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The expressive function of restorative punishment: a 'public interest' perspective

Bas van Stoikkom

1. Introduction

Restorative justice is on the rise. In the last decades in many jurisdictions restorative processes have been introduced. Restorative justice theories have become influential, and have left a firm mark on recent international criminological debates. Restorative justice is not in the margins, neither in practice, nor in theoretical discussions. For their part many influential penal academics – Dan Kahan, Paul Robinson and Andrew von Hirsch, to name a few – have been triggered to explain what are the 'virtues and vices' of restorative justice. Most agree that restorative justice has great potential and welcome its practices, but the ambitious agenda to reform criminal justice and the utopian ideal to 'supersede' punishment have been criticised severely.

Many proponents conceive restorative justice not simply as a complement to the criminal justice system, but as a substitute for it. Ideally restorative justice would ban all 'punishment'. Giving offenders the punishment 'they deserve' is rejected as an appropriate goal. Many want to keep punishment at bay from the sanction system. Lay people would run restorative justice processes as an alternative to the cold, professionalised and punitive criminal justice machinery. These 'restorativists' are easily tempted to let criminal justice function as a scapegoat. Instead of voluntarism, offering amends and reintegration – to name some important restorative values – the criminal justice system is identified with coercion, inflicting pain and exclusion. They reject punishment as a component of restorative justice because they consider it to be inherently disrespectful. Restorative processes are designed to help people become less punitive.

In fact, punishment problems are ambiguous and any ethical approach taken to extremes will produce one-sided or even immoral results. Punishment does not fit *one* kind of ethical standard or principle which may

presume *one* right choice. For that reason punishment ethics relies on a body of diverging legitimations and goals. Just deserts, reparation, rehabilitation and deterrence all seem essential to the body of legitimations of punishment. Nevertheless, the hierarchy is always changing, and nowadays reparation seems to get more credits, in spite of law and order tendencies.

How to define punishment? Punishment is imposing burdensome restrictions, payments or tasks on the offender. A rich person who committed a serious crime (beating up his ex-wife for instance) is sanctioned but not punished when he has to pay a considerable amount of money. He would be punished if he was imprisoned or ordered to do burdensome tasks. If he (partly) admits that he behaved wrongly and subsequently is ordered to make reparative efforts, one may call this a 'restorative punishment'. If he objects to any punishment, denies responsibility or is threatening to repeat his wrongful behaviour, 'punitive punishment' or 'hard treatment' could be indicated (subjected to strict discipline; denied opportunities to undertake activities; incapacitation, etc.). My claim is that restorative punishment is not hard treatment, but nevertheless punishment, in the sense of being obliged to do burdensome tasks.

Many restorative justice theorists feel uncomfortable in this discussion because they criticise the notion of punishment as such. They tend to favour informal forms of crime-handling and plea for a 'private justice' model between victims and offenders. Nevertheless, other restorativists do recognise the public function of sentencing. According to John Braithwaite and Philip Pettit (1990) crimes committed against others endanger the collective dominion. In sentencing the criminal, not only the dominion status of the victim is recognised, but also the community is reassured that the negative impact of the crime on anybody's dominion is undone.

However, many restorativists do not seem to recognise that for most serious crimes punishment is needed to underscore the community's denunciation of the crime and the vindication of the victim. They tend to ignore public punitiveness or dismiss these views as a form of 'false consciousness'. It seems that it would be more fruitful for them to address themselves to popular feelings if they want to produce real change. Sanctions can only take on constructive forms when the outraged feelings of the public have been assuaged. That is why the communication of anger and other retributive emotions is so important. Claiming that the primary response should be reparation, without canalising these emotions, could intensify the conflict between the offender and other parties (the victim, her family and the public) and keep trust at bay.

John Braithwaite (1999) argues that it is with respect to the most serious personal injury offences that the potential for restoration is greatest. However, convincing the public that the 'payoff' of restorative justice is

likely to be the greatest for the most serious crimes may well prove difficult (Roberts and Stalans, 2004).

