



Foreword: Special Edition on Restorative Justice and Punishment

The discussion around the relationship between restorative justice and punishment is not a new one. Despite that, there has not yet been a settlement or agreement on the matter. To me, that serves as proof of the lack of a simple answer, highlighting the complexity of the question, and the need for an ongoing debate. In the [October 2022](#) edition of the EFRJ newsletter, we published an article by Christian Gade who argued for an understanding of restorative justice as a constructive form of punishment. The article was accompanied by a response from Tim Chapman who focused on the value base of restorative justice as a dialogical process and criticised Gade's proposal of restorative processes as processes of punishment in order to enable a wider spread of restorative justice.

Christian's and Tim's newsletter and blog contributions have sparked the content of this special edition. The authors have used the arguments presented as starting points to sharpen, re-think and share their views on restorative justice and punishment. Extended versions of their articles were published in the Dutch-Flemish *Tijdschrift voor Herstelrecht* [*Journal of Restorative Justice*]. We are happy and honoured that they offered shortened and translated versions to be published by the EFRJ, so we can make their insights accessible to a wider audience. It is our aim to keep the discourse on the relationship between restorative justice and punishment — and ultimately — the relation of restorative justice and the criminal justice system open.

A broad spectrum

We all get an idea of the broad spectrum of possible perspectives on pursuing a discussion on punishment and restorative justice while reading the articles. Bas van Stokkom deals with the concept of punishment in criminal justice and enlarges the scope by looking at the meaning that punishment takes in other contexts. It is mainly the pedagogical contexts of child raising and education that he utilises to put forward his idea of a 'restorative punishment' that merely instils discomfort, but does not inflict pain.

In his piece Jacques Claessen introduces alternative definitions of punishment mainly by abolitionist thinkers and extensively deals with Gade's as well as van Stokkom's perspectives, rejecting a re-definition

of punishment for as long as there is a punitive aspect, a retribution of 'evil with evil' in any reaction to crime. Drawing from philosophers like Kant, Hume and Schopenhauer, he suggests the fusion of deontological and consequentialist positions in that restorative justice is a good in and of itself, but is also applied because it leads to good results. He sees special prevention as the only legitimate reason to apply punishment. The aim here is not to harm the offender, but to prevent harm in the future.

Contents

Kim Magjera	1
Bas van Stokkom	3
Jacques Claessen	8
Ivo Aertsen	18
Vincent Geeraets	24
News	28
Calendar	28

The approach that Ivo Aertsen is taking is very different. He argues that in order to keep restorative justice processes free from punitive elements, it is necessary to develop a better understanding of the institutionalisation of restorative justice. To him, the best position for restorative justice is an intermediate one in which a certain degree of autonomy is kept while at the same time a dialogue at eye level between restorative and criminal justice is enabled that entails

a debate about legal norms and life world meanings of justice, reactions to wrongdoing etc.

Vincent Geeraets' article revolves around the consequentialist stance that Christian Gade had put forward. The former takes a philosophical point of view to establish that consequentialist thought doesn't fit well with restorative justice. According to him restorative justice is primarily a humane response to crime in that it emphasises respect and is built on the foundation of decency and reconciliation, and thus should not mainly be evaluated as a means of crime control, or in relation to its effects on recidivism as well as its economic costs.

I feel enriched by reading each of the analyses. Yet, I haven't found a definite formula for the relationship between restorative justice and punishment. To me, the great achievement of the authors is to visualise the various possible angles from which to look at the relation, and to spark more questions.

Three directions

I would like to share with you three directions my thoughts were heading to after reading them:

1. I was reminded of Nils Christie's 'Five dangers ahead' in which he warned us not to narrowly assess restorative justice with the criteria usually applied to criminal justice processes (Christie, 2009).
2. I had to think of Hannah Arendt. Although she mainly contemplates the political sphere, her insights are transferable to the social sphere and restorative justice. She cautions that in politics one should never adopt a means-to-an-end way of thinking, because that would all too easily lead to the conclusion that all means are acceptable for as long as they're effective in reaching the one good aim. Even if we make exceptions to what is unacceptable, political thinking would start with that aim and be dominated by it, which — to her — is a risk in and of itself. When entrusted with the lives of other human beings, she writes that it is indispensable to reflect on the values that guide a certain practice, and to focus on the uniqueness of each person and situation. The strength of restorative justice precisely lies in the recognition of individuality and an adjusting of the process accordingly. Simply adopting a new concept of punishment that would be in line with and effective in reaching the aim of

e.g. reduced recidivism entails just that danger Arendt warns against — to over-emphasise the aim and to reduce restorative processes to a general technique that simply has to be applied (Arendt, 1958, 1970).

3. I reasoned about the power of words. In Germany there has been a shift in language around punishment in the pedagogical context over the past 30 years. While the term punishment (*Strafe*) is nearly extinct in pedagogical publications, the term consequences (*Konsequenz*) is all the more popular. This change in wording comes with great danger as it disguises the seriousness and risks of such acts and secretly shifts responsibilities from pedagogical experts to children and juveniles (Magiera and Wilder, 2020).

Drawing on this last point, it makes me happy that in this special edition the authors openly write about punishment and invite us to reflect on its role in restorative justice.

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Restorative punishment: imposing a discomfoting obligation to make amends

Christian Gade aims to promote restorative justice as a different, and potentially more constructive, form of legal punishment. I think that is a commendable goal. Unfortunately, he does not develop a definition of this constructive punishment. In this contribution I will outline some contours of a restorative punishment concept, centred around ‘calling to account’ and ‘making amends.’ In doing so, the punished person has to commit himself to a restorative obligation.

It is actually incomprehensible that legal punishment is described so little in terms of ‘taking responsibility’ and ‘moral learning.’ Often, punishment still has the classic meanings of ‘intentional infliction of suffering’ and ‘deterrence.’ These formulae have been controversial for a long time, partly because they are linked to notions such as revenge, subordination and hostility. These concepts are no longer in line with penal perspectives such as behavioural change and compensation that have become characteristic of a democratic society.

The imposition of a bearable burden could encourage the offender to pay attention to his misconduct, thereby initiating a moral learning process.

Many restorative justice thinkers — including Lode Walgrave (2008) — go to great lengths to demonstrate that a restorative sanction cannot and should not be a punishment. I think that’s not convincing because punishment is narrowed down to ‘intentional infliction of suffering.’ As Gade shows, there are many other definitions of legal punishment available. I opt for a definition in which punishment is understood as an ‘intentional discomfoting’ intervention that encourages a sense of responsibility. This intervention should be non-harmful. The imposition of a bearable burden could encourage the offender to pay attention to his misconduct, thereby initiating a moral learning process. I will emphasise that this restorative intervention does have punitive aspects. Just like imposing a take home punishment in the context of school, the imposition of reparation is an ‘act of power’ that entails restriction of freedom for the punished person. I will also argue that the restorative justice movement cannot afford to ignore humanistic conceptions and intuitions of punishment that are common at school and at home. There too, punishment counts as an obligation to learn and make amends, while the punished person has to deal with a restriction of freedom.

We need a broader view on the justification of

punishment. Current penal philosophy still has an ‘unhelpful hyper-focus on culpable adults, by states, often through imprisonment’ (Coverdale and Wrings, 2022). This focus impedes comprehensive accounts of (potential) constructive punishments such as community service, suspended sentences, compensation orders and behavioural orders, which aim to stimulate moral learning. It also impedes reflection on punishment practices by non-paradigmatic punishing agents such as schools and sport clubs. In my opinion, a concept of legal punishment that includes restorative justice principles could be tailored much more on those types of punishment.

In section 1, I will briefly discuss Gade’s views. Subsequently, I will criticise Walgrave’s view in which punishment is equated with the intention to inflict suffering or harm. It is more fruitful to define punishment as an ‘intentional discomfoting intervention’ (section 2). In section 3, I point out that when we shift attention to everyday contexts such as school and upbringing it becomes clearer that the essence of punishment is located in the imposition of obligations that encourage moral learning. Finally, I present a provisional conceptual framework of legal punishment which is based on restorative justice principles, that is, which is in line with the objectives of taking responsibility and making amends (section 4) and I offer some thoughts on civilising criminal justice *and* civilising criminal punishment (section 5).

