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The Virtues of Restorative Processes, The Vices of "Restorative Justice"

Paul H. Robinson
University of Pennsylvania Law School, phr@law.upenn.edu

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This Symposium is important for its ability to make better known the great benefits in the use of restorative processes. Below, I try to summarize some of the many promising achievements of those processes, by which I mean to include such practices as victim-offender mediation, sentencing circles, and family-group conferences to name just the most common. While many people refer to such processes by the name "restorative justice," that term and its originators, in fact, have a more ambitious agenda than simply encouraging their use. But that agenda is not one that the frontline practitioners of restorative processes necessarily share. It is primarily an anti-justice agenda, which prompts impassioned opposition. In this brief Article I try to explain why this is so and why it need not be so. I argue that restorative processes can and should be used more widely in ways entirely consistent with doing justice, and that the best thing for the restorative processes movement would be to publicly disavow the anti-justice agenda of the restorative justice movement.

I. THE VIRTUES OF RESTORATIVE PROCESSES

First, let me speak to the virtues of restorative processes. Frankly, it is hard to see why anyone would oppose such practices. They have the potential to change an offender's perspective—to make them fully appreciate the human side of the harm they have done—which can change their behavior when an opportunity for crime arises in the future. They also have the potential to deter offenders. That is, to the extent that there is some discomfort to having family and friends brought together to discuss one's wrongdoing, the social discomfort and the risk to social relations can stimulate offenders to avoid wrongdoing in the future. Restorative processes also provide an important mechanism of norm reinforcement. The concern of the people present makes clear to the offender—and to everyone present—the validity and importance of the norm violated. It is a unique opportunity for each person to see that *other* people share the norm, and it is that reinforcement that makes the norm stronger in the community. The power of such social influence on conduct ought not be underestimated. Social science studies increasingly suggest that it is the force of such social influence, more than the threat of official sanction by the criminal justice system, that induces law-abidingness. What could be better than a process

[*]Professor of Law, University of Pennsylvania Law School.

that advances several crime control mechanisms at the same time: rehabilitation, deterrence, and norm reinforcement?

Finally, the restorative processes advance other valuable interests, beyond those normally held to be the charge of the criminal justice system: providing restitution to the victim (normally the charge of civil tort law); giving victims a direct involvement in the disposition process, thereby providing an emotional sense of restoration and justice done; and putting a human face on the offender, thereby reducing the victim's generalized fear of victimization and perhaps giving the victim some appreciation of how the circumstances may have brought the offender to commit the offense.

Other articles in this Symposium give us specific evidence and illustrations of the value of restorative processes. William Nugent reports a nine percent reduction in recidivism.[1] This is quite impressive when one considers how small the investment of resources is in restorative processes as compared to other programs that typically do little better. Barton Poulson finds that restorative processes do much more than reduce recidivism.[2] I note of particular importance its effect in making people feel better about the adjudication system—feeling that it is more fair and more likely to give an appropriate sanction[3]—because these effects can build the moral credibility and legitimacy of the system, which can produce its own significant crime control benefits.

As hinted above, social science data suggests the great power of social influence in gaining law-abidingness. Criminal law is not irrelevant to this influence: If law can earn a reputation of moral authority with the community, it can to some extent harness this power. John Darley and I suggest two kinds of mechanisms by which criminal law can have an effect.[4] First, it can help shape—build up or tear down—social norms. We have recently seen such norm shifting, as in the increasing opposition to domestic violence and drunk driving and decreasing opposition to same-sex intercourse. These changes did not come about *because* of changes in criminal law, but criminal law changes played an important role in reinforcing the change in norms. Second, the criminal law can directly influence conduct in those instances in which the moral status of the conduct is ambiguous. Thus, it may not be initially obvious that insider trading

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[1] *See* William Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137, 163.

[2] *See* Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, *passim*.

