

RESTORATIVE JUSTICE AS A HUMAN RIGHT

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I thank the Institute for Human Rights very much for their invitation to write this article on restorative justice as a human right. As I understand it, “restorative justice” is a term that as far as I can see was coined by Presbyterian Church, U.S.A., Criminal Justice Office director Virginia Mackey in the mid-seventies. It became part of a North American movement toward “prison abolition”. I myself have been trained four ways in mediation, and have applied my training to mediation in a program of Canadian and U.S. Mennonites, the Victim Offender Reconciliation Program over the past six years. I have also been formally trained in law (then sociology), and have represented defendants in criminal court, advocated for people in numerous grievance fora, and qualified as an expert witness on a variety of criminal justice topics. In attempted recovery from the adversarial training that lies at the heart of the common-law tradition in which I was trained, I have chosen to try to understand and perfect the skill of mediation, as in restorative justice, instead.

I learn from every attempt I make at mediation. To me, the key word in “restorative justice” is “restore”. I seek to help victims and offenders find ways that they all can restore whatever trust the “crime” at hand has cost them, so that they all become woven into safe, honest social relations rather than separated, as by imprisonment.

I live in the global heartland of punitiveness. My country imprisons an entire quarter of the world total, and as I write my president is once again poised to launch international bloodshed. I also live in hope. I believe that as I learn mediation skills with hundreds of students most of all each year, especially in a required second-year class for criminal justice majors on “alternative social control systems”, I find students who are eagerly

to learn to concentrate on making peace instead of war. I believe that we learn peacemaking together by our growing awareness of what protection of human rights requires of us.

Here is my only citation or reference in this essay: <http://www.critcrim.org/critpapers/pepinsky-book.htm>. *A Criminologist's Quest For Peace* (2001) is the first book I have had published electronically rather than in hard copy, on the web site of the Critical Criminology Divisions of the American Society of Criminology and the Academy of Criminal Justice Sciences. There, it is available for free reading, copying, and use. The manuscript is strewn with references, which are listed at the end. Feel free to consult it for follow-up references, and for that matter, to contact me further for references to things I write here. I can well imagine that the readers of this journal are very well-read on human rights in their own right. My purpose here is simply to explain how my own understanding of how restorative justice as a human rights issue has evolved.

THE FIRST HUMAN RIGHT

From the Universal Declaration of Human Rights (1948):

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

These days, many of us would notice that Article 1 leaves out half of humanity – sisterhood. Correcting for that glaring omission, Article 1 to

me states the essence of human rights as I celebrate them.

Call me essentialist or reductionist. I seldom use the word “right”. It takes me back to Max Weber’s operational definition – something guaranteed by a state, via law enforcement. When I idealize “human rights,” I think instead of what awareness it takes to recognize in fact as well as in creed that “all human beings are born free and equal in dignity and rights.” I believe that it is by putting this belief into practice that human beings become safer in one another’s company, more trusting and trustworthy and responsible, and thereby let go of attachment to outcome – to planned repression of wrongful behavior instead of inviting redemption and atonement from all those stricken by violence.

Just think about what it means to act on the belief that we are all BORN equal in dignity and rights. My own preoccupation the last decade has been with how we respond to violence against children. Consider: Everyone who lives into adulthood has survived membership in what I consider to be the ultimate underclass – childhood, compounded as its oppression might be by race, class and gender. I have two litmus tests for whether children are being abused. The first is whether the child feels compelled to keep a secret about what an adult is doing with the child. The ultimate root of human dishonesty is protecting someone you love by not mentioning something significant that is happening with the one who presses you to keep the secret. What, for instance, do you when your father is making you lick his penis night after night?

My second litmus test is whether one approves of the child’s equal force against a parent’s wrongdoing as when a child wrongs a parent. For instance, if you believe a parent should spank a child who has almost stepped in front of a moving car, I would wonder whether you also would approve of the child’s spanking the parent for the same misdeed. Don’t we as adults need correction fully as much as our children? If adults know things children do not, do not children equally see things adults do not? Right now in my country, criminal justice rhetoric has taken hold enough that people will commonly speak of the duty of parents to “give consequences” to their children for hurtful or scary behavior. Meanwhile, I have heard and read countless personal testimonies of young children who have had to take care of sick, incompetent, or

out-of-control parents. If children need consequences from parents, aren’t parents equally liable to need consequences from their children? The only lesson I can draw from subjecting children to discipline that children are not able in turn to subject their adult caretakers to, is that might makes right.