1 Christian Gade’s vision: some reflections

The time when criminal courts focused solely on retaliation and deterrence is far behind us. Nowadays, punishment practices are implemented in a versatile manner.

An interesting aspect of Gade’s argument is that we should seek dialogue with people who work in

criminal law instead of ‘resisting’ punishment *per se*. Within the restorative justice movement criticism of infliction of suffering often functions as a hostile construction (an ‘enemy image’) to disqualify ‘the’ criminal law. Gade opposes binary thinking in terms of ‘we are in favour of making amends’ and ‘they are in favour of adding harm to harm’ — according to De Hert and Gutwirth (2011), Walgrave places punishment in a false light because he is only focused on the traditional concept of inflicting suffering. In this context they speak – in line with Gade – about a ‘polarizing scene setting.’ This way of reasoning fails to recognise that diverse — and often conflicting — punishment objectives play a role among magistrates, including constructive objectives such as behavioural change and restoration (de Keijser, 2000). The time when criminal courts focused solely on retaliation and deterrence is far behind us. Nowadays, punishment practices are implemented in a versatile manner. The Dutch penal system leaves room for tailor-made interventions, such as imposing anti-aggression training in the context of behavioural orders. The current turn in the Netherlands to responsive law and problem solving underlines that retribution and deterrence do not have a monopoly. Therefore, the criminal justice system is not as punitive as many restorative justice thinkers claim. This does not alter the fact that the doctrine of intentional infliction of suffering still plays a remarkable role in orthodox criminal law theory.

However, restorative justice thinkers and doers could promote constructive interventions where possible, for example, to prevent short-term detention through community service or home detention ...

However, Gade’s suggestion that restorative justice thinkers and doers can be part of the criminal justice ‘system’ goes too far in my opinion. After all, that system is geared to risk management and efficiently pushing through cases, which means that the human factor is quickly compromised. However, restorative justice thinkers and doers could promote constructive interventions where possible, for example, to prevent short-term detention through community service or home detention; see Claessen (2022b). They can seek cooperation with professionals in and around the criminal justice system who advocate humanisation of punishment, including professionals who are involved in community and drugs courts, therapeutic justice, victim support and victim-awareness courses

in the probation service.

Unfortunately, Gade presents himself as a ‘consequentialist’ who believes that punishment programmes should be judged on the basis of measurable results. This brings instrumental thinking to the fore, focused on the impact of interventions, which easily conflicts with restorative justice communication and the language of regaining dignity and self-respect. Moreover, it is questionable whether this thinking can deal with duties of care, such as helping convicted persons who struggle with personal problems.

A strong point in Gade’s argument is that the restorative justice movement should not get out of step when it comes to public ideas about punishment and penal intuitions. The idea that the general public would mainly rely on the populist rhetoric of harsh punishment is not correct. In everyday contexts such as schools and upbringing citizens embrace reasonable views on punishment. In the educational world, the formula ‘intentional infliction of pain’ is no longer endorsed. Punishment is more and more defined as an imposed exercise in moral learning; corporal punishment has lost its appeal (Turner, 2003).

Gade’s merit is that he has opened up the discussion about the definition of punishment. There are many philosophical views of what punishment should entail, and ‘intentional infliction of pain’ is just one of them.

2 Punishment as an intentional discomfoting intervention: some objections against Lode Walgrave’s view

Typically, perpetrators experience suffering not as a contribution to a lesson to be learned, but as an indication that they have no control over their fate.

One of the leading restorative justice thinkers who has systematically criticised the concept of punishment is Lode Walgrave. Like Walgrave, I am in favour of expanding restorative sanctions in the criminal justice system, although I prefer to call these impositions punishment. I fully agree with him that intentional infliction of suffering is not at all an appropriate tool in the pursuit of restoration. Indeed, it is a serious obstruction (Walgrave, 2008, p. 49). That’s why his criticism of Antony Duff’s view of restorative punishment is correct. Duff emphasises that restorative punishment should be severe and painful. ‘Hard treatment is not just *possible*, but a *necessary*,

method of communicating the censure that offenders deserve' (2001, p. 29). According to Duff, this harsh approach would force the punished person to concentrate on the norm violation and he is not allowed to divert attention from it. However, it is highly questionable whether suffering and harsh treatment are a reliable route to communication and moral learning. Typically, perpetrators experience suffering not as a contribution to a lesson to be learned, but as an indication that they have no control over their fate. His attention shifts from the harmfulness of the criminal act to his own suffering and the hardships that the punishment entails (van Stokkom, 2005, 2016).

So far I endorse Walgrave's view. But it is too easy to equate punishment entirely with intentional infliction of suffering. Based on that line of thought, he can argue that painful obligations that are imposed without the intention to cause suffering — like restorative sanctions — are not punishments (Walgrave, 2013, p. 354–355). But it is by no means necessary to make the classical formula of intentional infliction of suffering the sole criterion of punishment.

... non-harmful obligations may indeed stimulate offenders to reconsider their behaviour and respecting other people's rights.

I will criticise Walgrave's view along two lines. Firstly, we can define punishment as a 'non-harmful, albeit still "discomforting," response to the offender' (Demetriou, 2012, p. 3). This intentional infliction of 'discomfort' makes punishment easier to defend. Whereas it is impermissible to intentionally harm another person, imposing discomforting obligations are not morally worrying *per se*. Many social realms comprise intentional discomforting practices which might be termed morally unproblematic such as therapy, athletics, religious rituals or the military. Moreover, non-harmful obligations may indeed stimulate offenders to reconsider their behaviour and respecting other people's rights. Philosopher Dan Demetriou (2012) claims that this 'educative defence' is the royal road to justify legal punishment. Punishment is 'educative' when it aims at improving the civic competences and responsibilities of the offender in some way.

Secondly, Walgrave points out that imposing punishment is an 'act of power' (2008, p. 49). At the same time, he includes sanctions under the restorative justice umbrella, arguing that, under some conditions, imposed sanctions can serve a reparative goal. He defines a restorative sanction in terms of 'hav-

ing to undertake repair-work' (2008, p. 48), for example doing work for the benefit of a victims' fund, or community service. Walgrave recognises very well that these reparative sanctions are coercive. But he doesn't point out why these restorative 'acts of power' would not comprise punitive aspects. In my view, it makes good sense to call an official imposed obligation to undertake repair-work a punishment. After all, this imposition entails a restriction of freedom. Contrary to what Walgrave suggests, the coercive aspects of restorative sanctioning and restorative punishment can have the same strength and intensity.

3 Educational punishment

In order positively to distinguish practices of restorative justice from penal practices of the criminal justice system, many restorative justice theorists seem to focus on harmful punishments and the classic doctrine of returning evil for evil. These theorists, including Walgrave, seem to ignore the meanings of punishment in everyday contexts, at home and at school. At school punishment is no longer interpreted in terms of 'harsh treatment' or 'infliction of harm' — in educational sciences, a comparable debate is going on as in the restorative justice movement about the question of whether punishment can be legitimised at all. But that discussion focuses mainly on the question of whether children can be held responsible (see, for example Marshall, 1984 and Hobson, 1986). The idea has taken hold that the learning process which the punishment is intended to achieve, should not be hindered by discipline and aggressive treatment. To understand the essence of current punishment intuitions, it is important to focus on the imposition of take-home writing punishments. Characteristic of the teacher's intervention is the intention to discomfort the young person who has misbehaved, in order to instigate moral learning. This writing punishment should not be overburdening. Nor should a writing assignment be an exercise in copying lines. The purpose should be that students will realise what appropriate behaviour entails. They have to spend their time thinking about their misconduct and what they will (hopefully) do next time. They might explain their behaviour, why that behaviour is inappropriate, and how to correct it for the future. Ideally, it should set in motion improvement of civic competences (respecting other people's rights; etc.).