[3] *See id.* at 192–93. Also recall Kathy Elton's moving accounts—such as her story about the Christmas presents stolen by a neighborhood youth, which frightened so many, but which, in the end, produced a positive good of greater understanding and closer relationships—of how restorative processes could work so effectively on so many levels. Kathy Elton & Michelle M. Roybal, *Restoration, A Component of Justice*, 2003 UTAH L. REV. 43, 53 n.57.

[4] *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 471–77 (1997).

or computer hacking are condemnable acts, but a criminal prohibition from a morally credible criminal justice system can signal that they are. Of course, neither of these mechanisms can work to give law power to alter conduct unless it has moral credibility with the community it seeks to influence. And it is for this reason that the criminal law gains in crime control effectiveness by heeding the community's shared intuitions of justice, for its dispositions will then reinforce its reputation as a moral authority rather than undercut it. Ultimately, then, the ability of restorative processes to build the criminal law's moral credibility and legitimacy can give the law a greater ability to gain compliance.

Finally, there seems to be little downside to the use of restorative processes. If in some cases there could be an increased danger to victims from an unrepentant offender learning more about the victim, organizers can screen out such cases. The only real risk, then, is that the restorative processes will not work—that they will not give the full payoff that is their potential. But that is no reason not to try them.

II. THE VICES OF RESTORATIVE JUSTICE

With this enthusiasm for *restorative processes*, how can I be opposed to restorative justice when such processes are its central feature? Answer: Because of what "restorative justice" adds to restorative processes.

It is clear that many advocates of restorative processes use the term "restorative justice" as if it were interchangeable with restorative processes. But the literature by the leaders of the restorative justice movement make clear that they conceive of restorative processes not simply as a potentially useful piece of, or complement to, the criminal justice system, but as a *substitute* for it.[5] Further, restorative justice ideally would ban all "punishment," by which is meant, apparently, banning all punishment based on just deserts. (The restorative justice advocates concede, as they must, that in practice participants in restorative sessions commonly bring to bear their own intuitions of justice in sorting out an acceptable disposition, but the restorative justice ideal is forgiveness and reintegration, not deserved punishment.) Bowing to what they see as the demands of reality, the restorative justice advocates reluctantly direct the use of deterrence mechanisms if restorative processes fail, and incapacitation mechanisms if

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[5]*See, e.g.*, John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1746 (1999) (classifying restorative justice as competing with punitive justice).

deterrence fails.[6] But giving offenders the punishment they deserve—no more, no less—is rejected as never an appropriate goal.[7]

The centrality of this anti-justice view is expressed in the movement's name: restorative justice. The point of the naming exercise is to present restorative processes as if they were a form of doing justice. But, of course, these kind of word games only work so far. Calling something "justice" does not make it so. The term "justice" has an independent meaning and common usage that cannot be so easily cast aside: "reward or penalty as deserved; just deserts."[8] The naming move can create confusion, and perhaps that is all the leaders of restorative justice want at this point: time to get a foothold in common practice before it becomes too obvious that their restorative *justice* program is in fact anti-justice. But such word-trickery is not likely to be sufficient for gaining longer-term or wider support. For that, they must face the anti-justice issue squarely and persuade people, if they can, that people ought no longer care about doing justice.

It is this anti-justice agenda that restorative justice adds to restorative processes and that I find objectionable, somewhat odd, and potentially dangerous. (In this Article, I use the term "restorative justice" to include the more ambitious, anti-justice agenda, and the term "restorative processes" to refer to just the processes themselves.)

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[6] *Id.* at 1742.

[7] Consider the 1998 New Zealand case of Patrick Clotworthy, who inflicted six stab wounds upon an attempted robbery victim, which collapsed a lung and diaphragm and left the victim badly disfigured. *See* John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 87–88 (1999) (discussing *Clotworthy*); *see also* The Queen v. Patrick Clotworthy [1998], *available at* http://www.restorativejustice.org.nz/Judgements%20Page.htm (providing texts of opinions and sentencing notes for case). At a restorative conference organized by Justice Alternatives, the victim agreed to a disposition of a suspended prison sentence, two hundred hours of community work, and a compensation order of $15,000 to fund his cosmetic surgery. *See* Braithwaite, *supra*, at 87–88. Justice Thorburn of the Auckland District Court entered the disposition agreed upon at the conference. *See id.* (also noting that Court of Appeal ultimately quashed disposition and entered sentence of four years in prison and $5,000 compensation).