This chapter is focused at the 'expressive function' (Feinberg, 1970) of restorative punishment. I will argue that the 'private setting' of a conference paradoxically has better opportunities to affirm public norms and stimulate public peace than traditional judicial proceedings. It is first argued – *contra* restorativist intuitions – that punishment is an inevitable or unavoidable feature of social life and that constructive punishment is only possible when moral outrage is communicated and (some) trust is recovered. Secondly it is stressed that restorative justice offers promising ways of 'participative censuring' that could satisfy public needs. Focusing communication on personal testimonies of being injured and condemnation of the wrongful behaviour accommodates public concerns. These denunciation and reassurance functions may be the most powerful part of restorative justice. If the 'blaming symbols' are expressed vehemently, the public could be more easily convinced that repair arguments may override retributive arguments. In the words of Dan Kahan (2006), it is the 'expressive political economy' of restorative justice, the dispersal of condemnatory symbolic meanings, which could replace the need for imprisonment and other repressive sanctions.

Many restorative justice proponents seem to neglect the importance of public acceptance of their proposals. Penal philosophies that fail to comport with citizens' intuitions about just punishments, could easily lose legitimacy. Do restorative justice policies arouse resistance from powerful parts of the population? What does the public expect?

2. Dealing with the 'desire to punish'

2.1. The unavoidability of punishment

There are many arguments claiming that punishment – in the sense of 'hard treatment' – is unethical. Retributivists are eager to demonstrate that painful practices and negative interventions have some worthwhile ends. Despite these efforts they did not really succeed in developing plausible justifications for intentionally inflicting pain. The principles that retributivists have invented for that purpose – annulling the crime, taking away benefits, lowering the status of the criminal, and so on – remain vague, imaginary and ambiguous. It remains obscure how one evil can repair another. They fall back on 'metaphysical mystery-mongering' (Walker, 1991).

Nevertheless, retribution cannot be eliminated from morality. Retributive feelings, no matter how disappointing, are a vital part of our emotional life. Grievances reveal desires whose only satisfaction is the belief

that offenders are in turn being distressed or made to suffer.¹ The desire to cause this suffering fulfils psychological functions: grievance-satisfactions, canalisation of negative emotions like rage, revenge and fear, and regaining some peace of mind.²

Psychological studies demonstrate that citizens feel that assigning a punitive measure to the offender is morally required for criminal offences (Carlsmith et al. 2002). When a person intentionally wrongs an innocent other, moral outrage is generated. When a mugger violently robs another person a visceral reaction is evoked that the criminal must be punished (Darley and Pittman, 2003).

John Darley and Thane Pittman stress that the generally high correlation found between the moral offensiveness of the crime and the severity of the sentence suggests that a just deserts perspective drives sentencing. In the eyes of the public the perceived seriousness of the crime depends on the moral weight of the transgression (the wrongfulness of the motive for the crime), and is not solely a function of the severity of the harms done or the economic losses. If perpetrators are judged to have committed the harm unintentionally, compensation suffices. However when harm is thought to have been committed intentionally, people see punishment as necessary.³ The authors conclude: "*High moral outrage, coupled with a focus on the perpetrator, leads to retributive impulses and to the desire to punish. Low moral outrage, with a focus on the victim, leads to restorative impulses and to the imposition of compensation in the case of negligence*" (Darley and Pittman, 2003, 331). So high moral outrage seems to block restorative responses.

In an impressive overview Roberts and Stalans (2004) confirm these punitive attitudes of the public. With respect to the most serious forms of offending that do not contain extenuating external factors, the sentencing purpose favoured by the majority of the public shifts to punitive goals. Even complete restitution cannot prevent the public from desiring to punish serious offending. When a shift to retribution occurs, restorative sanctions lose their power, and the public reverts to the most punitive sanctions. However, Roberts and Stalans point to several studies that have demonstrated that apologies and the expression of remorse decrease the severity of the sentences recommended by citizens. People tend to mitigate punishment if they hear that the offender is repairing the harm (see also Darley and Pittman, 2003). Hough and Roberts (2004) demonstrated that public satisfaction with restorative sanction options rises substantially when the public is told that juvenile offenders have accepted responsibility for their actions and have written a letter of apology. Nevertheless, in most cases victims do not view apologies as substitutes for punishment, or as reasons for sentence reduction (Bibas and Bierschbach, 2004).

