combining these methodologies, stakeholders can create a more balanced justice system that not only administers punishment but also fosters understanding and reconciliation, ultimately contributing to a more equitable and cohesive society (Sherman & Strang, 2007).

In this framework, offenders are not only held accountable for their actions but are also encouraged to comprehend their impact, take responsibility, and make amends. Concurrently, the justice system implements necessary safeguards to protect the community and ensure that serious offenses are managed appropriately.

Therefore, it is imperative for policymakers, practitioners, and communities to engage with and support hybrid models of justice. Such an approach can facilitate a more nuanced and effective response to crime, emphasizing rehabilitation and restorative practices while maintaining the essential functions of traditional punitive measures.

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