If people take punishment for granted at home, at school and in sports clubs, it is difficult to explain that an imposed reparation task or repayment scheme is not a punishment (and 'only' a sanction). People

might wonder why those obligations would not have punitive elements (an act of power; restriction of freedom) and they might think that restorative justice protagonists are beating around the bush. Presumably, this is an important reason why the abolitionist mission to convince the public that imposing punishment is illegitimate will continue to meet great resistance. That mission goes against everyday intuitions such as the conviction that a young person who has once again done something unacceptable, must take on an uncomfortable but non-harmful burden, that he must feel. Restorative justice theorists cannot afford to simply ignore this kind of intuitions. This would alienate the movement from basic moral insights such as the idea that injustice must fail.

4 A definition of legal punishment, based on restorative justice principles

In this section I want to incorporate previous thoughts into a definition of legal punishment. I propose the following provisional definition:

Punishment is censuring and calling to account an offender (who has committed a criminal offence), and is accompanied by the imposition of an effort obligation that encourages a sense of responsibility.

This definition consists of three components: (a) censuring and calling to account, (b) the imposed effort obligation and (c) encouraging a sense of responsibility:

- (a) Legal punishment communicates — publicly — disapproval of the criminal offence and this censure also contains an appeal to adhere to legal norms from now on. The punished person is addressed as a fellow citizen.
- (b) The punisher imposes an obligation and thereby restricts the freedom of the person found guilty. That intervention is the punitive aspect of the punishment. However, the imposed burden must be a bearable by-product of a good worth pursuing, namely behavioural change and/or offering satisfaction to the victim. The intention of the punisher is therefore limited to ‘infliction of discomfort.’
- (c) The imposed obligation consists of a trajectory that encourages the development of a sense of responsibility. This trajectory aims to help

the punished person to understand what he has done and encourages him to provide an appropriate response. The justice department is responsible for facilitating this; it must ensure that the punished person *can* take his responsibilities and make amends. This requires moral involvement of the punisher; he has duties of care.

The imposed obligation should be bearable and the elements of restriction and coercion (complying with agreements and monitoring thereof) must be limited in such a way that they cannot thwart the fulfilment of the imposed tasks.

It is important that the means of punishment and the way in which the punished person is addressed are in line with promoting a sense of responsibility. The imposed obligation should be bearable and the elements of restriction and coercion (complying with agreements and monitoring thereof) must be limited in such a way that they cannot thwart the fulfilment of the imposed tasks. In this way the punished person *can* commit himself to the punishment. The focus should be on delivering and fulfilling something, what the (potential) victim and society are entitled to (including the offender’s behavioural change). Ideally, this involves a meaningful punishment trajectory — if possible consensually determined — that is tailored to achieving (self)restoration.

This definition raises many questions. I discuss some of them.

1. Firstly, the question is whether magistrates can distance themselves from a formal attitude towards convicted persons. After all, restorative punishment presupposes a committed attitude in which the punishing authority takes its duties of care seriously and takes into account the social circumstances of the punished person.
2. Another question is related to the assumption that the offender will improve his behaviour if he is offered a suitable programme. But does the convicted person always want to cooperate? It will be clear that accounting seasoned repeat offenders to their responsibility usually hits a hard wall. This suggests that in many cases the punisher has little choice but to resort to coercion and deterrence, although the execution of punishment must always provide

opportunities for communication, repentance and self-reform.

3. A third question is whether imprisonment would fit within the definition set out above. If detainees are placed in a standard regime with few freedoms and facilities, it is very difficult to stimulate a sense of responsibility. In that regime, punishment mainly has a repressive function. The question is whether a prison sentence can be called a punishment at all if we assume that legal punishment should not be inherently damaging and should not deprive the convicted person of civic responsibility. We could rather call imprisonment a repressive penal measure, where deterrence must mainly do the work.
4. A related question concerns the fine, which has little to offer from a moral-educational perspective. The learning process that fining initiates is often limited to reducing the chance of being caught. Often the fine is hardly felt as a burden; third parties can also take care of the payment.

This means that the punished person must be addressed respectfully, in such a way that he realises what he did to the victim.

The foregoing makes it clear that legal punishment is contained in a complex system with diverse, often conflicting objectives. It shows that developing a constructive overarching definition of legal punishment is extremely difficult. Perhaps imprisonment and the pecuniary penalty require separate legal definitions. Nevertheless, we could — reasoning from the principle of subsidiarity — give priority to a legal definition based on restorative justice goals. This means that the punished person must be addressed respectfully, in such a way that he realises what he did to the victim. He must earn his way back through restorative efforts. This punishment concept seems to fit better with current humanistic intuitions of what punishment should be, apart from state responses to serious and subversive crime.

5 Conclusion: civilising criminal punishment

One of the key questions raised by Christian Gade remains of great importance: how can we bring restorative justice from the margins to the mainstream

of criminal justice? As pointed out, I believe that developing a constructive punishment concept can give the legitimacy of restorative justice practices a significant boost. I also believe that this could reduce punitive ambitions of magistrates.

Lode Walgrave — and related thinkers — considers punishment an unnecessary and obsolete concept and deems ‘restorative punishment’ a contradictory formula. He identifies punishment solely with ‘intentional infliction of suffering.’ Simultaneously, Walgrave (2013; 2022) argues for a criminal justice system in which restorative justice procedures and sanctions have a greater role. He believes that further civilisation of the criminal justice system is possible, despite the continuing trend towards harsher sentences. Viewed in the long term, the use of violence and coercion could be further reduced.

After giving the state a monopoly on violence, and after making the use of violence more rational and more moderate, the next step is to reduce as much as possible the use of violence itself in the response to offending (Walgrave, 2022, p. 633).

In my view, we should supplement the mission to civilise the criminal justice system that Walgrave passionately advocates, with the ambition to develop humane punishment concepts and practices. Christian Gade points out the following in this regard:

By insisting that restorative justice is radically different from punishment, restorative justice advocates may — contrary to their intentions — play into the hands of those who want to preserve the status quo rather than developing future criminal justice systems in the direction of restorative justice (Gade, 2022b, p. 37).

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Beyond the boxes, to the heart: 'Thou shalt not harm another'

*What's in a name? That which we call a rose
By any other name would smell as sweet.*

William Shakespeare

1. Introduction

Are punishment and restoration necessarily mutually exclusive or can they overlap and therefore be in line with each other? This discussion was introduced by Christian Gade and Tim Chapman and then continued

through responses to it by Vincent Geeraets, Ivo Aertsen and Bas van Stokkom, among others (*Tijdschrift voor Herstelrecht*). In a sense, the reflections form a continuation of the discussion started by Antony Duff and Lode Walgrave over 20 years ago (see, among others, Walgrave, 2001; Duff, 2002).

In it, Duff takes the position that restoration is an alternative, albeit (potentially) better, more constructive or meaningful form of punishment (punishment and restoration overlap), while Walgrave defends the position that restoration is an alternative to punishment (punishment and reparation are mutually exclusive). These two opposing positions are now held by Gade and Chapman respectively.

This discussion will probably never reach a jointly supported final agreement — and that is a good thing. In a truly enlightened debate, including on criminal law, there is room for abrasive and conflicting visions, for only in this way can theory and practice continue to evolve. Realising a point omega would remove all dynamism and only lead to rigidity in the sense of dogmatism and totalitarianism. Following the relational view of law as formulated by the legal scholars Foqué and 't Hart (1990), concepts of law should remain open, including the concepts of punishment and restoration. Each author sheds his or her light on the issue and thus contributes to the debate. I myself have expressed my views on the concept of punishment and restoration several times in the past (see Claessen, 2010, 2012, 2020, 2023). In this contribution, I mainly want to raise a number of issues in response to the contributions of the aforementioned authors. This will show that my own view remains unchanged for the time being. However, I am aware that I too do not hold the truth or have the final say. It should be noted that I respond to the original Dutch contributions; when I respond to an English translation that differs in content from the Dutch contribution, I will explicitly note this.