Requiring the offender to pay the victim $15,000 for the needed surgery seems entirely appropriate, but such a sanction hardly reflects the extent of the punishment the offender deserves for so vicious an attack. Even if the offender were allowed to stay out of prison long enough to earn the $15,000, why would it not be appropriate for him to spend his weekends in jail, or to serve a term of imprisonment after the compensation had been earned? Restorative justice proponents like John Braithwaite support the disposition and decry the fact that it was later quashed, noting that the victim subsequently committed suicide for reasons unknown. The suicide is obviously tragic, but it does not alter the fact that the original disposition failed to do justice. Indeed, many would see the restorative conference as a second victimization—a desperate victim must agree to forgo justice in order to rid himself of the disfiguring scar the offender caused. It is a case of an offender benefitting from his own wrongdoing. That restorative justice proponents support such a disposition seems only to confirm their anti-justice orientation.

[8] WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 766 (2d ed. 1970).

III. GIVING RESTORATIVE JUSTICE PRIORITY OVER DETERRENCE AND INCAPACITATION

Let me look separately at the two components of restorative justice's proposed program: (1) giving restorative justice priority over deterrence and incapacitation, and (2) barring punishment based on justice.

As to the first, I am highly skeptical of the effectiveness of deterrence as a distributive principle. No doubt having some kind of sanctioning system has some deterrent effect. But the notion that we can construct distributive rules that will optimize deterrence is, I suspect, unrealistic. Offenders simply are not likely to alter their conduct because the law formulates a liability rule one way or another.[9] In any case, deterrence as a distributive principle often produces results that a just society ought not tolerate.

As for incapacitation as a principle for distributing liability and punishment, I concede that it does work. One can prevent offenders from committing most offenses by keeping them in prison. However, as I have argued elsewhere, using the criminal justice system for such preventive detention purposes is bad for both detainees and for society, for such a system is both unfair to detainees—detaining even when there is little preventive justification and confining under inappropriately punitive conditions—and is inefficient and ineffective in protecting society.[10]

So I am inclined to let these distributive programs fend for themselves in response to restorative justice claims for superiority. I am happy to have them replaced.

Before moving on, however, I should say I am not sure I understand the restorative justice arguments for why it should take priority over these distributive principles. The restorative justice perspective on deterrence is particularly confusing. The proposal is that restorative justice should be used first, and repeatedly, until it is clear that it cannot work, and only then should the system resort to deterrence. Of course, by turning first to restorative justice, repeatedly, deterrence has already been sacrificed. The signal to potential offenders is that they will be given repeated chances to escape the threatened deterrent sanction. That message cannot be undone when the system finally does "turn to deterrence," upon a failure of restorative justice.

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[9]*See* PAUL H. ROBINSON & JOHN M. DARLEY, DOES CRIMINAL LAW DETER? A SOCIAL SCIENCE INVESTIGATION 3 (forthcoming 2003); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. (forthcoming 2003).

[10]*See* Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1446–47 (2001) (arguing that using criminal justice system for preventive detention is ineffective and unfair).

I will let the deterrence advocates press these arguments. My real opposition to restorative justice is based on its conflict with just punishment.

