

## **Exploring the History of the Restorative Justice Movement**

One thing that stands out to me about the academic literature on restorative justice is that the history of this phenomenon is given very little consideration. Usually, the history of restorative justice is presented as a single obligatory paragraph at the beginning of a book or article, and appears as a mere preface to the “real” content of the remainder of the text. To give you an example, Russ Immarigeon (1996) opens his book chapter on prison-based Victim-Offender Reconciliation programs by claiming:

Just over 20 years ago, the first victim-offender reconciliation meeting was held in Kitchener, Ontario, CAN (Peachey, 1989). Several years later, a victim-offender meeting was held in Elkhart, IN (Umbreit, 1985). Subsequently, the concept of victim-offender reconciliation has gained widespread and worldwide acceptance (p. 463).

Interestingly, these “histories” conflict with one another, with the “origins” of restorative justice being variously ascribed to the Victims’ Rights Movement, indigenous justice practices, a range of religious persuasions, and so on.

When authors do consider the history of restorative justice in greater detail, a number of problems arise. Where should this history begin? Should one start at the point where the term “restorative justice” came into popular usage, or go further back in time, linking modern restorative practices with historical precursors such as restitution or indigenous justice? Do such histories amount to harmless explorations of the past, or do they have a more strategic purpose?

The argument I will make in this paper is as follows: the body of literature on restorative justice, and particularly that literature which addresses the history of this phenomenon uses history as a strategy to render restorative justice a legitimate and politically palatable criminal justice option in the present. These histories act – however inadvertently – to make restorative justice appear as a “natural” and unproblematic, and at times “miraculous” and panacean paradigm of criminal justice.

In the first section of this paper, I will use Elmar Weitekamp’s (1999) ambitiously titled essay *The History of Restorative Justice* as a case in point. Weitekamp’s history draws on two main sources in order to legitimise the ascendancy of restorative justice: firstly, he looks at the legal anthropological literature, and secondly, at what we might call the historical criminological literature. Let’s consider firstly his use of the anthropological material.

Weitekamp (1999) draws on a range of well-known works of legal anthropology in order to support his bold claim that “restorative justice has existed since humans began forming communities” (p. 81). He says, “It is kind of ironic that we have....to go back to methods and forms of conflict resolution that were practiced some millennia ago by our ancestors who seemed to be much more successful than we are today” (p. 93).

In support of this claim, Weitekamp cites evidence from a diverse range of sources from the practices of ancient indigenous Australian and Eskimo communities, to the Code of Hammurabi, the Laws of Ethelbert of Kent and even Homer's *Iliad*.

Weitekamp, of course, is not alone in making these claims, and most of you will be aware of the monotonous regularity with which this assertion is made. It is perhaps epitomised in Braithwaite's (1999) widely quoted remark that "Restorative justice has been the dominant model of criminal justice throughout most of human history for all the world's peoples" (p. 2).

Although such claims have been dismissed by scholars such as Anthony Bottoms (2003, p. 88), who claims that they are easily refuted by any serious look at the work of legal anthropologists, my argument here is more far-reaching than this. I do not intend to merely refute claims about the universal practice of restorative justice in ancient and indigenous communities, but to demonstrate that by making these claims, authors such as Weitekamp are using history to legitimise restorative justice in present.

A similar argument has recently been made by Douglas Sylvester (2003) in an article titled "Myth in Restorative Justice History". Sylvester (2003) returns to the same anthropological sources on which Weitekamp (1999) draws in order to assess the validity of his claims; his conclusions however, are markedly different. In a nutshell, Sylvester's examination of these same texts reveals that in addition to the so-called "restorative"

practices that they suggest were utilised in ancient societies, a range of highly retributive practices were widely used in these communities as well.

Let's consider Weitekamp's use of E. Adamson Hoebel's famous anthropological work *The Law of Primitive Man* to provide just one example. Drawing on Hoebel's work, Weitekamp (1999) claims that blood revenge was rarely used in Eskimo communities, even in homicide matters. In support of his claim, he quotes the following from Hoebel's work:

Murder is followed quite regularly by the murderer taking over the widow and children of the victim. In many instances the desire to acquire the woman is the cause of the murder, but where this is not the motive, a social principle requiring provisions for the bereaved family places the responsibility directly upon the murderer (p. 76).