We do not have to accept unquestioningly the findings of Darley and Pittman. The public see multiple purposes that are relevant to sentencing serious offenders, not only providing punishment but also providing restitution. Alternative sentences do coexist in the public mind with more punitive attitudes (Doble, 2002). The public is 'selectively punitive' and 'selectively merciful' depending upon specific conditions (Stalans, 2002). Although the general public does largely support harsh punishment for serious offenders, they are also very much in favour of compensation and forgiveness. The principles of restitution, 'making good' and 'paying back' appeal strongly to the public.⁴

Many research findings point out that the experience of victimisation does not increase support for hard treatment. Intuitive beliefs that victims are most likely to seek retributive or harsh consequences for offenders, are obviously inaccurate (Maruna and King, 2004). That is noteworthy since headline criminal justice policy is often justified by the claim that victims are the main proponents of a 'tougher' approach to sentencing.

2.2. Justice as 'conflict resolution': recovering trust

In the overwhelming majority of 'minor cases' there is much to be said for restricting the sentencing powers of the court to reparative measures or to constructive community-based sanctions that are designed to prevent reoffending. However, serious offences have broader social consequences which transcend the personal harm or loss experienced by the direct victim. The fact that the general public is indignant about serious crimes proves that the impact of crime transcends the actual victimisation. The harm caused by many offences goes beyond the actual victim's suffering and losses (Walgrave, 2000; Dignan, 2003).

As stated, in respect of serious crime many restorativists mistakenly underestimate the role of moral outrage within the public, the desire to retaliate, and the need for punishment. The harm caused by those who break basic rules arouses moral indignation and anger. Censuring and just sentencing calm this anger. It redirects destructive emotions in morally acceptable and possible social constructive ways. To ignore those emotions would invite further conflict.

The philosopher Wesley Cragg argues that sentencing can be viewed as a form of 'conflict resolution'. Once a serious crime has been committed, a conflict between the offender and the public (and the law) is the result, and the goal of the trial and sentencing process is to keep the conflict from escalating and to defuse it as much as possible. According to Cragg the purpose of the law is to resolve conflicts in a way that is fair and reduces

recourse to the justified use of force. A formal legal system – having the *Gewaltho monopol* (monopoly of force) at its disposal – is necessary because informal systems can be unfair or ineffective in resolving disputes and might even spin off into violence (vigilantism; ‘wild justice’) (Cragg, 1992). Christie’s theory of ‘conflicts as property’ uncritically supposes that conflict resolution will succeed through the spontaneous exercise of community morality and its reconciliatory nature. But it is a mistake to see informality as inevitably benign or by its nature less punitive or more humanitarian (op. cit.). Where punishments rest on informal mechanisms, they are subject to all the distortions associated with vengeance. In short, the legal system should try to defuse initial hostility and to increase trust. It reduces the vulnerability of citizens and provides improved opportunities to build and maintain public confidence in the law and stimulates cooperation in society.

Cragg stresses that if confidence in the law is to be maintained, criminal offences must be denounced and the rights of victims protected and affirmed. It will involve the imposition of penalties in the knowledge that they will be experienced as painful. The sentencing process requires that offenders participate in an unpleasant process of evaluation and criticism, whose goal is to convince or require them to do painful or burdensome things (bearing guilt, apologise for misdeeds, make amends through compensation or community service) (op. cit.).

