Asking the Restorative Question in Response to Criminal Wrongdoing – Widening the Scope for Legal and Restorative Integration

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Declaration

This thesis is the product of my own work. Where material from other authors has been used, either paraphrased or verbatim, it is acknowledged in the text and in the references. Quotes provided by interviewees have also been included. Excepting the cited use of materials from other authors, all remaining work is my original labour and production.

Signed

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Abstract

This thesis poses a normative question. It asks how a response to criminal wrongdoing should be reframed so as to achieve justice. The question is asked in the context of debates on the role of restorative justice and within a conceptual framework that sees justice as primarily concerned with distribution. Conventional responses to wrongdoing accept that offenders must be given their deserts and treated equally, and that all persons affected by the wrongdoing must have their rights promoted and protected. What is distributed to meet these aims is mostly in the form of burdens, primarily coercively imposed punishment.

This thesis offers new insights into how well such conventional responses meet the needs of justice. It says that not all of what is required to mark such distributions as just is currently acknowledged. What is missing is a focus on removing the burdens imposed as a consequence of wrongdoing. There is an explicit failure to accept that benefits as well as burdens need to be distributed, primarily benefits of repair necessary to restore damaged individuals and relationships. What is also lacking is a more effective means to trigger crime prevention. This thesis argues that it is only by asking ‘the restorative question’ in all responses to wrongdoing that institutional responses can be rendered more effective in meeting these deficiencies.

This thesis considers the benefits that the restorative practice of justice brings to this issue. Empirical evidence gathered from sites of practice shows that restorative responses provide many missing elements. They address the need to re-establish
harmonious social relationships and to consider the imposition of necessary burdens through means other than punishment.

Restorative practice nonetheless has its own inadequacies as a form of justice practice in response to wrongdoing. These limitations are highlighted when the seriousness of the wrongdoing calls for a strongly retributive response. Consequently rather than representing a replacement discourse, restorative practice acts best in a complementary role to conventional legal justice.

Using methodology which integrates a normative/doctrinal/philosophical approach with ethnographic methods and legal and historical studies, this thesis offers a fundamental reworking of the justice response to wrongdoing. By means of this analysis, the thesis develops a set of institutional design ideas about how best to restructure the response to criminal wrongdoing. This integrated design is seen to better meet the need to give people their desert, to treat them equally, to protect their rights while at the same time promoting harmonious social relationships between them.

The integrated model developed is founded on two core propositions. The first is that the purpose of responses to wrongdoing must always be to meet retributive, restorative and consequentialist goals. The second (and more radical) proposition is that many of these aspects can be better met through restorative means. Even aspects of retribution can be satisfied through the censuring power of restorative encounters. Restoration is as much achieved by remedying personal harm as it is by restoring the normative harm which wrongdoing causes. Consequential aims of crime prevention can be as effectively
delivered through responses contextualised to the individual circumstances of those affected.

Integrating the restorative approach within conventional institutional responses requires care and inventiveness. There is a risk of diluting the protective rights-based focus of legal practice if another more personalised form of response is added. There is also the risk of overly institutionalising restorative practice and so damaging the effectiveness of the alternative responses it can bring to wrongdoing. But integration has clear benefits. Properly integrated, the restorative practice of justice will percolate up to influence the needlessly punitive responses of legal justice, and the legal practice of justice will filter down to strengthen the at times inadequate rights adherence of restorative practice. In the process, a stronger justice response to wrongdoing is delivered.
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