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Rethinking the Restorative Dimension of Criminal Justice

Special Issue, *The Howard Journal of Crime and Justice*

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Criminal justice has long been in crisis across the Western world. The increases in prison numbers, the overcrowding and violence in carceral spaces, the recidivism and the many inequalities that underpin and result from criminal justice practices are but the outer symptoms of a system desperately in need of change—or challenge. In their various forms, restorative approaches have sought to question the punitive logics that predominate in conventional ways of thinking about and doing justice. Despite the sometimes extensive application of these approaches, a wealth of empirical support for their utilisation, and an intuitive sense of its promise, restorative justice has nonetheless failed to realise its potential as a fully-fledged alternative to punishment and remains a relatively discrete and, to a large extent, limited field. The purpose of this special issue is to foster debates through which we may seek to understand, explain and address this impasse.

The idea for this special issue arose out of a seminar on ‘The Problem of Justice: The Restorative Dimension’ hosted at the University of Warwick in October 2019. Although more narrowly focused on issues around restorative justice, the discussions that ensued in and from the seminar raised broader questions about the concept of restoration, its promises, its problems, and the role and value it has regarding contemporary pursuits of justice—particularly in relation to criminal justice. On that basis, we invited other contributors to join those who participated in the original seminar in a special issue aimed at exploring three key issues that we believe are critical to the advancement of theory and practice in this domain:

1. The synergistic relation between restoration and criminal justice, the tensions inherent to this relation and how (or whether) they might be overcome.
2. The promising core of restoration and its challenge to punitive justice.
3. Intersectional and alternative perspectives on restoration and its limits.

Drawing on a range of disciplinary specialisms, this collection aims to thoroughly examine these issues and offer fresh insights into the complexity of restoration. Although each contribution has a unique focus and approach, all of them engage with the idea that restoration alludes to a dimension inherent in the idea of justice, which encourages us to look at how instances of harm and wrongdoing reflect broader interpersonal, ethical and social issues, which we ought to seek to repair. However, at the same time as this impulse forms the basis of a critique of criminal, and especially punitive justice, a specific aim in this issue was also to complicate this dichotomy, by showing how the restorative dimension of justice can be found, even if in limited and tentative ways, *within* contemporary penal practices at the same time as it can also lead us beyond and against these practices. By the same token, this thicker, more critical notion of restoration offers compelling challenges to restorative justice as institution and practice, highlighting its limits, its broken promises and its many complicities. At its core, then, this issue hopes to be a thorough, compelling critique of restorative as well as of criminal justice, but one which is done from the perspective of a strong commitment to a deeper, more solidary, ‘restorative’ approach to justice, which is so needed in these punitive times.

It follows that the restorative dimension comprises two aspects: a form and a function. As a form, or perhaps better, a ‘form of life’, it connotes particular features of human restoration in process. As the contributions in this issue demonstrate, such features are real—that is, they are grounded in concrete human potentials and social relations. They are not abstract ideals. While the restorative form is curtailed, suppressed and even distorted on the ground, we can nonetheless identify and build on its real foundations. As a function, the restorative dimension offers a critical tool from which to

understand the limits of conventional legal and philosophical conceptions of justice, and to challenge orthodox framings. From here, we can look to restore justice to a thicker conception than is provided by the status quo ante.

The collection starts with four papers that directly engage with restorative justice (Pavlich, Johnstone, Wilson, and Tauri) before turning to contributions that discuss the restorative dimension of justice more broadly (Pali and Canning, Chamberlen and Carvalho, and Norrie).