Resolving the conflict between offender and the public – Cragg argues – cannot be accomplished without elements of pain and endurance, contrary to what many restorativists believe. Punishment is an unavoidable component of the sentencing process, a logical concomitant of sentencing. However it is not its proper purpose. Penalties are imposed or agreed to, not with the aim of deliberately causing suffering, but with the aim of conflict resolution. Cragg stresses that a court should attempt to win the cooperation of both offenders and victims. The central goal of sentencing is to persuade the offender to comply with the law voluntarily. Imposing hard treatment sets the offender off from others; it blocks cooperation. It is an essentially negative act and does not guarantee that the offender would have ‘learned a lesson’. Suffering cannot repair harm or rebuild what has been destroyed (op. cit.). But on the other hand, the law has obligations to the entire public, which places constraints on how flexible the legal system can be in its attempt to win the compliance of the offender.

For many restorativists Cragg’s sophisticated perspective on justice as ‘conflict resolution’ would be disturbing. The culture of restorative justice is non-punitive. Many theorists argue that pure punishment carries the seeds of more social discord and non well-being, and thus of more crime and criminalisation. In Walgrave’s view, the a priori position that crime must be punished is both ethically questionable and instrumentally inefficient

(Walgrave, 2003b). In the words of Martin Wright: “Balancing the harm done by the offender with further harm inflicted on the offender only adds to the total amount of harm in the world” (Wright, 1992, 525). Punishment is counterproductive: it is a serious obstruction to possible restoration. But in Cragg’s vision keeping punishment at bay could intensify social conflicts.

Other restorative justice theorists, such as Kathleen Daly (2000), argue that to view restoration as an ‘alternative to punishment’ is misleading. Offenders will treat the claim that they are not being punished as hypocritical. Victims might see it as a denial of the validity of the retributive emotions such as indignation and resentment, which they feel towards the offender. And the community might see it as trivialising crime (Johnstone, 2002). If the offender has significantly wronged a victim, excusing him from punishment betrays the crime and the harm. “*Offenders, victims, and society interpret the failure to punish to mean that the crime is not really wrong and that the offender is free to keep doing it*” (Bibas and Bierschbach, 2004, 123).

Daly (2002) stresses that a restorative conference incorporates diverse justice aims, including retributive, restorative and rehabilitative aims. These principles are in many respects dependent on one another. The stage of holding offenders accountable, which is the retributive part of the restorative process, is crucial: without it the retributive feelings of the victim (and his/her supporters) are not channelled and possible mitigation of moral outrage fails to occur. Both censure and reparation may be experienced as punishment by offenders, even if this is not the intent of the participants. But in the ‘advocacy literature’, Daly argues, there is too quick a move to repair the harm or heal those injured by the crime, or reintegrate offenders, passing over the crucial phase of holding offenders accountable. So many proponents mistakenly suggest that restorative justice would not apply to the blame-fixing stage of the process. They fear that blame hinders acceptance of responsibility and healing.

2.3. Constructive punishment

A punitive response to serious crime seems to be indispensable. But the real challenge is to try to combine it with the social constructiveness of restorative responses. After all, as Cragg states, punishment is not the most effective method of communicating normative standards to offenders, or eliciting compliance with those standards. Offenders would have relatively little incentive to accept a reparation package if they necessarily had to suffer ‘hard treatment’. As Cragg puts it, the administration of justice, in terms of punishment, does not necessarily restore trust. It is more important to persuade offenders to take responsibility, than to punish them in accordance

with strict just deserts principles.

In the case of a cooperative offender – and where constructive sanctions would be possible – to accompany the repair work with ‘hard treatment’ is questionable, because it would destroy trust. Although restorative punishment deliberately induces pain, since it aims to induce repentance and critical self-evaluation, hard treatment would make the punishment a meaningless burden, which strengthens the reluctance of the offender to cooperate. Nevertheless, reparation must be burdensome if it is to serve the purpose of expressing a serious apology for a wrong done. *“If it cost the wrongdoer nothing, it would mean no more than an empty verbal apology”* (Duff, 2001, 52).⁵

The goal of the painful reparative tasks that offenders must execute, is to stimulate moral self-reform. In this respect the way that offenders are treated, is of decisive importance. If we treat them in an oppressive way, we fail to communicate the message to reconsider their behaviour. By contrast, if we respect the integrity of offenders we might succeed to engage them in this process of self-reform (van Stokkom, 2005). In short, restorative punishment is an alternative form of punishment, combining ‘burdensome reparative efforts’ with respectful treatment.