2. The concepts of punishment and restoration

First of all, it struck me on reading the contributions that not only Gade but also Van Stokkom gives the impression that (mainly) restorative justice thinkers conceive of punishment at its core as the intentional infliction of suffering and place it diametrically opposed to restoration — as if it were a different paradigm. In this regard, Gade refers to Howard Zehr, Van Stokkom to Walgrave. Gade speaks of a 'caricature' in this context (Gade, 2023, p. 48), while Van Stokkom finds the narrowing of punishment to the intentional infliction of suffering 'contrived,' as he argues, following Gade, that there are 'many other

definitions of punishment' to be given (van Stokkom, 2023, p. 77). I will come back to the question of whether this definition of punishment is indeed a caricature and artificial, but first I would like to point out that the definition 'punishment is the intentional infliction of suffering':

- (a) has been established long before the explicit emergence of restorative justice, and
- (b) is endorsed by most criminal justice thinkers to this day.

Without wanting to open a whole bookcase here as 'proof' of both propositions (see Claessen, 2010, chap. 3), I point here to 'the standard concept of punishment' as formulated by the influential British legal philosopher Herbert Hart. Hart defines punishment on the basis of the following five cumulative 'elements':

1. it must involve pain or other consequences normally considered unpleasant;
2. it must be for an offence against legal rules;
3. it must be of an actual or supposed offender for his offence;
4. it must be intentionally administered by human beings other than the offender and
5. it must be imposed and administered by an authority constituted by a legal system against which the offence is committed (Hart, 1968, pp. 4–5; see also Claessen, 2010, p. 125).

Elements 1 and 4 together already show the 'intentional-suffering' nature of punishment.

Gade and Van Stokkom are right when they argue that other definitions of punishment are possible, but as far as I know, these alternative definitions often come from restorative justice thinkers, starting with Herman Bianchi. In his *Ethiek van het Straffen (Ethics of Punishing)*, Bianchi speaks of punishment as 'unwillingness to give in to crime, unwillingness to give way to the tendencies towards causing harm in this world,' now that *straf* (punishment) etymologically means nothing other than *stijf* (rigid) in the sense of 'non-retreat, intransigence and steadiness' (Bianchi, 1964, p. 17). In his later work, however, Bianchi turns against punishment because, also in his view, it has acquired the negative connotation of the intentional infliction of suffering. Instead of striving for a different, restorative content of the concept of punishment, he too, in his fight for restorative justice, chose to contrast punishment and restoration, since punishment in the sense of the intentional infliction

of suffering is something essentially different from restoration in the sense of *Wiedergutmachung* (Bianchi, 2010, p. 21). According to Louk Hulsman, that other great Dutch restorative justice pioneer, ‘real’ punishment presupposes not only personal responsibility but also agreement between parties (Hulsman, 1986, pp. 76–77). However, Hulsman too ultimately argues for the abolition of punishment, since it involves nothing more than

activities of a series of state organisations ... aimed at inflicting suffering, without the consent of those directly involved (Hulsman, 1986, p. 76).

In other words, criminal law is neither really about taking responsibility nor about consultation between parties to give substance to how responsibility can be taken — and so we would better say goodbye to it.

In his essay *De straf: een oergevoel in de wijsvinger* (*Punishment: a primal feeling in the index finger*), Dutch criminologist Peter Hoefnagels states:

... let us start from the primal feeling that there is something in us that makes us want to slam someone for certain behaviour, get rid of them, isolate them, lock them up, hurt them, kill them. ... As a criminologist, I can now say and sincerely believe that you and I should not do that ... because it is counterproductive for society, the other person and ourselves — and I can usually prove it — but I do not believe that you and I have a fraction *less need for punishment* as a result. ... Punishment is deeply ingrained in people (Hoefnagels, 1974, pp. 39–41).

Although to my knowledge not *every* human being, after being wronged, *always* has, let alone continues to have, a need for punishment, Hoefnagels does aptly describe what that need for punishment is, when it arises, namely: to want to give the offender literally or figuratively ‘a thrashing.’ The original basis of (the need for) punishment is therefore — via (the urge for) retribution — (the lust for) revenge (see, among others: Knigge, 1988, pp. 8, 13–15; ‘t Hart, 1997, p. 115; Claessen, 2010, pp. 134–138; Kelk and de Jong, 2023, pp. 1, 9–10). Hoefnagels — and this seems to be overlooked by many legal scholars when they cite this essay in order to *legitimise* punishment — points out that ‘our primal feeling index finger’ is out of balance, because:

It was only after the development of the state and its power that a retribution arose that is not aimed at restoration, but at doing back for the sake of doing back itself. Retribution used to mean: to compensate, to make amends, to give wages for. And [the] *Van Dale* [dictionary] still calls it that. But the word retribution has ... developed for the worse. Our living language here reveals no progress compared to Old Testament times. ... Since power centralised, since the organisation of the reaction to deviant behaviour, through the state, we no longer let people make up for what they did wrong. No, the ruler took over. And how. The ruler does not heal. He retaliates (Hoefnagels, 1974, pp. 56–58).

It is as if I am hearing Bianchi speak.

Is criminal law practice ready for a concept of punishment in which the intentional infliction of suffering plays no role, or at least no longer predominates? Hoefnagels was not optimistic about this:

In academia, people have been hammering on the anvil of the humanisation of punishment for over a century. ... But it does not help. ... Most judges and public prosecutors know remarkably little about the results of criminological research. Besides, what does it help? You can talk about purposeful punishment, but if you are a *vanuiter*, that is, if you react from ... your primal feeling, even if you use efficiency terms, you still remain a *vanuiter* (Hoefnagels, 1974, pp. 40–41).

Has so much changed in the past half century that criminal law practice is now ready for the introduction of a more humane concept of punishment? Van Stokkom believes so, now that

(t)he time when criminal judges focused only on retribution and deterrence is (far) behind us’ [and] ... criminal judges and public prosecutors adopt a problem-oriented approach

and, partly for that reason,

place great importance on the question of what can be achieved with a variety of punishments (van Stokkom 2023, pp. 78, 80; see also Van Stokkom’s English contribution, paragraph 1).

Certainly, in the meantime, community service has been added to the arsenal of punishments as a possible alternative to (short-term) imprisonment, all kinds of special conditions that are (partly) aimed at resocialisation and restoration can be attached to (partly) suspended sentences, and treatment is possible in the context of several criminal measures. However, at its core and as a rule, criminal law (read: *penal law*) is still about punishment in the sense of ‘giving the offender a thrashing.’ Van Stokkom’s picture is far too optimistic for me, while his comparison with educational punishment *in the home and school context* that focuses on ‘taking responsibility,’ ‘making amends’ and ‘moral learning’ is not convincing in my opinion: that context is significantly different from the criminal law context, especially among adult offenders (Van Stokkom’s English contribution, paragraph 3). Just take a look at the sentencing guidelines and sentencing orientation points of the Public Prosecution Office or the criminal courts respectively. For each offence listed therein, there is a certain ‘starting rate’ that can hardly be considered a good starting point for customisation. After all, that starting rate constitutes nothing more than the expression of retribution and deterrence (Claessen, 2022a, p. 116). Of course, in a concrete case, ‘pluses and minuses’ can be applied based on the person of the defendant and the circumstances of the case, but that margin does not appear to be particularly large in practice. The large group of offenders sentenced to short-term detention in the Netherlands — on the basis of the aforementioned guidelines and orientation points — is illustrative of the fact that a truly meaningful response to crime is often lacking (Claessen et al., 2023). Once more I quote Hoefnagels, now that his words have once again lost none of their topicality:

Imprisonment is ... for a wider group, [while] the general trend of scientific research is: ... damages and fines are far preferable to imprisonment (Hoefnagels, 1974, pp. 40–41, 43).