George Pavlich's paper begins by revisiting the 'multifaceted archive' of restorative justice. Its 'commencement' was launched by the promotion of particular norms, values and practices that reflected commandments to reject or challenge alienating and repressive 'state criminalisation'. In the service of this and the announcement of a new paradigm, three mandates were pledged: 1) diversion; 2) social transformation; and 3) decolonisation. Drawing on legal pluralism as a critical lens, Pavlich shows how these mandates 'mutated' into offshoot complements to existing criminalising processes. These complementary mutations have aided the movement's global success, but such political bargains have come at the cost of its paradigm shifting aspirations. Pavlich sees promise in revitalising the commandments that earmarked its commencement. He argues that bringing these into focus afresh, through reimagining their links with social fields other than criminal justice, might help restorative justice to craft its paradigmatic lens. This could give rise to the emergence of different framings, methods, purposes, practices, foci, affiliations and alliances, thereby unshackling the archives of restorative justice from state criminalisation. Pavlich's paper contributes to our understanding of the form of the restorative dimension through its twin emphasis on pluralism and the broader social field. These features, though suppressed by complementary mutations, can be developed as the basis for a more authentic paradigmatic-shifting lens for restorative justice. This lens also performs a critical function: a means by which state criminalisation can be challenged and overcome.

Also returning to the emergence of restorative justice in order to arrive at a more authentic conception, Gerry Johnstone's paper critically analyses the relationship between restorative justice and the culture of control. In the process, he builds a new narrative that challenges commonplace understandings of this relation. Many scholars claim that the emergence of restorative justice post the 1970s era of penal welfarism was rooted in an oppositional challenge to the culture of control. The claimed emphasis on the marginalisation of punishment advocated by proponents also appears to support this view. But Johnstone argues that there is more to the story. Drawing on Cohen's (1985) account of deviancy control and the 'destructuring impulse', he provides a more nuanced picture. The campaign for restorative justice had its root in the desire for community ownership of and participation in the handling of crime (contra state ownership and the domination of expert professionals). It also focused on moving away from banal bureaucratic processes and towards 'emotionally charged' ones. Johnstone argues that that these foci reflect what Cohen calls 'the spirit of sentimental anarchism' in the culture of control. In doing so, he establishes that, while some aspects of the campaign are evidently opposed to features of the culture of control, other aspects actually share common ground. Neglecting this more complex relation leaves us with a distorted view of the campaign for restorative justice. Johnstone's paper highlights the limits of dichotomous thinking. It demonstrates how central elements of the restorative form—impulses towards destructuring and 'sentimental anarchism'—share mutual territory with the culture of control. This common ground is important to acknowledge. It not only complicates the narrative of restorative justice, but it also suggests: a) a promising basis from which to challenge the dominant structure of justice and; b) an unlikely ally that could be marshalled in support of the campaign for restorative justice.

The starting point for Amanda Wilson's paper is the claim that restorative justice lacks a sufficient understanding of what it is in ethical terms. She sees the concepts of guilt and shame as being central to an adequate understanding, but finds that restorative justice theorists have failed to grasp the moral and psychological depths of these concepts, and the complexity of their relation. Wilson argues that this can be corrected by revisiting the import of psychoanalysis. Her account demonstrates how Freudian metapsychology can provide the necessary groundwork for such a task. Drawing on the work of Hans Loewald, the account begins with a simplified overview of how the psyche comes to develop—an understanding of which paves the way for explaining the difference between what she calls 'primitive' and 'mature' forms of guilt and shame. Primitive and mature forms are rooted in different structural arrangements and tensions. Wilson goes on to explore the 'symbiotic relation' between the mature forms and how their relationship might play out in practice: shame can 'creep' through guilt or one can be 'shamed' into guilt. She argues that whatever way it plays out, the reason it plays out at all is because mature guilt and shame operate out of 'mature psychological being'—that is, a well-organised superego oriented towards atonement and reconciliation that can give effect to deeper, more sophisticated, reflexive responses to violation and its repair. Accordingly, Wilson concludes that restorative justice needs a mature guilt-and-shame complex as its ethical foundation. Wilson's paper contributes to our understanding the form of the restorative dimension by laying out the groundwork for a moral psychology of violation and its repair (see also Norrie in this issue). Restorative justice in process requires mature responses which means that we need an understanding of the mature ethical concepts that give effect to such responses. From here, we can begin to build up an adequate ethics of restorative justice that is independent of, and therefore able to challenge, retributivist ethics.