Still, in cases of serious crime constructive punishment often is not realizable (at once). When public retributive emotions are flamed up, we first need ‘punitive symbols’ to express condemnation of the wrong. Sometimes even the most repentant offender cannot be granted constructive punishment, because that option would again provoke retributive feelings. Thus, restorative punishment can only function as a ‘secondary principle’; the conflict resolution between the offender and the public – in terms of assuaging retributive emotions – is more weighty, and determines the scope for possible reparation-sanctions.

3. Restorative censuring: communicating indignation

3.1. Sentencing: need for public guarantees

Restorative approaches seem to underestimate the public dimensions of much crime, and are arguably more individualistic than traditional approaches to crime. Crime is understood primarily as a matter between the offender and the victim, rather than an offence against society as a whole. Restorative justice reflects a pronounced anti-statist ethos and tends to privatise the response to crime: only the perspectives of the immediately interested parties are deemed relevant.

In the case of minor wrongdoing there is no problem in reserving crime-handling for the direct stakeholders. In cases of serious offending

the public functions cannot be evaded. Serious and violent crimes transcend the impact on the local community in which they have been committed. A coercive public intervention and sanction by the formal justice system is considered necessary to keep peace and order in society. This system also offers the framework for guaranteeing the legal rights of the victim and the offender. If this judicial warrant is not available, Walgrave (2000) states, the restorative responses may go off the rails towards outcomes that are not ‘just’ at all.

For these reasons restorative conferences with serious juvenile offenders in Belgium are not diversionary options and are positioned in the centre of juridical processing. The outcome of the settlement is not an ‘agreement’ but a ‘common declaration of intention’; this is sent to the judge, who will incorporate it in the court’s judgment (Walgrave, 2003a; Vanfraechem, 2005).

During the conference a police officer is present. He or she safeguards the public interest in the settlement of the offence and provides a crucial symbolic expression of the authorities’ commitment in the meeting. *“The police’s opening of the conference with reading the facts at stake makes clear immediately to all participants that this is not going to be a ‘soft’ talking hour, but that there is public concern about a serious event and a public pressure to find a solution”* (Walgrave, 2003a, 74).

The outcomes of the conferences are sent to the judge who places them within a proportional framework. In this way standards of sanctioning represent not just the views of the conference-parties but wider public understandings concerning the degree of blameworthiness of the conduct. The restorative theorist Jim Dignan argues that we have to link the proportionality constraint to the seriousness of the wrong that has been done to the victim and possibly the wider community, rather than the harm that actually may have been caused. In this way the scale of the overall response is detached from the particular harm that the victim may have experienced, while still acknowledging the latter’s entitlement to appropriate reparation. The ‘seriousness’ of the wrong should place an upper limit on the severity of the sanctions deemed appropriate (Dignan, 2003).

Some restorativists would object. The procedure should leave decisions primarily to the stakeholders; individual offenders and their victims ‘own’ their case. What matters is not how culpable the offender is, but the particulars concerning how much the victim has been hurt. That vision may indeed ‘go off the rails’ as Walgrave says. The desired reparation for ‘equal crimes’ could vary considerably, depending on the subjective experience of harm. One victim may claim excessive reparations, another does not claim anything. Admitting these differences could undermine the public’s feelings of justice.

It is safer to work on the principle that the severity of the sanction should reflect how blameworthy the conduct is deemed to be. Harm is of course an important element in determining the degree of blameworthiness of the conduct, but culpability (foreseeability of the harm; the kind of intent involved; mitigating conditions) is also vitally important (von Hirsch et al. 2003).