A prototype of what it takes to make peace at any level is to resolve the contradictions inherent in how we as adults manage conflicts with our children. Do I make them stop crying because they make me feel bad, or do I celebrate tears as expressions of honest feeling, and welcome them? Do I learn from my children’s talking back, or punish them for trying?

To me, imbalance in any relationship occurs when one party gets to dictate consequences to another. Parties to any interaction fail to grant one another equal respect and dignity simply by getting stuck on making consequences happen – by fixation on agendas, goals, or missions, or as Roger Fisher put it, by getting stuck in positions rather than negotiating mutual accommodation of interests. The key test of whether accommodation is occurring, therefore, is whether what people want or issues people attend to are changing as people take turns talking and listening to one another. If they are really listening and responding, they themselves will emerge from interaction knowing, wanting, and attending to things that they learned to care about during the interaction, things they could not foresee before the interaction. As a corollary, over time in any interaction in which the human right to equal respect and dignity is granted, all parties ought to have a roughly equal share of talking and listening time. This is the foundation on which restorative justice as I understand it rests.

THE IDEA OF RESTORATIVE JUSTICE

Norwegian criminologist Nils Christie has become internationally renowned for his plainspoken profundity about social control, recently in his now twice-revised book, *Crime Control as Industry*. In a keynote address that became the lead article in the 1977 volume of the *British Journal of Criminology*, Nils spoke of “Conflicts as Property”. In so doing, he identified the key element in various forms of restorative justice that also manifested themselves in

criminological literature and practice in that period, for instance: victim offender reconciliation, conferencing, sentencing circles, the Navajo peacemaker court, or in U.S. legal enterprise, “alternative dispute resolution”. Somehow since the rise of European feudalism, agents of state had displaced victims as recognized aggrieved parties. Nils reminds us: the handling of conflicts belongs to the people involved, not to surrogates who know nothing about them and their circumstances, such as legislators. Instead of prejudging what victims and offenders want, we ought to be guided by how they themselves respond to the dispute at hand. They have to live with consequences of the response. They, then, are best qualified to decide how they respond to the dispute.

To illustrate what giving disputes back to victims entails, I have on several occasions tried to apply the principle as a *pro bono* (free-of-charge) expert witness on “peacemaking” in child custody and visitation hearings. In each case, without interrogating children myself, I believed their allegations that they were repeatedly being sexually assaulted by a parent during unsupervised visitation. To each judge, I expressed my interest in encouraging children involved to grow up to love and feel safe with both their parents. To that end, I recommended that the court support the children’s being with counselors they “liked”. I recommended that the courts call upon those counselors for guidance as to how and when the children were ready to spend time with either parent.

As I see it, an antidote to violence is giving those most vulnerable to violence the first say in how to make peace. I knew without having to ask myself that the children in these cases were clear about their desire not to spend time alone with a parent. I asked that respect for that wish be given highest priority. Happily, one judge accepted my recommendation, after interviewing the child in alone in his office.

Peacemaking entails triage. When you get to the scene of a social wreck, including a wreck known as a violent crime, you attend first and foremost to the needs and interests of the person who seems most hurt and vulnerable.

What, then, of the offender? What steps do we take to reduce the threat of re-offending?