Weitekamp (1999) goes on to comment on the ingenuity of this system of dealing with conflict, by claiming that “[Albert] Eglash...who coined the term “creative restitution” would have been delighted by the creativity of these Eskimo communities” (p. 76).

Contrary to Weitekamp's argument however, I would in fact suggest that nobody in their right mind, let alone Albert Eglash, would find the prospect of a man murdering another

man, and then supposedly “repairing” this damage by shacking up with his wife and kids “delightful” in any regard.

For Sylvester (2003, p. 12) however, there are more profound problems with Weitekamp’s use of Hoebel’s work than this. After examining the same text that Weitekamp uses in order to demonstrate the absence of retribution in ancient societies, Sylvester (2003) discovered that in *The Law of Primitive Man*, Hoebel describes numerous instances of Eskimo clans carrying out revenge killings for a variety of offences. Although Hoebel admits that such killings were made less frequent by the practice of restitution, his work hardly supports Weitekamp’s claim that revenge killings were “used only rarely” (Sylvester, 2003, p. 12).

Sylvester (2003) thus concludes that the argument put forward by Weitekamp and other restorative justice scholars is “either grossly overstated or flatly contradicted by Hoebel’s conclusions” (p. 12). Furthermore, after reviewing all of the other examples used by Weitekamp (1999) and others in the same manner, Sylvester (2003) concludes that “there is little doubt that restorative justice scholars have only scratched the surface of the anthropological literature and...have been highly selective in the examples expressed” (p. 12).

There is a great deal more that could be said about the claim that restorative justice has been the dominant method of dealing with conflict for most of human history. Suffice it to say at this point however, that the work of Bottoms (2003), Sylvester (2003) and others

demonstrates that although restorative processes almost certainly existed in pre-modern communities, they existed alongside a diverse range of other practices, including retribution. In Braithwaite's (1996) own words, "I have yet to discover a culture which does not have some deep-seated restorative traditions. Nor is there a culture without retributive traditions" (p. 327). My point here is that it therefore cannot be the "indigenousness" or "ancientness" of restorative processes alone that has allowed them to be accepted into criminal justice systems today. If this was the case, and current governments were to implement justice measures based solely on their having been practiced in indigenous and pre-modern societies, a whole range of practices – from restorative justice to spearing, banishment and death – would currently be in use.

Let's move on to Weitekamp's second – and I think, far more interesting - method of drawing on the past in order to legitimate the current use of restorative justice. Here, Weitekamp uses historical criminological material – that is, the literature of Jeremy Bentham, Cesare Beccaria, Enrico Ferri and others – to retrace a history for restorative justice.

He claims for instance, that Beccaria was "a humanitarian opposed to capital punishment" who laid "the groundwork for advocates of restorative justice" (p. 90). He also claims that Bentham "stressed the necessity of taking care of the crime victim by means of restorative justice" (p. 90), and that Garofalo "pointed out the benefits of restorative justice to society as a whole" (p. 91).

I must admit, I was quite shocked when I read this take on history. Even aside from the problematic nature of labelling long-dead criminologists “advocates of restorative justice” when they lived and wrote in a time long before the paradigm of restorative justice had even been articulated, this was certainly not the history I had learned as an undergraduate, nor the history I have since taught undergraduate students of criminology.

Here, I do not intend to call into question the accuracy of Weitekamp’s essay *per se*; rather, I mean to raise a question about the problematic nature of drawing selectively on criminology’s early texts in order to reclaim a lengthy history for restorative justice. I do not doubt the authenticity for example, of the particular quotes that Weitekamp attributes to Bentham, Beccaria and others. I would argue however, that many of these are used selectively, and do not accurately represent the work of these early criminologists. Let’s consider Jeremy Bentham as an example. Bentham did, in fact, promote restitution to victims, as Weitekamp suggests. This however, constitutes only a fraction of Bentham’s wide-ranging work in the criminological field. Gilbert Geis (1972) lists the following as only some of the reforms Bentham instigated:

...the mitigation of the severity of criminal punishment; the abolition of transportation; the adoption of a prison philosophy stressing example and reformation; removal of certain defects in jury systems...abolition of usury laws; abolition of law

taxes and fees in courts of justice; [and] removal of the exclusionary laws in evidence (p. 66).