We now know that the same is true of community service. Yet, among adult offenders, imprisonment is still the most commonly imposed punishment in the Netherlands. So, there is more customisation (possible) than fifty years ago, but that customisation is too often and too much in the periphery, now that retribution and deterrence still dominate. Also, I doubt that the number of *vanuiters* among public prosecutors and criminal judges is smaller than before. I would like to believe otherwise, but practice

is largely sobering.

In short, punishment *can* mean something other than the intentional infliction of suffering, but for a long time punishment has stood for the intentional infliction of suffering, and that definition is used by most criminal and restorative justice thinkers (see also Aertsen, 2023, p. 67). Nevertheless, Gade and Van Stokkom argue for a different concept of punishment. Since I cannot fathom Gade’s concept of punishment properly, I focus in the following on Van Stokkom’s more concrete proposal. In his original Dutch contribution, he advocates ‘a more constructive conceptualisation’ and then defines punishment as:

an imposed obligation that contributes to achieving restoration or self-restoration (behavioural change). The restoration efforts that the offender has to make are considered a conscious infringement of his freedoms (van Stokkom, 2023, p. 77).

I can go a long way with *the content of* this proposed response to crime, but I do have two fundamental objections.

1. The obligation to restore of which the first sentence speaks constitutes a restorative sanction that fits entirely within a maximalist or consequential restorative justice; in my view, this restorative sanction is not a punishment (Claessen, 2012, 2020, 2022b). What is *punitive* about the order to repair what one has broken? Then any obligation to pay damages in tort law should also be considered punitive — which is rightly not the case. Therefore, it seems that the punitive nature is exclusively enclosed in the second sentence, which brings me to my second objection.
2. In my view, the infringement of the offender’s freedom by his fulfilment of the obligation to restore should not be *deliberate*; at most, it is an almost inevitable side effect. Why should such an infringement take place in the sense of ‘ought to’ (*sollen*) instead of ‘must’ (*müssen*)? In short: in Van Stokkom’s case, the infringement of the offender’s freedoms takes place *deliberately*, this is the *punitive* element and for that reason, there is a *punishment*.

He refers to Mireille Hildebrandt’s concept of punishment. According to her, punishment is:

1. a deliberate infringement of interests in the sense of rights and freedoms;
2. of a legal norm violator;
3. inflicted by the institutionalised central ruler, being a government;
4. following a legal norm violation;
5. aimed at (re)establishing the authority of the violated legal norm (Hildebrandt, 2002, p. 114).

Although Hildebrandt does not explicitly refer to pain or suffering, it is difficult to maintain that a deliberate violation of the offender's rights and freedoms has *nothing* to do with it. In the words of Dutch legal scholar Wim Jonkers:

... the most general *content* of punishment ... can be described as an objective harm that is normally also subjectively experienced as suffering (Jonkers, 1999, pp. 163–164).

Similarly, Dutch legal scholar Willem Pompe states:

Suffering is not to be understood here as the grief (subjectively) that the offender experiences about the violation of his freedom, etc. He will feel sorrow, but in principle it comes down to the damage to his goods (objectively), such as freedom, etc. One could express this objective character of the punishment with the word “evil” (Pompe, 1959, p. 8).

At first glance, Hildebrandt's definition of punishment sounds more civilised, but its content still involves the deliberate harming of the offender, the retribution of evil with evil (Claessen, 2010, pp. 125–127). This is also the case in Van Stokkom's 'constructive conceptualisation.' He apparently considers the *punitive* element — like Duff — *necessary* in response to crime. It is precisely by adding this punitive element that the response to crime becomes a punishment. However, this punitive element is not necessary at all. On the contrary, it is morally reprehensible and should therefore be avoided as much as possible — by focusing on restoring the damage by the offender towards the victim and the community. And then, in my view, there is no punishment, but restoration. In addition, the infringement of the freedoms and the suffering that compliance with the obligation to restore entails for the offender *as a side effect*, as well as

the obligation to restore itself, must be proportionate and, above all, reasonable and fair.

Furthermore, in my view, there are 'contradictions' in Van Stokkom's 'restorative concept of punishment':

The punisher imposes obligations and in doing so, he intentionally infringes on the freedoms of the person who is found guilty. That intervention is the punitive aspect of punishment. In reality — regardless of the punisher's intention — the burden imposed will be perceived as something unpleasant. The punisher should ensure that that burden is a bearable by-product of a desirable good, namely, providing restoration to the victim (van Stokkom, 2023, p. 81).

On the one hand, there is — linked to the punisher's intention — the infringement of the offender's freedoms as an *objective* ('the objective evil'), and on the other hand — separate from the punisher's intention — there is the burden of 'something unpleasant' (read: pain and suffering) as a *by-product* or side effect ('the subjective evil'). However, these are *normally* two sides of the same coin, making the distinction artificial. But more importantly, this restorative punishment definition is about restoration ('satisfaction') towards the victim (and the community?) via *deliberately* harming the offender. Although Van Stokkom argues, following Pompe and Duff, for a 'meaningful punishment trajectory' aimed at 'developing a sense of responsibility' and 'guilt redemption' as well as, following Walgrave and myself, for making 'restorative efforts ... to compensate victims and society' (van Stokkom, 2023, p. 82), this does not really come into its own, as attention to 'the constructive part' is distracted by the focus on 'the destructive part,' namely: the deliberate infringement of the offender's freedoms. Retribution of evil *with evil* cannot be reconciled with retribution of evil *with good*, no matter how subtle the attempt. It is the preservation of the punitive aspect that makes me unable to follow Van Stokkom's concept of punishment.

In his English contribution, Van Stokkom seems to take a slightly different course with regard to his 'restorative punishment concept'; there seems to be advancing insight. He now makes a plea for punishment as 'a discomfoting obligation to make amends' and 'an intentional discomfoting intervention that encourages a sense of responsibility.' The focus now seems to be on 'taking responsibility,' 'making amends' and 'moral learning,' while the intervention should be

‘non-harmful’ and ‘non-afflictive.’ According to Van Stokkom, it is possible ‘to define punishment as a ‘non-harmful,’ albeit still ‘discomforting,’ response to the offender.’ The ‘discomfort’ consists on the one hand of the confrontation of the offender with the harmful consequences of his or her act for the victim and society and on the other hand of the execution of the repair tasks and/or self-reform tasks. The intention of the punisher is limited to ‘infliction of discomfort.’ At the same time, however, the intervention does have ‘punitive aspects’ consisting of the fact that the punisher imposes ‘an obligation and thereby restricts the freedom of the person found guilty.’ In short: Van Stokkom is now concerned with the imposition of an intervention that primarily concerns ‘taking responsibility,’ ‘making amends’ and ‘moral learning,’ while this intervention is non-harmful and non-afflictive but still (intentional!) discomforting and punitive. In Van Stokkom’s view, this restorative punishment concept is the ideal punishment concept. Although I can better follow Van Stokkom’s ideas in his English contribution, I am still not convinced.

1. My first question: why should this intervention be called punishment? For me, this intervention is a restorative sanction.
2. My second question: what exactly is the difference between ‘harmful,’ ‘afflictive’ and ‘discomforting’ — and how are these concepts related to ‘suffering’? For me, these concepts largely overlap and I don’t like ‘word games.’
3. My third and final question: why should it be ‘an *intentional* discomforting intervention’? Why isn’t discomfort (or suffering) simply seen as an almost inevitable *side effect* of a restorative sanction?

It is interesting that Van Stokkom raises the question of whether imprisonment and fines meet his ideal punishment concept. The answer is simple: no, they don’t. Nevertheless, these are still the most commonly imposed punishments in criminal law, especially among adult offenders, which brings me back to the question of whether practice is ready for ‘civilising criminal punishment’ in a restorative way. It does not appear to be so, as I have already explained in the foregoing.