One saying I have is that would-be peacemakers know the world to be much worse than warmakers allow themselves to imagine. The plain fact is that as far as I know from survivors whose reports I accept, child rapists and worse often survive and socially thrive. I first want known victims to break free of continued threat. After that, if conceivable, I would like offenders to recognize and want to atone for harm they have done. In the select sample of victim offender reconciliation cases I get, “offenders” acknowledge that they have done harm criminally charged. When they can do things their victims suggest and show they are really better than when they offended, great. Insofar as victims are strong enough to confront their offenders and negotiate settlements, wonderful. Otherwise, we who would confront offenders can ask them how they would redeem themselves, and negotiate whatever it takes to live with offenders safely meanwhile. For example, since 1994 the Canadian prison authority has contracted with largely volunteer groups to provide “circles of support and accountability”, in the first instance with a Mennonite group in Kingston, Ontario, to encircle “high-risk sex offenders” coming out of prison. In these circles, offenders take the lead in constructing their own post-criminal lives. They negotiate boundaries of trustworthy behavior with other members of the circle. One way or another, we can certainly negotiate social arrangements – as in not being left alone with children – short of building jail cells that might cost a hundred thousand dollars a year to build, and tens of thousands more to operate.

In 1989, the parliament of New Zealand passed the Youth Justice Act. Under the act, any juvenile charged with anything short of murder who agreed to a guilty plea would be entitled to a “family group conference”. The conference would be facilitated by a state social service specialist. Police and probation officers would be present. So would a lawyer for the “offender”. Victims would be invited to attend. Where trauma was especially raw as in rape cases, extra time would be offered to get the conference together. Victims ended up appearing with family members and other supporters about half the time. Most often, the accused ended up signing an agreement to take some concrete action to “make things right.” The agreement is referred to the juvenile judge, who can modify it or add onto it as the judge sees fit.

In the aftermath of the legislation, youth detention fell by half, and recidivism fell

substantially too. In cities including Auckland and Wellington, similarly successful experiments have been conducted with adult offenders. New Zealand demonstrates the potential for using restorative justice to obviate demand for punishment of offenders.

Unfortunately, restorative justice may become an addition to punishment of offenders rather than a substitute. This is the case in the victim-offender reconciliation program in which I volunteer. Virtually all of our cases are referrals of young people who have already been through the court system. In many cases, they have already served time in detention. Typically, they are doing community service, and paying for a number of other “services”. Although participation in mediation is supposedly voluntary, the offenders have been told that participation is a condition of their probation. Even then, I find mediation worthwhile to give victims and offenders a sense of ownership over their own problems, and a sense of receiving special, personalized attention. I keep the faith that eventually prosecutors and defense counsel will see the value of trying to bring victims and offenders together before going through the court process.

And so I move in my thinking from the right of a child to dignity and rights equal to an adult’s, to a practical duty to be guided first and foremost by experience of victims of violence, to a duty to negotiating safeguards against future victimization, and giving offenders the option to win their way back into popular trust. Peacemaking takes time, but to me, it is the only way we ever transform violence into safety.

CRIMES WITHOUT VICTIMS

Think of the child who has to tuck her drunk parent into bed. There is no neat distinction between violent crime and victimless crime. Whether or not violence – narcissism, being on one’s own mission – has a manifest or intended victim, the things we do may hurt and burden those around us. We have a duty to encourage those we interact with to speak openly and call us to account for victimization we have not noticed. Unless there is a personal grievance, there is no rightful call to interfere with personal liberty. Worldwide these days, a large proportion of increased incarceration is for drug law violations,

irrespective of harm done. From my human rights perspective, a crime without an identified personal victim should simply not be a cause for social concern.

TOWARD RESTORATION

Here is my view of human nature, on which my experience and understanding of peacemaking and of fostering human rights is based.

I believe we are all born with minds full of the universe of human experience and feeling. We learn languages so readily. We seek belonging in this world through language, through how we express ourselves in words, in tears, however...

Then, *For Your Own Good* as Alice Miller writes (see references in my e-mail book), adults say, in effect, if you really love and trust us, you ought to feel the way we think you should. Stop crying. Stop complaining. Stiff upper lip and all. And so you repress that part of yourself, especially the part that suffers suppression, and just stay mad and suspicious of those who would not let you air and share your fears. In a psychological word, you are driven to “dissociation”. You are driven to be an imposter, to smile through your tears and sense of unfairness. You get to pretend living through other people’s feelings and needs.

In living out someone else’s idea of how you should live, as against expressing your own reality, as I see it, you die. You become someone else’s social robot. You become vulnerable to victimization on the one hand and to victimizing others without feeling their pain and fear on the other.