Moreover, Bentham's name is, of course, synonymous with the Panopticon style of prison that he designed and fervently promoted. This quite nasty prison was to be arranged so that each cell would be visible from a central point. The prison guard could thus view any prisoner at any given moment; prisoners however, who could not see the guard, would never know when they were or were not under surveillance. Geis (1972) calls the Panopticon Bentham's most "unique" (p. 52) and "tangible" (p. 63) contribution to criminology.

To retrospectively claim Bentham as an "advocate of restorative justice" thus seems both rather odd and somewhat imprecise. Of course, whether or not we can call a person a supporter of restorative justice might depend simply on how we define restorative justice, an area that I do not intend to address here. I think it is safe to suggest however, that if a person supports capital punishment, they can probably not be described as a restorative justice advocate. Unfortunately for Weitekamp, a number of the early criminologists he draws on – including Ferri (Sellin, 1972, p. 366) and Garofalo (Allen, 1972, p. 330) fall into this category.

Weitekamp's (1999) history also raises the issue of where we might draw the line on what is and is not restorative justice. It appears for example, that drawing on the history of restitution and compensation is a common technique in constructing a past for

restorative justice. But even if we were to accept Weitekamp's portrayal of Jeremy Bentham as a heroic promoter of restitution for instance, is this entirely relevant to the history of restorative practices? Although the concept of restitution is certainly a component of some restorative procedures, the question must be asked: is it acceptable to claim the histories of restitution and compensation for example, as restorative justice histories? Surely there is something that differentiates restorative justice from mere restitution? If there is not, then why the new discourse of restorative justice?

This technique of drawing posthumously on the work of theorists is certainly not new. As early as 1975, Hudson and Galaway (1975) did much the same thing when they included a range of historical material in their edited collection *Considering The Victim*. Among a number of other historical figures, poor old Jeremy Bentham is again used as an example of an advocate of restitution to crime victims.

Certainly, the section of Bentham's writings reprinted in Hudson and Galaway's text indicates his support for restitution. The ten or so pages mysteriously missing from the middle section of Bentham's essay however, reveal that he also supported inflicting punishment on offenders in order to placate victims (see Bowring, 1962, p. 383).

Bentham's status as an early proponent of restitution, as portrayed by Hudson and Galaway, therefore seems more doubtful upon closer inspection of his original writings. By omitting a few pages of Bentham's text, Hudson and Galaway effectively rewrite history, transforming a supporter of retribution into an advocate of restitution.

Rick Sarre (1999) is another scholar who employs this tactic in reimagining a past for restorative practices. In a paper that purports to explore the history of the restorative justice concept, Sarre (1999) only very briefly considers the topic, claiming that the roots of restorative justice can be traced to early in the 1900s (p. 13). In support of this, he quotes social psychologist George Herbert Mead on the limitations of retribution (p. 13). Sarre (1999) then jumps forward to 1977, claiming Nils Christie and Albert Eglash as the forefathers of restorative justice, before declaring that subsequently, “Restorative justice...emerged as a legitimate justice model” (p. 14).

Once again therefore, a theorist’s work is retrospectively used in order to give restorative justice a noble history. Like Jeremy Bentham, George Herbert Mead’s words appear to be compatible with restorative justice only in a very tenuous way. The quote of Mead’s used by Sarre (1999, p. 13) to demonstrate the origins of the restorative justice ethos only really show that Mead opposed a *retributive* model of justice. His support for *restorative justice* however, appears to have been credited to him posthumously.