Unlike Gade and Van Stokkom, I see no point in redefining punishment as long as it directly or indirectly contains the retribution of evil *with evil*. And even if punishment were to be redefined in such a restorative way that in it the retribution of evil *with*

good would be the starting point, I see little point in it, because practice is not ready for it. The risk that the penal justice system will erode and ‘corrupt’ restorative justice is, in my view, life-threatening. In Chapman’s words:

I fear ... that Gade’s advocacy will lead to the demise of restorative justice. ... we’d better offer something else (Chapman, 2023, p. 53).

For the time being, it is better to bring criminal justice and restorative justice together where necessary and possible and align them, but not merge them. This is also how Aertsen seems to think, when he acknowledges that ‘some form of cooperation ... is necessary,’ but at the same time warns against ‘institutionalisation’ in the sense of ‘co-optation,’ in which ‘the original restorative justice values are in danger of being compromised’ (Aertsen, 2023, p. 70). The implementation of mediation in criminal cases in the Netherlands provides a good example of cooperation but not co-optation, or worse: submission. Mediation in criminal cases and the criminal process remain distinct processes (different games with their own rules) but are not entirely separated, as the public prosecutor or the criminal judge must take a successful mediation into account when imposing a sanction. As yet, the dialectic between punishment (as thesis) and restoration (as antithesis) has not led to a solid synthesis, with which practitioners can and want to work.

Had I become well-nigh convinced otherwise, the following passage in Gade’s contribution would have awakened me from my slumber:

It is important for the restorative justice movement to recognise that there is a widespread call to punish crimes. ... We must be careful not to become a club that is out of step with views of the general public (Gade, 2023, p. 49).

This quote reminds me of what a colleague recently said to me somewhat tantalised: ‘If you think retribution is outrageous, then I can tell you that it is completely legitimate.’ By retribution, this colleague quite clear meant the intentional infliction of suffering. And that is exactly what ‘the general public’ means by it, scholars, practitioners and politicians included. I think it is an ominous sign that the vast majority of criminal law scholars seem to be either not open to or no longer interested in the question of whether punishment in the sense of the intentional

infliction of suffering for the purpose of retribution is morally permissible. Nevertheless, history is full of prominent thinkers who rejected retribution for good ethical reasons, from Plato to Martha Nussbaum. Punishment, in their view, is permissible only for prevention, as a ‘necessary-evil’ measure. The intentional infliction of suffering is then neither a deserved evil nor an end-goal but a means to realise special and/or general prevention. Even though a lot can be haggled over in terms of prevention thinking (after all, if the effects are measurable at all, punishment often turns out not to be as effective as thought), *special* prevention thinking is also, in my view, the only right reason to punish, provided that the goal:

- a. cannot be realised in other, less drastic ways,
- b. is proportionate to the means and
- c. is actually achieved.

Strict application of these conditions automatically leads to punishment as a last resort, which leaves ample room for something else: restorative justice (Claessen, 2023).

3. Consequentialism and deontology

Gade adopts a consequentialist perspective: in his view, restorative justice deserves support only insofar as it (potentially) achieves better results in terms of victim satisfaction, recidivism reduction and cost savings. See here already the erosion and ‘corruption’ that lurk when restorative justice is incorporated into the straitjacket of the criminal justice system. This was rightly criticised in other contributions (Chapman, 2023, p. 52; Aertsen, 2023, p. 72). The author who most comprehensively denounces Gade’s consequentialist perspective is Geeraets. Although he recognises that prominent restorative justice thinkers such as Braithwaite and Walgrave employ a consequentialist argumentation in which the repair of damage is the goal, it occurs to him that restorative justice thinkers are primarily concerned with ‘dealing decently with crime, treating both offenders and victims with respect’ (Geeraets, 2023, p. 61). In his conclusion, he writes:

The mission of restorative justice is to provide a civilised response to crime, where all parties can count on respect. ... what restorative justice thinkers really care about is: offering a humane response to crime that allows for reconciliation’ (Geeraets, 2023, p. 65).

When I read these words, the question arises for me: do most criminal justice thinkers not aim for a decent, civilised and humane response to crime? Without further elaboration of these terms, restorative justice hardly distinguishes itself from other responses to crime.

Moreover, I consider Geeraets’ separation between justice on the one hand and decent, civilised and humane responses to crime on the other to be artificial and unjustified (Claessen, 2022a, p. 113). According to Geeraets, restorative justice is primarily characterised neither by a consequentialist argumentation, in which it is about the good or bad consequences of behaviour, nor by a deontological argumentation, in which behaviour in itself is good or bad. But isn’t it just the other way around: isn’t restorative justice instead characterised by both consequentialist and deontological argumentation? In other words, isn’t restorative justice both instrumental and principled? I myself follow Walgrave when he posits the restoration of harm as the *primary objective* of restorative justice. Restoration of harm is the *intended outcome* that is best achieved through *restorative* procedures, including mediation and conferencing. In my view, these restorative procedures are not only the ideal means to achieve the restorative goal, but are also themselves expressions of restorative *justice* (*sic!*). In addition, restorative justice thinkers like Walgrave and I reject the *intentional* harming of the offender and the *deliberate* adding of suffering to the offender as immoral. Unlike German philosopher Immanuel Kant who derives the duty to retribution from his categorical imperative, I derive the categorical rejection of retribution from the Golden Rule: ‘Treat others as you would like to be treated yourself’ (Claessen, 2022b, p. 16). I align myself with Scottish philosopher David Hume according to whom morality is not rooted in ‘rational argument, ... but in sympathy’ (Baggini, 2018, p. 83). German philosopher Arthur Schopenhauer takes the same view; where Hume speaks of *sympathy*, he speaks of *Mitleid* (compassion). Schopenhauer links this feeling to what he calls ‘the better consciousness,’ a spiritual consciousness from one experiences interconnectedness instead of separateness. From this he then derives his own categorical imperative:

Harm no one, on the contrary, help everyone, as much as you can (Schopenhauer, 2010, p. 120, 138; Claessen, 2011).

I completely follow my favourite philosopher on this point. As far as the moral rejection of retribution is

concerned, I can also do very well with the Socratic-Platonic method of question and answer to arrive at moral knowledge. In his work on the state, Plato has Socrates enter into a conversation with Polemarchos on the question of what constitutes good behaviour. After an extensive ‘Q&A-session,’ Plato has Socrates conclude as follows:

We therefore conclude that a person does not behave well if, as a result of his behaviour, another person suffers badly, even if that other person is an enemy. ... So if someone says that good behaviour means treating one’s fellow human beings according to what they deserve, and if for him this then means that a man ought to treat his enemies badly, he thereby shows a lack of insight, for we observe that it can never be good to treat anyone badly’ (Plato, 2005, p. 22).

Both ‘routes’ — Hume-Schopenhauer’s and Socrates-Plato’s — lead to the moral rejection of retribution and fit well with what British philosopher Julian Baggini writes:

Our moral beliefs are closely linked to how we perceive the world, and skewed perception can lead to skewed morality. Wrong beliefs lead to bad ethics. ... Our moral judgements have weight only if they are consistent with the facts about both human nature and the world’ (Baggini, 2018, pp. 85, 87).

Another word on a consequentialist argumentation in the context of restorative justice: in the foregoing, I wrote that, in my view, *special* prevention is the only right reason to punish, provided a number of conditions are met and that strict application of those conditions automatically leads to punishment as a last resort, which leaves ample room for something else: restorative justice. Because, what does restorative justice show? *Grosso modo*, it appears to lead to better results in the prevention of new crime than criminal law (Sherman and Strang, 2007; Shapland et al., 2008; Strang et al., 2013; Sherman et al., 2015). This applies not only to conferencing but also to mediation (van Dijk, 2024). While for myself the principled-deontological argument is paramount — we apply restorative justice because it is good in itself — I cannot ignore the instrumental-consequentialist argument: we apply restorative justice because it leads to good results — also in terms of reducing

reoffending rates. For me, these are two sides of the same coin: one recognises the tree by its fruits.