3.2. *Censuring: focusing on personal harms*

Now retributive theorists such as von Hirsch claim that not only the sentencing process but also censuring must deal with wrongdoing. Through the censure a public evaluation is expressed, that certain kinds of conduct are injurious and reprehensible. This public valuation conveys censure to the offender and potential offenders, and also gives victims and potential victims the message that the behaviour is deemed wrong. In providing public acknowledgement of wrongdoing, one gives public recognition to the value of the rights involved, and makes a moral appeal to citizens that they should desist from the conduct (von Hirsch et al. 2003).

Apart from the many difficulties that the concept of 'wrong' evokes⁶, the question is whether that view is convincing. Restorativists agree that disapproval of the crime must be expressed during the conference. The stakeholders have to be reassured that steps are being taken to discourage its recurrence. But what distinguishes restorative censuring is that the reasons for the disapproval are directly related to the harm caused. Restorative censuring does not refer to abstract moral norms or standards, but to the obligation to respect the concrete quality of life of the participants (Walgrave, 2005).

Ideally, retributive theorists say, the negotiations during restorative conferences should be constrained by public understandings concerning the blameworthiness of the criminal conduct. But in doing so they tend to depersonalise crime-handling: justice on this account is concerned with abstract wrongs and not with persons. This focus on abstract wrongdoing fails to instruct the public. Above all through the co-experience of personal tragedies the importance of public norms becomes clear. For that reason the participants, the harmed victim and the repentant offender, must be given a face. Personal testimonies lend themselves to identify with; they allow recognition. By contrast, the judge's censure has the same ills as any 'rhetoric from above': moralising messages without much opportunity of internalising them.

One could add that classical retributivists do not really care about post-offence repair, apology, or repentance. If one focuses on abstract wrongfulness it is hard to see why these restorative core issues should matter.

Crime is largely viewed as a matter between the state and the offender: the interests of victims and the community have little role to play (Dignan, 2003). Besides, when it comes to the entitlement to reparation the wishes of victims and the community stakeholders actually should carry some special weight in determining what specific sanctions of a reparative nature should be brought to bear on the offender.⁷

Dignan points out that the censure perspective of retributive theorists suffers from other shortcomings. Firstly, the crude form of instrumentalist reasoning that just deserts relies on (fixed punishment tariffs) is unlikely to be the most effective method of communicating normative standards to offenders, or of eliciting compliance with those standards. Secondly, the moral attitudes of citizens towards particular offences are unlikely to be affected by the severity of the punishment that is (or which they believe to be) inflicted. A third shortcoming of the retributivist censure perspective is related to the court-based forum within which the censure is conveyed. Dignan correctly states that this forum has "*extremely limited opportunities for any meaningful censure-based communication to take place, and virtually no possibility of any constructive engagement on the part of either victim or offender*" (op. cit., 143).

3.3. *Participatory censuring*

Victims have been effectively silenced by a system that relegates them to being witnesses subject to strict evidentiary rules. The conventional process fails to acknowledge the special status of victims, arising from the fact they have personally suffered harm as a result of the crime. There is no opportunity to engage in dialogue or even an exchange of views either with criminal justice officials or more crucially, with the other significant party, the offender. By restricting the scope for meaningful participation in this way, the victim (like the offender) is necessary consigned to a limited, partisan and confrontational role. While this fits with the traditional adversarial ethos of the criminal process, it is unlikely to empower victims (or offenders) or make them feel less marginalised (Dignan, 2005). Often the conflict is not settled and the animosity between the parties is prolonged; victims may be even turned into instruments of vengeance. Disenfranchisement drives some desperate victims into the arms of the media, eager to express 'sensational crime stories'. These ways of communicating emotions are fuelled by excess rather than moderation.

So within traditional judicial processes the crime is denounced in a formal, impersonal way. Restorative conferences – on the contrary – allow forms of personal communication between the stakeholders involved. The

victim, his or her supporters, but also the offender's family and friends may act as powerful denunciatory agents.