The final example I will use today to demonstrate the reclaiming of history by restorative justice advocates – although there are many others – is the reinterpretation of legislation. By this I mean the way in which advocates of restorative justice retrospectively reinterpret legislation that was enacted long before the restorative justice paradigm had even emerged, as being compatible with the restorative ethos. David Miers (2001) for example, relates that in Belgium, mediation between juvenile offenders and their victims

is “indirectly authorised” by the *Juvenile Justice Act* of 1965. In other words, although this legislation doesn’t explicitly endorse victim-offender mediation, it can be read retrospectively to conform to the restorative justice ethos. Similarly, Marlyce Nuzum (n.d.) lists several pieces of United States legislation which she acknowledges do not use the term “restorative justice”, but which she argues are nonetheless compatible with the “general principles” of a restorative approach. Nuzum (n.d.) uses a piece of Utah legislation as an illustration of a law that “incorporates…restorative justice terminology and principles”. This Utah legislation includes the following options for juvenile offenders:

[overhead]

Repair, replacement [*sic*] or otherwise make restitution for damage or loss caused by the minor’s wrongful act, including costs of treatment;

The court may through its probation department encourage the development of employment or work programs to enable minors to fulfil their restitution obligations;

Compensatory community service (Nuzum, n.d., para 41-43).

Now what stands out to me about this *Act* is that it only “authorises” restorative justice in the most vague manner possible. The principles listed in this Utah statute – restitution, community service and employment programs – could retrospectively be interpreted to “authorise” just about any criminal justice practice other than imprisonment or capital punishment. Certainly, legislation such as that which Miers (2001) and Nuzum (n.d.) outline make restorative practices a possibility. In a very vague sense they are aligned with some of the underlying principles of restorative justice. They do not however, make restorative practices inevitable or necessary, as is implied by those who retrospectively repossess these laws, and present them as part of the evolution of restorative justice.

Once again therefore, a history – this time, a legislative history – is reclaimed for restorative justice. [Check journal on this topic – add anything relevant.] [An Australian example – ACT?]

My point here is that by selectively arranging historical data as Weitekamp has done, or by claiming that existing laws can authorise restorative practices retrospectively, the impression is given that restorative justice has a lengthy and seamless history; it appears as an inevitable and natural consequence of the past. As David Garland (1994) argues in relation to the discipline of criminology, history can act as “a kind of framing device for subsequent arguments” (p. 20). He says:

On such occasions, history becomes a way of conducting theoretical debate by other means. The

recovery of a lost theoretical tradition, the reinterpretation of the subject's early history, claims and counter-claims about the true 'founders' of the discipline, or critical summaries of previous patterns of thought, are all ways in which the subject's history gets drafted into current controversies and made to do duty for one side or the other (p. 20).

If we apply Garland's (1994, p. 20) comments to restorative justice, we can see that histories such as Weitekamp's do not exist merely as an interesting exploration into the roots of restorative practices. Rather they act with a specific purpose – to make restorative justice appear as a legitimate and unproblematic criminal justice practice with a lengthy past. In Nikolas Rose's (1988) words, the aim of such histories is "not to enlighten us about the past but to legitimize the present" (p. 181). Sylvester (2003) suggests that where restorative justice is concerned, this is hardly surprising. He says that "in law...scholars inevitably seek to enlist historical evidence in support of modern positions. Restorative justice scholars, seeking to effect legal change, have increasingly sought to justify that change by expanding the sources of their legitimacy. In the battle for cognitive legitimacy, history is one more tool in the restorative justice arsenal" (p. 10).

This melting pot of competing histories of restorative justice, and as I have argued, attempts to reclaim histories for restorative justice, forms the backdrop to my current

research. The approach I have chosen to explore the history of this phenomenon while aiming to avoid some of the problems associated with traditional history is “genealogy”.

“Genealogy”, or “history of the present” is a methodology put forward by French philosopher-historian Michel Foucault. Genealogy aims to disrupt, fragment and de-legitimate the process, phenomenon or institution that it takes as the object of its study. A genealogy of restorative justice might therefore seek to destabilise many of the assumptions about restorative justice currently in favour, such as that restorative justice is a “natural”, “innate” phenomenon which evolved gradually until emerging as a progressive and superior criminal justice paradigm.

Although genealogy itself is by no means unproblematic, it may be one approach useful in exploring the emergence of restorative justice without resorting to the temptation of using history to legitimate restorative practices.