Juan Tauri's paper critically examines both the expansion and experience of state-centric restorative justice—as a global crime control industry—from an Indigenous perspective. The globalisation of restorative justice has been supported by disingenuous linkages to and claims about Indigenous peoples and their artefacts, rendering them '*unsuspecting contributors*' and '*unwilling recipients*' of resultant policies and interventions of allegedly 'indigenised' state-centric restorative justice. Tauri notes the various ways in which proponents of restorative justice have 'over-promised and under-delivered' with respect to claims to: increase community involvement in justice, thereby aligning with 'communitarian sensibilities of Indigenous peoples'; divert perpetrators away from the system; provide culturally appropriate and empowering platforms for Indigenous peoples. The paper then turns to the important question contained in its title: what are you restoring us to? Here we are confronted with the real, Indigenous story of state-centric restorative justice. This has two aspects: the representation of 'Indigenous life-worlds'; and the lived experience of Indigenous peoples. In unpacking both, Tauri draws attention to the 'tyranny' of the restorative justice movement. As a counterpoint to state-centric restorative justice, he goes on to outline examples of Indigenous-centred restorative justice that take the empowerment of Indigenous communities seriously. With its focus on situated practice, cultural relevance, local centrality and accessibility, participation and ownership, and effectiveness, Tauri argues that Indigenous-centred restorative justice can surmount the limitations of state-centric restorative justice. Tauri's account is a sobering one. As well as prompting critical reflection on the limits of the pursuit of state-centric restorative justice, it also highlights the costs of this complicitous pursuit—the harms engendered by it and the impact of those harms on Indigenous persons. Like Pavlich, Tauri emphasises the importance of pluralism to the restorative dimension of justice, in particular, initiatives that are Indigenous designed, owned, and implemented.

Brunilda Pali and Victoria Canning's paper considers how we can respond to the intractable problem of interpersonal and sexualised violence against women and girls by men through the lens of decarceration. Feminist responses to this problem typically advocate one of two positions: to call on (punitive) state-centric apparatuses (so-called 'carceral feminism'); or to look for alternatives

(decarceral/abolitionist feminism). Pali and Canning adopt the latter position and a decarceration agenda, but do so from a critical perspective that aims to concretely engage with abolitionist values and ideas. They argue that the 'intense feminist labour' directed at improving the capacity of the criminal justice system to adequately respond to gendered violence has failed. The violence has not been 'eradicated'; in fact, it is increasing. They go on to suggest that, if eradication is the goal, then the question needs to be asked whether we should continue to support institutions that inflict violence in the name of ending it when they are unable to deliver on this score. Their answer is that we should not and that there are other, more promising frames available for us to pursue. The remainder of the paper is dedicated to exploring these frames by considering what Terwiel's theoretical concept of a 'spectrum of decarceration'—which seeks to bridge the (misleading) binary of carceral feminism vs. non-carceral feminism—might look like in practical terms. Various interventions on the spectrum of decarceration are canvassed including perpetrator interventions in the criminal justice system, restorative justice, and transformative justice/community accountability. Pali and Canning's paper brings into focus the social context of harm/wrongdoing and how attention to this takes us beyond the punitive landscape. The infliction of harm in response to harm not only fails to eradicate it, it thwarts the possibility for more promising approaches to repair. At the core of these more promising approaches lies an abolitionist impulse—an impulse which also emerges spontaneously in the papers by Chamberlen and Carvalho, and Norrie.