IV. RESTORATIVE JUSTICE VS. JUST PUNISHMENT

First, let me define what I mean by distributing punishment according to justice—for the restorative justice proponents seem inclined to caricature notions of just desert. (I understand the appeal of the move: if one can make the alternative a monster, then restorative justice looks more attractive. But that kind of distortion only tends to signal weakness in one's own theory.) Here is what I mean by doing justice: Giving a wrongdoer punishment according to what he deserves—no more, no less—by taking account of all those factors that we, as a society, think are relevant in assessing personal blameworthiness.[11] Justice, then, requires that, in assessing an offender's blameworthiness, we must take account of not only the seriousness of the offense and its consequences but also the offender's own state of mind and mental and emotional capacities, as well as any circumstances of the offense that may suggest justification or excuse. Indeed, a rich desert theory would take account of many facets of what can happen during restorative processes. Genuine remorse, public acknowledgment of wrongdoing, and sincere apology can all, in my view, reduce an offender's blameworthiness—and, thereby, the amount of punishment deserved.[12]

It is a peculiar view of just desert to see it as "degrading to both its subject and its object,"[13] as the restorative justice proponents suggest. How many times have we seen on the television news the bereaved family of a victim—ordinary people with good hearts—express their often tearful relief that justice has finally been done. Frankly, I do not know of anyone (other than restorative justice proponents) who would think of the family members as degrading themselves by taking relief in justice being done. That certainly is not the way most societies judge the feeling.

Restorative processes can provide some wonderful benefits, but they can also create serious injustices and failures of justice if used in a way that systematically conflicts with doing justice—where offenders are given more punishment, or less punishment, than their wrongdoing deserves. That does not mean that we must avoid restorative processes. It only means that we must use them in a way that

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[11]There are two sources of data for determining what is relevant to desert—moral philosophy and empirical studies of a community's shared intuitions of justice—but for present purposes I do not believe that the difference between them is significant. I have written elsewhere about these differences. *See* PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE (forthcoming 2004).

[12]I do not know that retributivists as a group would agree with this; I offer it only as my own view.

[13]*See* Braithwaite, *supra* note 5, at 1742.

does not conflict with doing justice—something that I will suggest later *can be done* easily for a *full range of cases*.

Let me flesh out this relation between restorative justice and justice by addressing three questions:

A. Does restorative justice conflict with doing justice?
B. Why is such conflict objectionable?
C. Can restorative processes be used in a way that does not conflict with doing justice?

A. Does Restorative Justice Conflict with Doing Justice?

It is more than obvious that restorative justice *can* conflict with doing justice. That does not need much discussion. I can imagine a devoted Jew finding it in her heart to "take the great opportunity for grace to inspire a transformative will"[14] to forgive Dr. Mengele for his ghastly concentration camp experiments on her and her family. But few would think justice was done if that meant Dr. Mengele was free to skip away to a happy life, even if he genuinely apologized to her.

Another obvious problem is the potential disparity in treatment of identical offenders committing identical offenses. Every "sentencing circle" will have a different cast of characters. Having the offender's punishment depend not on his personal blameworthiness but rather on the chance collection of persons at the circle is objectionable in itself, whatever the disposition in the case.

The discussions in this Symposium by David Dolinko and Stephen Garvey provide persuasive illustrations of just how inconsistent restorative justice can be with doing justice.[15]

While it seems clear that restorative justice *can* seriously conflict with doing justice, I think I would be more cautious than most in predicting that the use of restorative processes necessarily will conflict. John Darley and I have researched lay intuitions of justice and found a surprising amount of agreement among laypersons, over a wide range of situations and cutting across most demographic variables.[16] Thus, when people in a restorative process session are sorting out what they think is an acceptable disposition, their intuitions are likely to track those of the larger community, especially as the sentencing circle is made larger.

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[14] *See* Braithwaite, *supra* note 7, at 1–2.

[15] *See generally* David Dolinko, *Restorative Justice and the Justification of Punishment*, 2003 UTAH L. REV. 319, 331–34 (noting that restorative justice may give similar offenders disparate treatment); Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 306–08 (distinguishing harms from wrongs and arguing that restorative justice repairs harms but ignores wrongs).

[16] *See* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW *passim* (1995).