One element of a genealogy, and one that I think is relevant in terms of what I have been talking about today, is the technique of highlighting the heterogeneity of practices grouped together under the one rubric. In other words, as a genealogy of restorative justice, my research aims to emphasise the disparity of the various practices that are held to constitute the restorative justice “movement”. What is it about victim-offender mediation, youth justice conferencing and circle sentencing for example, that allows them to be grouped together and labelled “restorative practices”? Part of my task as a genealogist is to demonstrate the heterogeneity of these processes and their discrete

histories, and to bring into doubt the assumption that we can in fact call restorative justice a “movement” at all. Genealogist Steven Sutcliffe (2003) argues that using the term “movement” “essentialise[s] a set of mixed, meandering, even divergent social processes” (p. 9) and raises questions about whose interests are served by categorising multiple practices under one unified discursive entity (p. 10). The “movement” in the title of my paper is therefore in inverted commas.

Let’s consider as an example, the differing role of the victim in Family Group Conferencing and Victim-Offender Mediation or Dialogue. It appears that when some Family Group Conferencing schemes were first coming into being, victims’ concerns were not considered to be of much importance. As Sam Garkawe (1999) argues, the New Zealand Family Group Conferencing legislation originally provided for “[a]ny victim of the offence or alleged offence to which the conference relates, or a representative of that victim...” to attend a conference (p. 15). No provision was included however, that would have allowed a victim to bring a support person or persons to the conference (Garkawe, 1999, p. 15). In Garkawe’s (1999) words therefore:

This legislation was clearly flawed....This simple example – who is entitled to attend a conference – clearly shows that the original legislation could not have come at the initiative of the victims movement. People with an understanding and awareness of the trauma that victims might feel if they are about to

enter into a conference with the offender, their family and/or their supporters would have known that victims also need to be able to bring support people... (p. 15).

Although the New Zealand legislation was later amended so that victims could bring supporters to a conference, Garkawé (1999) claims that this “clearly came as more of an afterthought, showing that victim perspectives were not within the initial contemplation of the legislative drafters” (p. 15).

The Wagga Wagga scheme, which was to some extent based on the New Zealand model of Family Group Conferencing, also appears to have had little regard for victims in the beginning of its operations. Consider for example, Terry O’Connell’s (as cited in Morton, 1999) description of the first conference he facilitated, which involved four young offenders who had stolen a motorbike and caused \$1000 damage. He says:

The conference was conducted in two parts: the first involved asking the offenders, in the presence of their families, to name those who had been affected by their behaviour. I asked them some simple questions: what had they thought about when they stole the bike, what had they thought about since, who had been affected by the crime and why? I recorded all this

information on a whiteboard. Then I brought the owner of the bike into the room. That was the last thing they were expecting (p. 12).

Now although by all accounts this particular conference was quite a success – with the victim and four offenders discussing their mutual passion for motorbikes on the way out of the police station – it does appear that the role of the victim was to shock or scare the youths into obeying the law in future. In fact, O'Connell (n.d., p. 35) later admitted that the victim was quite “reluctant” to take part in the conference. The purpose of the conference therefore seems to have been the reformation of the juvenile offenders, rather than any potential benefit for the victim.

As with the New Zealand legislation, this model of conferencing was later changed to include the victim in the whole process. Terry O'Connell (n.d.) later said of this first conference:

My thinking was that the introduction of the victim...[in this manner]...would have had the greatest impact [on the offenders] because of the element of surprise. I realised that this denied the victim the opportunity of being able to fully participate in a conference which was convened to deal directly with his victimisation (p. 43).

Interestingly, many other early conferences in Wagga Wagga were facilitated in cases of “victimless crimes”, such as adolescent marijuana use (O'Connell, 1992). Without getting into a debate about whether or not smoking drugs is a “victimless crime”, what this and the other examples I've given indicate is that the presence of a victim is *not* an essential component of a Family Group Conference. Indeed, as Maxwell and Morris' (as cited in Booby, n.d., p. 6) 1993 evaluation of Family Group Conferencing in New Zealand found, victims were present at less than half of the conferences facilitated. One third of these victims claimed that they had not even been invited to attend.

In a Victim-Offender Mediation or Dialogue on the other hand, the presence of a victim is of much greater importance. Indeed, in a process involving only an offender, a victim and a facilitator, their attendance is virtually a necessity, particularly in cases with only a lone victim and offender.