According to Diane Whiteley (1998) there are two reasons to give the victim a distinct, institutionalised role 'to make his case' (not just as a witness). First, the victim's justified resentment and the reasons for it may provide significant information to both the community and the wrongdoer, especially about the human impact of the crime. The victim needs to defy openly and publicly the wrongdoer's attack on her value as a person. In this way the wrongdoer and other stakeholders gain a full understanding of the harm done. Secondly, third parties would have the opportunity to influence the victim to moderate his resentment to an appropriate level. They would have the opportunity to examine critically the victim's resentment and his reasons for it.

The benefit of public participation of victims and offenders is humanisation of the experience of crime. Participation can calm fears, challenge stereotypes, and reinforce community values. It schools citizens in the expression and containment of emotions like fear, anger and resentment. Albert Dzur and Alan Wertheimer (2002) stress that dyadic communication does not suffice to validate the victim's truth (not deserving to be harmed and be treated as less than equal). Their truth is not merely a subjective report on the harm suffered, but a report on the status of the community as a moral order. Dyadic communication is also less capable of putting pressure on offenders to recognise the harm of their acts and acknowledge responsibility.

In conclusion: in restorative conferencing victims and other stakeholders function as denunciatory agents. Through communicating 'private' harms and feelings of indignation they contribute to public norm-confirmation.⁸ It is acknowledged that victim satisfaction and victim empowerment actually constitute a part of the public interest. Conversely, as long as victims and other direct stakeholders do not have a say in the criminal justice process, retributive feelings are not coped with. They may become excessive and obstruct public peace.

4. Conclusion

Restorative settings and processes are more appropriate for communicating moral disapproval than criminal justice procedures. They provide important mechanisms of norm reinforcement. The concern of the stakeholders who are present during the conference makes clear to the offender and others that the victim's life and liberty need protection. At the same time it is a unique opportunity for each participant to see that people share public norms. The power of such social influence induces compliance with the law, far

more than the threat of official sanctions (Robinson, 2003). Social science studies (Tyler and Huo, 2002) increasingly suggest that justice-feelings and respectful treatment do stimulate compliance with the law. Because participants in restorative practices feel they are treated more respectfully, fairly and justly – compared with criminal justice procedures (Strang, 2002; Poulson, 2003) – the credibility and legitimacy of the law are augmented.

Dan Kahan (2006) argues that if statements or signs of denunciation are missing, the public resists alternative punishments like community service. A shortage of symbolic constraints blocks the public adoption of alternative sanctions. We need expressively viable alternative sanctions, that condemn wrongdoing as clearly as imprisonment does. In his view that is exactly the power of restorative justice processes. Many members of the public, Kahan says, approve of restorative justice because victims are enabled to 'face down' their offenders on front of a supportive audience. Kahan adds that the disapprobation must be constructive. The objective is not to brand offenders as deviants.⁹

Restorative censuring does indeed have a 'punitive punch'. The public seems to endorse these retributivist aspects of the restorative conference: citizens attach positive value to the vivid spectacle of public denunciation. Take away these retributive elements, Bilz and Darley (2004) argue, and citizens will be unwilling to believe in restorative justice.

Many would object that this 'punitive punch' is risky. The shaming aspects of the denunciation would get the upper hand and make the process of reintegration all the more difficult. Responding to retributive sentiments would open the door to allowing stirred-up emotions to influence the sentences imposed. These objections are not convincing. Research has demonstrated that respondents who are angry want more severe punishment than respondents who are not angry. But accountability – having to communicate their attitude to others – eliminates this influence of anger on punishment judgments (Lerner et al. 1998). As stated, public attitudes are not nearly as harsh as many think. What citizens appear to want is serious attention addressed to their concerns. Sentencing thus must lead to solutions that meet the expectations of victims in particular and the public in general (Cragg, 1992).