No doubt some members will tend to be more harsh in their demands and some more lenient, but typically there will be general agreement as to what factors affect the offender's blameworthiness and how they affect it, and the harsh and the lenient sentencers will average out across the group. Indeed, I might predict that a sentencing circle would be more likely to track the shared intuitions of justice of the community than would a single sentencing judge.

But I remain uneasy about a sentencing circle operating without articulated guidelines, for some of the reasons addressed by Robert Weisberg.[17] Even for the fair-minded person, it is easy to be distracted by the particular characteristics of the offender at hand and hard to stand back and put this case in the larger perspective of other cases. There is too much danger for participants left without articulated guidelines to be influenced, perhaps unconsciously, by things such as how similar or different this offender is from themselves. What would be better than pure ad hoc decision-making would be articulated guidelines that captured the larger community's shared intuitions of the principles of justice, to provide at least a benchmark that could inform the sentencing circle's discussions. (On the other hand, it is also my view, as many of you know from my dissent from the United States Sentencing Commission guidelines, that badly-drafted guidelines can do more harm than good.[18])

My ultimate conclusion, then, is that the use of restorative processes might or might not conflict with doing justice, depending upon how they are structured. That is, one could use restorative processes in a way that would *guarantee* failures of justice, and that is just what true restorative justice proponents appear to want: Specifically, to require disposition by restorative processes where the dispositional options available are inadequate to satisfy the demands of justice. In fact, from what I can tell from the restorative justice literature, it is this justice-frustrating effect of restorative processes that is thought of by its proponents as being one of its most important virtues.

B. Why is the Conflict of Restorative Justice with Doing Justice Objectionable?

For those who believe that "doing justice" is a value in itself, the question is rhetorical. Neither the value of doing justice nor the harm of conflicting with justice needs further explanation or independent justification.

For crime control utilitarians, doing justice has traditionally been thought of as suboptimal in reducing crime, or at least as less effective than the mechanisms

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[17]Robert Weisberg, *Restorative Justice and the Danger of "Community,"* 2003 UTAH L. REV. 343, 370–71.

[18]*See* Sentencing Guidelines for United States Courts, Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18,046, 18,121 (May 13, 1987).

of deterrence and incapacitation. But crime control utilitarians *ought* to be interested in doing justice (in the sense of having the criminal justice system distribute liability and punishment according to the intuitive principles of justice shared by the community) because, as noted above, social science data suggests that the criminal law can harness the great power of social influence to gain law-abidingness if it can earn a reputation of moral authority and legitimacy with the community.[19] By distributing punishment that conflicts with the demands of doing justice, restorative justice ultimately undercuts the system's crime control effectiveness.

Let me also speak to those persons who care neither about doing justice for its own sake nor about crime control, but rather in something more ethereal such as promoting forgiveness for its own sake. I would advise the devoted Jew in her forgiveness of Dr. Mengele that, despite all the virtues of forgiveness that have been expressed by advocates for restorative processes, there is more at stake in how we deal with Dr. Mengele than just this victim's forgiveness.

First, the harm of most criminal offenses spreads to persons beyond the immediate "official victim." Many Jews not part of Dr. Mengele's experiments may nonetheless feel victimized by him. Indeed, criminal law is unique in embodying norms against violation of societal, rather than personal, interests. All crimes have society as their victim, not merely a single person. Further, not all victims may be as forgiving as the one at hand. Are the feelings of many to be overlooked because of the forgiveness of a few? Are the societal norms that protect us all to be undercut because of the forgiveness of the victim at hand?