As Richard Delgado (2000) has said of Victim Offender Mediation, “...mediation cannot be applied, without radical modification, to victimless crimes, such as drug offenses....In these cases, no ordinary victim is available to meet with the perpetrator and discuss restitution, nor has the perpetrator victimized a specific individual or community who could be made whole” (p. 762).

Another significant variation between Family Group Conferencing and Victim-Offender Mediation that I think ties into this is the role of the family. Rather than the *victim* being

an integral part of Family Group Conferences, the presence of the offender's family is almost what defines this process. This however, is certainly not the case in a Victim-Offender Mediation or Dialogue. This difference was noted by Mark Umbreit and Howard Zehr, after they examined the Wagga Wagga conferencing model some years ago. Among other differences between the Family Group Conference and mediation models, Umbreit and Zehr (as cited in Booby, n.d.) found that conferencing "acknowledges the important role of the family in the life of the juvenile offender" (p. 20).

In contrast, consider also these comments made by Dorothy McKnight (1981) in her evaluation of early Victim Offender Reconciliation Projects in Canada:

One issue was to resolve the role of parents of juvenile offenders. Experiences dealing with the parents of young offenders varied. VORP staff kept the parents informed of the process and suggested that they be supportive but allow the youth to carry out the process on his own. Parental involvement ranged from none to a desire to take over completely. On one occasion a father was invited to accompany his young son and the VORP worker to a particularly difficult meeting with a victim. The father said, "I'm not going. I didn't commit the crime and I'll have nothing

to do with it”.....It was difficult finding the right balance, but generally parental response was encouraging (p. 297).

My point here is that while it would be hard to run a Victim-Offender Mediation without a victim, it would be easy to do so without a family. Conversely, it would be hard to run a Family Group Conference without a family, but easy to do so without a victim.

I should stress here that I am not suggesting that this is necessarily the case among all processes that use the terms “Family Group Conference” or “Victim-Offender Mediation”, nor across all localities where these processes are utilised. I am merely suggesting that we should perhaps consider how a process in which the family is an integral component, and a process in which families are not encouraged to participate – as McKnight’s (1981) work claims – can both be categorised under the restorative justice banner. What is it about these practices – and for that matter, the range of other “restorative” practices such as circle sentencing and “surrogate” meetings between victims and offenders - that justifies their being subsumed under a unified label?

My argument here is that using the term “movement” to describe restorative justice falsely unifies a set of practices, and prevents a more nuanced exploration of the history of restorative justice. Furthermore, restorative practices are granted legitimacy in the present as a result of being portrayed historically as belonging to the restorative justice “movement”. Imagine how credible practices like conferencing and mediation might

seem if they were presented as unrelated processes, rather than as members of the restorative justice “family”.

A number of authors in this field have suggested that presenting restorative justice in a positive, if somewhat inaccurate light may actually be necessary in order to make restorative justice politically acceptable. Kathy Daly (2002) for instance, argues that presenting a restricted and modified history – what she calls “the mythical true story of restorative justice” (p. 72) – may be beneficial in terms of promoting restorative practices to policy makers and legislatures. (p. 72). She says, “I do not see bad faith at work here. Rather, advocates are trying to move an idea into the political and policy arena, and this may necessitate having to utilize...an origin myth of how it all came to be” (p. 63).

Sylvester (2003) likewise poses the question “...is there a time and place for allowing history to be bent to serve modern ends?” and argues that with limitations, history might be manipulated in order to be made relevant to modern political debate (p. 3).

I have aimed to make two main points in this paper. Firstly, that history is used by proponents of restorative justice to authorise the implementation of restorative processes in the present, and secondly, that the historical portrayal of restorative justice as a “movement” misleadingly unites a range of divergent practices. In summary therefore, the presentation of restorative justice as a unified phenomenon with a long and seamless past is an attempt by advocates to make restorative justice seem a natural and credible criminal justice practice rather than a detailed and informed account of the emergence of

restorative justice. In Sutcliffe's (2003) words therefore, this portrayal of restorative justice might be considered to be "strategy rather than history" (p. 29).

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