Anastasia Chamberlen and Henrique Carvalho's paper interrogates the issue of why, despite our continuous investments in justice rhetorics and institutions, we seem to live in a world where justice feels perennially absent from our social experience. The article starts with the premise that contemporary approaches to justice, especially in western liberal societies, are pathological, in the sense that they betray a problematic attachment to punitiveness. The first part of the paper is dedicated to developing a conceptual framework which can inform an understanding of this pathological character of justice, which is done through a critical engagement with the work of Drew Leder and the philosophy and sociology of embodiment. Chamberlen and Carvalho suggest that our contemporary relationship to justice is analogous to how we socially approach our bodily experiences, especially in relation to pain. As a result, we take justice for granted, and primarily become aware of it through the episodic experience of injustice. This focus on injustice as episodic, unwanted and alien presences conditions our response to it, so that we are predominantly concerned with excluding the identified source of injustice to make the pain 'go away'. Against this tendency, the authors argue for the need to develop what they call a 'lived sense of justice'. The second part of the paper develops a conceptual framework for this alternative approach, outlining a phenomenological theory of justice that sees it as a concrete relational practice. Then, relying on insights taken from the engagement with scholarship on embodiment, the authors reflect on the promises and limits of restorative and transformative approaches to justice, as well as contemporary social movements. A key insight of Chamberlen and Carvalho's paper is the centrality of lived experience to the restorative dimension of justice, both as a form and as a critical function, in the sense that this centrality can unsettle contemporary, predominant understandings of justice at the same time as it can potentially ground new and emerging perspectives.

Alan Norrie's paper explores restorative themes in the prison context through a close reading of ex-prisoner Jimmy Boyle's biography *A Sense of Freedom* which describes Boyle's experience of the Scottish prison system and his time at the Barlinnie Special Unit (BSU). The latter is of particular interest to Norrie because it embodied a restorative philosophy or 'impulse' that speaks to the concrete possibility of penal abolitionism from *within* the prison. He suggests that what made the BSU restorative was that it provided the necessary arrangements (setting, practices, dialogue) that allowed Boyle to 'retrieve and develop' the 'essential human elements' that enabled him to change—that is,

to flourish, to give back, and to understand his life anew. But what lies at the core of such change? This is the question Norrie seeks to understand, the answer to which he finds by exploring the moral and psychological processes involved, and how these relate to different senses of freedom. In tracking the progressive, deepening moral psychological logic of Boyle's account, Norrie identifies eight senses of freedom—freedom as: refusal; resistance; isolation; abstract ideal; germ of emancipation; trust and collective empowerment; taking responsibility and self-knowledge; becoming; love and creativity. Each sense reveals something important about how change in the human animal can be understood in the prison setting. The final part of the paper considers the 'loving prison' (qua the 'concrete practice' of the BSU) as it relates to abolition. Norrie argues that penal systems are restorative in the 'minor key' and persecutory in the 'major key' and suggests that this is why the BSU was marginalised. It was too successful in challenging the persecutory 'structure in dominance'. Its inversion of that structure tells us something important about prison reform and abolition more generally; that it can have an 'inside-outside direction of travel'. Like Wilson, Norrie contributes to the moral psychology of human restoration in process, taking as his focus what it means to change. Different (and evolving) senses of moral freedom are central to understanding change undergone in the restorative process. Norrie also complicates the relation between the restorative/reparative and the persecutory—showing how the former can destabilise the latter, and that persecutory environments can be challenged from *within*.

The notion of 'restoration', or 'to restore', is typically taken to mean 'to bring something to a former state', or 'to give back something that has been lost or taken'. Such meanings assume the prior existence or plausibility of balance, harmony or health. Many proponents of restorative justice invoke this sense of restoration as 'restoring *back to*': the idea that justice in such cases is meant to rescue a previous condition that has been harmed or undermined through the harm or violation. Restoration as 'restoring *back to*' also features in criminal justice. But restoration can mean other things. For instance, 'to restore' can also mean 'to renew'; 'to re-establish'. In these senses, when we restore, we are not seeking to return to a previous state, but rather to start anew, to transform and to move beyond. This forward-looking, emancipatory sense of restoration lies at the core of the perspective on justice that this special issue hoped to rethink, and to foster.