Second, many people believe that forgiveness is appropriate only after a wrongdoer accepts full responsibility for his wrongdoing and fully atones for it. Being remorseful, by itself, is not full atonement. Atonement is not achieved simply by making restitution, but may require suffering beyond restitution, a suffering the acceptance of which will show the person's acceptance of the wrongfulness of his actions. Indeed, the offender who does not expect and accept his just punishment may be seen as one who does not understand or accept the wrongfulness of his conduct.[20]

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[19]*See* TOM TYLER, WHY PEOPLE OBEY THE LAW 108 (1990); Robinson & Darley, *supra* note 4, at 471–77. This represents a different kind of "hybrid" distributive principle from that which Erik Luna has discussed. *See* Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 225–27. Here there are no trade-offs between utility and doing justice. Rather, the greatest utility is found in a justice distribution of liability and punishment, or at least in a distribution according to a community's shared intuitions of justice.

[20]In fact, genuinely remorseful offenders will think their just punishment is *less* than that actually deserved, for this reason: The offenders' genuine remorse reduces their blameworthiness for the offense, yet offenders cannot expect or insist that their remorse reduce their punishment, any more than they can expect or insist on forgiveness. To insist on a mitigation for remorse is to undercut the sincerity of the remorse itself. Thus, the punishment discount for remorse will always be a pleasant surprise to the genuinely remorseful offender.

Finally, it is not entirely clear to me that the *personal* virtue of forgiveness can be an effective operating principle for a society. One can admire and encourage forgiveness, and believe that it is a personal virtue that ought to guide people in their daily lives, yet also conclude that those who have the responsibility to build a better society—where victims as well as wrongdoers can live fruitful lives—must leave forgiveness to the realm of personal virtue.

C. Can Restorative Processes Be Used in a Way That Does Not Conflict with Justice?

The short answer is yes. Where restorative processes are used to complement the criminal justice process rather than to replace it, such processes have little justice-distorting opportunity. There seems every reason to embrace their use.

Can restorative processes ever be used *as a substitute* for the traditional criminal justice adjudication in a way that is consistent with doing justice? In many kinds of cases it can. The most serious limiting factor is the restriction commonly placed on the kinds of dispositions restorative processes are authorized to make.

Given the present limitations, restorative processes seem consistent with doing justice in at least four kinds of cases:

1. *Crimes by juveniles.* Even for serious offenses, juvenile offenders are likely to have significantly reduced blameworthiness due to their limited maturity. That is, (a) they may not fully appreciate the consequences of the harm they cause, (b) they may not have had an opportunity to fully appreciate the societal norm they have violated, and (c) they may be too young for us to expect them to have developed the impulse control that we would expect of an adult in responding to difficult situations or temptations or provocative conduct.[21]
2. *Minor offenses by adults.* Minor offenses will call for deserved punishment levels sufficiently low that they may be satisfied by the dispositions that are typically within the authority of restorative processes.
3. *Serious offenses by adults for which there are significant mitigations.* If strong arguments for justification or excuse exist, the ultimate level of punishment deserved may be within the range of the sanctions available in restorative processes.
4. *Offenses by nonhuman legal entities.* Entities, such as corporations, are not moral beings for whom the notion of justice has meaning. (In fact, in

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[21] *See* Kim Taylor-Thompson, States of Mind/States of Development 20–24 (Nov. 19, 2002) (unpublished manuscript, on file with author).

> my view, to use the criminal justice system to "convict" and "punish" such legal fictions risks obscuring the moral content of criminal liability. Better that such entities are dealt with through methods outside of the criminal justice process.[22])

What is most interesting about these four categories of cases in which restorative processes avoid conflict with justice is that, as far as I can tell, all of the dispositional authority that has been granted to restorative processes to date falls into one of these four categories. Examples of some well-known programs are as follows:

> New South Wales and New Zealand: Restorative processes are used for disposition of juvenile offenders.[23]
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> Vermont: Restorative processes operate as a condition of probation, and therefore are subject to all of the limitations as to what offenses can be given a sentence of probation and are subject to screening by the sentencing judge.[24]
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> Delaware: Restorative processes are available only upon the prosecutor's approval, as with traditional pretrial diversion programs; presumably prosecutors screen cases according to whether a restorative process disposition can do justice.[25]
>
> Minnesota: Restorative processes are used informally, running in parallel to the criminal justice process, rather than as a substitute for it.[26]

In these jurisdictions I found no instance in which the existing statutes limited either: (a) a prosecutor's traditional ability to charge and prosecute offenses to insure that justice is done, or (b) a court's traditional ability to impose a deserved sentence.