Finally, reconciliation. According to Geeraets, reconciliation constitutes — alongside decency — the driving force behind restorative justice. Although at first glance reconciliation is also in line with a consequentialist argument, Geeraets notes that

most restorative justice thinkers consider the conversation between offender and victim to be valuable in itself, irrespective of outcomes

and that the conversation

has an intrinsic meaning even if the goal of reconciliation is not achieved (Geeraets, 2023, p. 64).

As mentioned, there are restorative justice thinkers who do link restorative procedures to the realisation of the restoration of harm. Harm includes *relational* harm in addition to material, immaterial and moral harm. The restorative justice thinker who puts reconciliation at the centre of his work is Bianchi. According to him, everything must culminate in justice. When asked what *result* justice should lead to, he replies:

As the good fruit of justice we consider the reconciliation between people (Bianchi, 1964, p. 37).

Even if reconciliation cannot be posited as a goal, since it cannot be enforced, it does appear to be ‘best’ achieved within the context of restorative procedures.

All in all: while restorative justice is indeed justice-oriented, it fits neither entirely into a consequentialist ethics nor entirely into a deontological ethics. It has features of both, without being limited to either form of ethics.

4. Closing remarks

Restoration *can* be classified under the concept of punishment; it *can* also be associated with consequentialist as well as deontological thinking. Everything depends on definitions that indicate the core and boundaries of ‘the boxes.’ In this contribution, I have shown that, in my view, restoration is not the same as punishment, *as long as* in the latter concept, directly or indirectly, retribution in the sense of battling evil *with evil* has a place, concretely: the *intention* of harming the offender. In my view, equating punishment with retribution in the sense of the intentional infliction of suffering — whether in disguised form or not — is anything but a caricature or contrived

given current theory and practice. Therefore, I reject punishment for the time being and see restoration as something substantially different and better. Furthermore, I have shown that restorative *justice* (*sic!*) is *partly* consistent with both consequentialist and deontological thinking, and that it *primarily* does have to do with justice, not just decency. In my view, a criminal law (not a *penal* law) based on *restorative justice* can also be called humane, because it puts human beings at the centre and aims at restoring and preserving them through the retribution of evil *with good*. Incidentally, this form of retribution can be harsh if necessary; consider the intentional infliction of suffering for *special* prevention as a last resort. The aim here is not to harm the offender but to prevent new harm — including to the offender himself. Returning good for evil involves an awareness and attitude that invariably aims to repair and prevent harm. Beyond all the boxes lies the heart that should be at stake: ‘Thou shalt not harm another,’ because: ‘Treat others as you would like to be treated yourself.’ Whatever a response to injustice that underlies this core is called ... the rose will be recognised by its scent.

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What place for punishment? Some reflections on the strategic position of restorative justice

In this short article, I would like to join the discussion on the concept and role of punishment in restorative justice, as initiated by Christian Gade (2022a) and Tim Chapman (2022). Framing the debate within the context of the ‘institutionalisation’ of restorative justice will allow me to clarify the relationship between restorative justice and criminal justice and at the same time to put forward a personal opinion about the role of punishment and the strategic position of restorative justice, building on earlier developed insights (see, amongst other, Aertsen, 2004, 2006, 2022).

... how can restorative justice keep its own values and principles within an institutional environment that is strongly dominated by punitive and security rationalities?

The discussion on the institutionalisation of restorative justice is not new. In a book, published as a result of an international seminar held in Leuven in 2004, a group of social scientists presented their observations on the development of restorative justice in various parts of the world (Aertsen et al., 2006). A common thread was the following. On the one hand, a promising perspective was pictured: restorative justice is now grown up, widely available in several countries and more and more accepted at the legislative and political level. On the other hand, a critical concern could be heard: how can restorative justice keep its own values and principles within an institutional environment that is strongly dominated by punitive and security rationalities? This dilemma is certainly very much recognisable for readers of this *Newsletter*, active in the field of restorative justice, be it as practitioners or researchers. It is also a main concern in the discussion between Gade and Chapman.

Restorative justice initially developed within the context of criminal law, but was searching from the very beginning for an adequate position towards criminal justice and other normative systems in society. The discussion on the fundamentals, the legitimisation, the function and possible side-effects of criminal sanctioning has been present all the time. In this article, the concept of ‘punishment’ refers to the deliberate, intentional and legally regulated pain infliction that comes on top of the function of societal disapproval or censure (the latter can include painful or burdensome elements, but does not necessarily imply the intention of pain infliction). This restricted approach does not ignore the many other goals and

functions the phenomenon of punishment and the existence of penal institutions can adopt in society.

... it has been accepted that restorative justice has its own finality, where values such as participation, dialogue and redress are paramount.

The debate on a possible penal content of restorative justice processes mainly came to the fore in the late 1990s, when several countries witnessed a breakthrough of restorative justice programmes after a period of stagnation or hesitant developments. Legislation had helped to make a difference in many countries, often with the support of ‘soft law’ from the Council of Europe with its Recommendation R(99)19 on mediation in penal matters (1999) and the 2000 and 2002 ECOSOC Resolutions on restorative justice from the United Nations. Although the EU Framework Decision of 2001 on the standing of victims in criminal proceedings and the EU Victims Directive 2012/29/EU (2012) have contributed in a more coercive way to the implementation of restorative justice in Europe, it were mainly the above mentioned forms of non-coercive regulation (such as also the Council of Europe Recommendation CM/Rec(2018)8 concerning restorative justice in criminal matters) that have been most influential in determining the scope and principles of restorative justice. These principles do also include the necessarily ‘autonomous’ character of restorative justice *vis-à-vis* the criminal justice system. In other words, space is offered officially to develop restorative justice in an independent way: it has been accepted that restorative justice has its own finality, where values such as participation, dialogue and redress are paramount. Hence, although restorative justice processes in many countries are closely aligned to formal criminal justice procedures, international regulations insist on their autonomy. At the same time, the same regulations do stress the need

of cooperation, be it from an autonomous position. In short, although restorative justice and criminal justice processes can influence each other, international regulations do not adopt, formally or officially, a (classic or other) concept of punishment.

But still, these supranational regulations do not present restorative justice as a right for victims and offenders, and EU member states have not formally been obliged to implement restorative justice. The lack of mandatory implementation is maybe no problem at all: looking back at the young history of restorative justice in Europe and its determining factors, it is good to keep in mind the finding that successful countries where restorative justice has been broadly implemented, all started from a bottom-up approach with small-scale pilot projects beginning at the local level, followed by gradual implementation in other places, and then finally institutionalised by national legislation (Dünkel et al., 2015a).

This is all to say that restorative justice, also in European countries, has known an important development, resulting in formal legislation in nearly all EU member states. The latter has not prevented important differences from appearing between European countries, and legislation — as one form of ‘institutionalisation’ — can be conceived in very different ways in terms of scope and conditions for restorative justice to be applied. Also within countries considerable differences occur. One example of this is Belgium — with similar developments later on in The Netherlands — where on the one hand, within the framework of the criminal justice procedure and based on the French example, in 1994 the model of ‘penal mediation’ was created and top-down implemented by way of a diversionary approach for less serious offences, and, on the other hand, the model of ‘restorative mediation’ was developed gradually and bottom-up along the criminal justice process to address offences of various nature and degrees of seriousness before resulting in formal legislation in 2005. Moreover, in various countries important discrepancies are shown between restorative justice in the law and restorative justice in practice. There are even countries where restorative justice has found a legal basis without effectuating any practice. A general insight is now — internationally speaking — that the potential of restorative justice is ‘underused’ considerably, even in countries that have a more or less generalised practice such as Belgium. The challenge is to know how many cases should be dealt with by restorative justice in a country on an annual basis, taking into account the volume of (registered and non-registered) crime and the number of cases that

according to the law could be referred to restorative justice programmes.

Notwithstanding the presence of strong research evidence . . . , we are thus confronted with somewhat ambivalent developments in practice and policy.