According to Dan Kahan it is the 'expressive political economy' of restorative justice, the dispersal of condemnatory symbolic meanings which could replace the need for repressive sanctions. The phenomenon of 'expressive overdetermination' regulates the (political) acceptability of punishments. "Precisely because restorative justice bears a plurality of meanings, it has the potential to satisfy the expectations of citizens holding a diversity of cultural persuasions." (Ibid., 25). Egalitarians, communitarians, conservatives and individualists alike, all can pick up

meanings that are connected with their preferred visions of a good society. By combining condemnation and rehabilitation, communal commitments with individual accountability for criminal wrongdoing, restorative justice supplies meanings accessible to citizens of all cultural persuasions. "The view that many commentators see in this sanction – its supposed theoretical incoherence – turns out to be its greatest political strength" (Kahan, 2006, 27). Making restorative justice consistent with a particular purist philosophy erodes its greatest asset: its ability to appeal across political dividing lines. Purist and sectarian ideas will be rejected altogether by the public – that's the bitter lesson of the abolitionist movement in the seventies and eighties.

The reflex which dismisses moral outrage as 'uncivilised' is not very helpful. The desire to punish is much more robust than many restorative justice proponents suggest. They underestimate the persistent influence of that feeling and the subsequent obstruction to trust and peaceful cooperation. Therefore we have to give censure its proper place: the condemnation of serious offenders is needed to tone down public rage. Retributive sentiments must be poured out. If not, as Cragg argues, the conflict between the offender and the public cannot be settled.

This 'sociological truth of retribution' – punishing for the sake of mitigating the feelings of anger or hatred – needs more attention. Restorative justice is powerless when confronted with persistent public outrage and suspicion. In case of serious offences, restorative conferences could be focused more on the retributive part of the process, which in turn may elicit repentant initiatives of the offender. If this were done, the public could be convinced that reparative arguments may override retributive ones.

The insistence of some leading restorative justice spokespeople on 'banning punishment' blocks a broader consensus in favour of repair. Trying to devise a pure theory they lose contact with the public's desire to punish and condemn wrongdoers. As Kahan says: removing the denunciatory and retributive elements weakens the political capital of restorative justice.

Notes:

- 1 In this respect the philosopher J.L. Mackie (1985) introduces the "paradox of retributivism": the difficulty that retribution cannot be made reasonable sense of, and the fact that retributive feelings are inescapable.
- 2 Punitive attitudes serve expressive and symbolic functions. People are driven by very deep and very personal psychodynamic histories (Marrna and King, 2004). Instrumental theories which suggest that punitiveness is motivated largely by self-interest (feeling threatened by crime) are not really convincing (Tyler and Boeckman, 1997).
- 3 Roberts and Stalans (1997, 61/62) however point to studies in which intentionally

- 4 committing harm and seriousness of the crime are only moderately related.
- 5 Mayhew and van Kesteren (2002) found in an international comparison that Western European countries rank last in support for imprisonment and first in support for community service. However, not only the US is more punitive, but also the UK. The authors point at high 'Anglophone' punitiveness levels.
- 6 According to R.A. Duff a (mere) apology cannot heal the moral wound. The wrongdoer owes the victim and society something more: he deserves to suffer, so that personal repentance is generated. But against Duff it must be claimed that hard treatment and self-correction are not compatible. Elsewhere I have criticised Duff's idealism which claims that any offender would be able and willing to repent, and if not so, punishment will stimulate them to do so (van Stokkom, 2005).
- 7 The focus on wrongdoing (infringements of public morality) is often misleading and obscure. Public arguments about wrongdoing are volatile and determined by conjunctures of popular sentiment and media publicity. A related problem is the assumption of widespread moral agreement about right and wrong. The public is in fact strongly divided about issues of blameworthiness of – for example – dealing in crack cocaine, hate speech or business frauds (Braithwaite and Pettit, 1990).
- 8 By focusing on the specific harms of specific crimes, we can more easily identify what an offender needs to do to 'make good'. Without assessing harms we do not know what must be repaired. How much do we disvalue specific crimes as burglary and theft? If we want to answer such questions rigorously we have to translate them into questions of harms (Bilz and Darley, 2004).
- 9 A possible problem is that many victims do not really want to express these feelings during restorative conferences with serious juvenile offenders (Vanfraechem, 2005).
- 10 Kahan distances himself from his former plea for public shaming penalties.

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