This is good news in judging the attractiveness and potential acceptability of current restorative processes. But it seems inconsistent with the claims of restorative justice proponents that their program is "a global social movement"

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[22]Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 211 n.40 (1996) (noting that, unlike people, legal fictions neither feel nor deserve moral condemnation).

[23]*See* Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235, 240, 273–76 (2000) (discussing programs in New South Wales and New Zealand).

[24]*See* Susan M. Olson & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV. 57, 65–68 (discussing Vermont's reparative boards program).

[25]*See* DEL. CODE ANN. tit. 11, §§ 9501–9505 (2001) (setting forth Delaware's victim-offender mediation program).

[26]*See* Univ. of Minn., School of Social Work, Center for Restorative Justice & Peacemaking, *available at* http://ssw.che.umn.edu/rjp/ (last updated Feb. 7, 2003) (discussing various programs in Minnesota).

with some good momentum.[27] If the primary contribution that restorative justice makes beyond the virtues of simple restorative processes is to discard concerns about doing justice, one would think that with all its "great success" one could find at least a few programs in which it was achieving its anti-justice mission.

This also means that the label "restorative justice" is misleading when used to describe our present practices. The current use of restorative processes appears to be deliberately limited to cases where the available sanctions are enough to do justice; that is, the current system is careful to preserve its ability to do justice. What exists today, then, is not the anti-justice "restorative justice" but rather the simple use of restorative processes.

V. CAN PRESENT RESTORATIVE PROCESSES BE EXPANDED TO INCLUDE A FULL RANGE OF CASES WHILE REMAINING TRUE TO JUSTICE?

Can the use of restorative processes be expanded to serious offenses and remain consistent with desert? This is a particularly important question because, according to the empirical results Heather Strang and Lawrence Sherman report, it may be that restorative processes have their greatest benefit in the most serious cases.[28]

I believe such expansion is possible in a way that is consistent with justice. How can this be done? First, as is obvious from the previous discussion, if the seriousness of the authorized dispositions by restorative processes are increased, the kinds of cases dealt with could be widened. Some people will be hesitant to give serious sentencing authority, such as imprisonment, to a restorative process body, no matter what an offender's veto power. But one can conceive of versions of restorative processes that include judicial participation and/or include guidelines that structure discretion.

A second point may be the most important for expanding restorative processes. Consider for a moment the demands of justice: justice cares about *amount, not method* of punishment. Thus, one could impose deserved punishment through any variety of alternative methods without undercutting justice—fine, community service, house arrest, curfew, regular reporting, diary keeping, and so on—as long as the total punitive "bite" (the "punishment units") of the disposition satisfies the total punishment the offender deserves, no more, no less.[29]

This characteristic of justice has two important implications for restorative processes. First, because all forms of sanction can give rise to "punishment

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[27]Braithwaite, *supra* note 5, at 1728, 1743.

[28]*See* Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 40.

[29]I have written about such a proposal. Paul H. Robinson, *Desert, Crime Control, Disparity, and Units of Punishment*, *in* PENAL THEORY AND PRACTICE: TRADITION AND INNOVATION IN CRIMINAL JUSTICE 93, 99–104 (Anthony Duff et al. eds., 1994).

credit," good-faith participation in restorative processes can count toward satisfying the required punishment, at least to the extent of the personal suffering that it produces. No doubt there is discomfort in attending a meeting where family and friends have gathered to discuss one's wrongdoing. Second, restorative processes may provide an effective means for sorting out just how the total punishment units called for are best "spent"—*i.e.*, restorative processes may be a particularly effective means of fashioning a disposition from among the wide variety of available methods, that will best advance the interests of restoring the victim, the offender, and society.