Restorative justice is designed to break through the dissociation. As a mediator, I feel a primary duty to encourage parties to show their own feelings, and to talk about what they themselves rather than someone else believes important. I find that as people gain a sense of freedom to tell their stories in their own way, and get in touch with and express their own true feelings, they become capable of empathizing with others – feeling their pain and accommodating their interests. This contrasts sharply with European-based legal processes in which rules of evidence tightly constrain what parties to conflict can say, and in which it is

routine to coach parties on what to say and not to say at various stages of proceedings. For instance, I commonly hear victims express anger that offenders have never approached or apologized to them – not realizing that criminal defendants dare not risk sanctions for “intimidating” a witness or “interfering with process”.

Friends from other parts of the world have remarked to me how reluctant people in my country tend to be to show open disagreement, how much we shy away from public displays of emotion-laden conflict. This amounts to a culture of dissociation. In that culture, we tend to become indifferent to human suffering. We tend to rely heavily on separating parties to conflict, so much so that even though we imprison people at world-record levels with world-leading sentences, people are still heard to complain that we let offenders off too lightly.

Restorative justice amounts to embracing conflict rather than suppressing it. I find myself trying to apply restorative justice principles in my teaching – encouraging my students openly to disagree with me above all, rewarding honest expression of feeling and belief in written and oral dialogue rather than passing judgment on whether students give me the right answers. My hope is that as we experience safe and open confrontation of our differences and grievances, we first learn to value our own opinions and interests, and in turn become less punitive and more empathic toward others. In fact I have noticed that the earlier and more openly students disagree with me, the more they surprise themselves by becoming critical of criminal justice excesses and supportive of transforming punishment into restoration.

I have come full circle in my understanding of what “restoration” means in a positive sense, as a path toward human safety and security. Back to childhood. To me, restoration implies putting ourselves back where we were when our own true feelings and beliefs were forcefully suppressed. Back to the time when you learned and mimicked your parents’ and peers’ language, when you so energetically tried to belong and to be of value to your elders. At that time, when you had a conflict, you were so willing to deal with the conflict directly, personally. You had no option. You saw it as in your best interest to listen, learn, and propose to your elders how you might restore trust when you

had frightened or neglected one another. You went into each conflict with no preconceptions as to what result you had to obtain.

What appeals to me most basically about restorative justice is the idea of going into confrontation among people in conflict without preconceptions as to results that must follow one particular way or another. The very power of restoration to transform punitiveness rests on the honesty with which parties to conflict talk about what they most urgently are feeling, on what in the moment of confrontation they think needs to be said. The truest sign to me of restoration in any relationship, including that of formal mediator or teacher, is when I am surprised myself by what I end up saying and thinking about next. This, of course, is the very opposite of what I was carefully taught in law school, to make “the rule of law”, including what Max Weber called “substantive rationality”, sacred. I had the sacredness of calculating the consequences of one’s conduct drummed into my head by some of the reputedly greatest minds in the U.S. legal professoriate. Then I felt it, and now I say with conviction: “Nonsense”.

The art and science of restoration is instead one of figuring out how to arrange it so that those most directly affected have the greatest opportunity to say freely, without fear of self-incrimination or retaliation, what honestly is foremost on their minds and in their hearts. The primary challenge of human co-existence is how fast and openly we can listen, learn, and CREATE responses to our awareness and empathy for fears and grievances others have with us. As one mother struggling to retain custody of children told a seminar of mine she had discovered: “I’ve had to learn to ask my children to tell me when I’ve hurt their feelings, and to say, ‘I’m sorry.’” I never ask anyone in mediation to say, “I’m sorry.” I ask them to let their inner children take hold and make whatever they will of the opportunity. As some of my fellow volunteer mediators have put it to me, we trust the process. What Max Weber calls procedural rationality is indeed to me a science of how to get real human issues on the table where they can honestly be discussed. State prosecution inhibits that conversation. Restorative justice invites it, as a way of human life, in recognition of the principle that we are all born equal in deserving respect and dignity for being our own true selves.