Finally, as has been noted above, the problem of limitations on the dispositional authority of restorative processes is relevant only in instances where such restorative processes are used as the dispositional process—that is, where it is substituting for the criminal justice system or becoming the dispositional mechanism for that system. This is equally true when restorative processes are used for serious offenses. Where such processes are only complementary to the criminal justice system—where they operate parallel to criminal justice—there is no reason for any limitation on their use, for there is no danger that justice will be undercut. (One might worry that if restorative processes were an entirely complimentary rather than a substitute system, offenders might have little motivation to participate. But one could have the criminal justice system look to and take account of the restorative processes disposition in setting the criminal justice sentence.)

VI. CONCLUSION

Ultimately, my reaction to restorative justice—the theory of restorative justice, not the practice of restorative processes—is one of puzzlement, for this reason: What makes restorative processes work is the emotional need of the participants—a victim's or participant's sense of satisfaction or release in justice being done or, on occasion, an offender's sense of atonement from a just result. Yet it is this same emotional need—inherent in human nature—that restorative justice is so quick to reject outside of the restorative process.

Imagine the people who have attended a sentencing circle one day, who the next day read in their morning newspaper a story of a twenty-two year old who runs on foot from police when police spot him in a car he has failed to return to its owner. During the police chase, an officer on foot is killed by an officer driving a patrol car. The offender is convicted of murder under the felony-murder rule and sentenced to forty years imprisonment.[30] The readers are likely to be

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[30]This is the *McCarty* case from South Chicago. *See* PAUL H. ROBINSON, CRIMINAL LAW CASE STUDIES 1–5 (2d ed. 2002); PAUL H. ROBINSON, TEACHER'S MANUAL FOR CRIMINAL LAW CASE STUDIES 13–14 (2d ed. 2002).

offended by this result; it violates their collective notions of what the offender deserves. (Empirical studies confirm that people typically see such cases of accidental killings in the course of a felony as tantamount to manslaughter at most, not murder.[31] Indeed, in this case it is not even clear that people would see the offender in such a case as having much, if any, causal accountability for the death.[32]) Yet this is apparently irrelevant to the restorative justice proponents. If the restorative process does not work—assume the dead police officer's family is of a very unforgiving sort—the restorative justice proponents would defer to deterrence, and the felony-murder rule makes good sense under a deterrence theory; deterrence is the primary basis on which it is justified. Why wouldn't the restorative justice proponents, sensitive as they are to the importance of people's feelings about justice, enthusiastically support attempts to track shared community intuitions of justice as the criminal justice system's distributive principle? How can the feelings of those at the sentencing circle be so legitimate and so central the day before, but now so irrelevant?

Or imagine that our sentencing circle members the next morning read the story of an unrepentant Nazi concentration camp officer who, it is decided, will not be prosecuted because he is now elderly and no longer a danger—classic incapacitation analysis. Our sentencing circle people are offended: They see a failure of justice in this disposition. Yesterday their collective views were central, but today their views are irrelevant, something the criminal justice system should ignore? Restorative justice tells us to follow the principle of incapacitation, which lets the Nazi officer go free because there is no danger of future crime to be avoided by his incarceration, rather than to look to doing justice.

To summarize my proposal, it is this: Use restorative processes as much as possible, as either complementary to the criminal justice system or as a dispositional process within it. Where restorative processes are used as the dispositional process, the sanctioning options made available ought to be sufficiently serious to allow justice to be done. This can be done either by limiting the use of restorative processes to cases where deserved punishment is not great—as is typically done today—or by increasing the punishment available to restorative processes. In the latter case in particular, articulated guidelines are desirable, as would be a "punishment units" system that allows the restorative processes greater unfettered discretion in determining the method of punishment than in determining its amount.

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[31] *See* ROBINSON & DARLEY, *supra* note 16, at 169–81.

[32] *See id.* at 181–89.