Notwithstanding the presence of strong research evidence showing the positive effects of victim-offender mediation, conferencing and other restorative justice processes in various ways, we are thus confronted with somewhat ambivalent developments in practice and policy. This should encourage us to reflect and to be clear on what we can or should expect, and what should be avoided in implementation processes. It goes back to our core ideas of restorative justice, and how we want to build it. In this context the process of ‘institutionalisation’ should be looked at more into detail: to find out whether and how certain ideas of restorative justice and restorative values can be secured and promoted, and what place ‘punishment’ can take.

Different understandings of ‘institutionalisation’

In its sociological meaning, institutionalisation refers to a process of how certain behavioural patterns, because of their recurrent occurrence, become an independent entity or ‘institution’ in society. This could happen with, for example, mediation, if it operates as a steadily growing practice that can count on a collective application, continuity and structure. The new institution then becomes an autonomous regulatory body on itself and by its mere existence it will exercise a form of primary social control. We all feel the relevance and attractiveness of this perspective, at least ideally: restorative justice can be developed in such a way that it becomes its own institution, guided by its original values and principles.

Our understandings of punishment, sanctioning and social control will be shaped by the (institutional) environment where they operate.

But, there is also another meaning of ‘institutionalisation,’ which refers to an understanding that worries us much more. This is when mediation or other restorative justice practices are not developing into an autonomous institution, but become part of, and

dependent of, another, existing institution. The existing structure — in our case — can be for example a police service, the public prosecutor's office, the probation service, a juvenile justice agency or a victim assistance service. Restorative justice will be implemented within their structures, which are controlling essential components of the new programme, such as funding, case referrals and staff. In such an institutional and 'embedded' context it is almost unavoidable that organisational culture, task perceptions, priorities and importantly considered skills in the 'host institution' will heavily influence or determine the self-image of restorative justice practitioners and their working principles and processes, including the selection and referral of cases suitable for restorative justice. Such influences may appear even in a more pronounced way when (less clearly defined) 'restorative practices' are being implemented in social settings outside criminal justice, such as schools where specific disciplinary practices prevail. Our understandings of punishment, sanctioning and social control will be shaped by the (institutional) environment where they operate.

In most of our countries we have examples of this type of institutionalisation. In a certain way such developments are not necessarily negative, as they can help to re-orient 'the system' from inside. It becomes more problematic however when, for example, the mediation style in a programme run by the police is only focusing on quick financial settlements to be reached under (time) pressure, or when social workers in a juvenile justice agency are struggling with the challenge to give equal attention to the victim. Restricting restorative justice practices just to these formats — even when they contain restorative elements — may then become missed opportunities.

It is here where the (negative) connotation of 'co-option' of restorative justice programmes by existing structures appears: restorative justice processes will unavoidably develop into a direction where they ultimately serve the objectives, priorities and values of the host institution and where original restorative justice values may risk to become dominated. The more we accept within restorative justice practices the presence of punitive elements — as Gade is doing — the higher the chance that these practices will be situated, accepted and implemented within institutional contexts with a predominating punitive orientation, or where at least a classic concept of punishment — in the sense of deliberate pain infliction — will not be questioned. The existence, for offenders, of a psychological need or acceptance to be punished does not alter our concern that systems

are being reinforced in a punitive sense where this is not needed, or where they become disproportional, or even harmful, for both the offender and society.

In short, theoretically speaking it can go two ways: the phenomenon of 'institutionalisation' can be considered as 'a dynamic process with a constructive social meaning and innovative potential,' or it can be seen 'from a restrictive and dependent perspective when new practices are developing under the roof of existing judicial or social structures' (Aertsen, 2006), considerations which I draw on below. Or is a third way possible?

How to cope with the dilemma?

Official regulations ... do not always facilitate and allow for extension of the field of application; they can also tend to restrict the field, for example by defining the legal criteria of suitability of cases.

The dilemma as sketched above is real and recognisable for many working in the field of restorative justice. Restorative justice practitioners find themselves oscillating between two tendencies. On the one hand, we are happy that finally after all these years public and policy acceptance has been obtained, that a legal basis has been established, that funding has been secured, training programmes put into place and restorative justice programmes made available all over the country (to various degrees, depending on the country). On the other hand, we feel limited by actual situations of dependence on judicial frameworks, structures and referrals, where the potential of restorative justice is not realised in terms of real impact on society. Official regulations — important as they are — do not always facilitate and allow for extension of the field of application; they can also tend to restrict the field, for example by defining the legal criteria of suitability of cases. These criteria mostly relate to characteristics of the offender or the offence, not the needs of the victim. Regulation on funding prohibits restorative justice services to expand their scope beyond the field of criminal procedures and to develop innovative or experimental practices. In Belgium, for example, mediation is well established in both the fields of juvenile and adult criminal law, but the restorative justice services, which are mainly NGOs accredited and subsidised by the government, are not allowed to pick up cases for which no criminal or juvenile justice procedure is initiated. The space to experiment with new restorative justice models

or to apply restorative justice to prescribed or non-conventional types of crime is often restricted. This all implies that the majority of victims and offenders in society are excluded from the offer of restorative justice and that restorative justice services will be inclined to adopt and replicate the selectivity, definitions and conceptual frames of criminal justice. In this sense, we are indeed far from the ideal of giving citizens an equal right of access to restorative justice.

Much more than a question of unwillingness or lack of cooperation, the challenge has to do with institutional inertia and incapacity. Restorative justice services can adopt various positions on the continuum from system based to community oriented organisations. Whatever the institutional position of a restorative justice programme is, ongoing efforts will remain necessary in building cooperation in various directions in a balanced way, with criminal justice actors and with a range of other sectors in society.

... *how much* autonomy is needed for restorative justice programmes? And when does a lack of autonomy become a real problem?

In this debate, the key question seems to be: *how much* autonomy is needed for restorative justice programmes? And when does a lack of autonomy become a real problem? As long as our criminal justice systems are not fundamentally focusing on problem solving and restoration of individual harm and social injustices, innovative approaches such as restorative justice must be protected in their authenticity. How to ensure this autonomy? How to do so in a complex field, while keeping a sphere of mutual respect and without burning bridges? Conditions at two levels must be met: conceptually and organisationally.

Conceptual clarity

As we all know, restorative justice can be given different objectives, depending on the position of the user: an educational tool towards the offender, support to the victim, reducing re-offending, cost-effectiveness or streamlining the caseload of the judicial system, ... Besides these rather 'instrumental' or 'utilitarian' approaches, restorative justice can also be considered just as an offer or a service making dialogue possible in difficult situations. Participation is then not considered as a part or a condition in a judicial procedure, a measure or a favour, but as an intrinsic goal or a societal value on its own. Participation in a restorative justice process then becomes a good

for its own sake or for its emancipatory potential for citizens in democratic societies. This is how morality and moral growth can be practised by citizens, not by a unilateral rule-conforming approach, but by the unique experience of talking to 'the other' where affective, cognitive and performative elements (feeling, thinking and doing) are coming together and are reinforcing each other (Schweigert, 1999). The safe environment that is necessary for such encounters cannot be found within criminal justice procedures and structures, but can be offered by restorative justice practices such as mediation and conferencing. Here, the idea is to leave the shadow of predominating practices focusing on instrumental objectives as defined by the system itself, such as effectiveness or satisfaction with outcomes.

This diversity of perspectives is not new. They were already discussed in studies on 'the mediation movement' in the US 30 years ago: how some approached these new practices from

- a 'satisfaction story' (problem solving, cost effectiveness, ...),
- a 'social justice story' (community building),
- a 'transformation story' ('empowerment' and 'recognition' at individual and community level) and finally
- an 'oppression story' (confirmation and strengthening of structural injustices) (Bush and Folger, 1994).

For a similar analysis applied to restorative justice, see Johnstone and Van Ness (2007).

To assign punitive elements to restorative justice practices ... will limit the potential for offering an autonomous, neutral space free of power influences.

In this way, the approach presented here differs from the consequentialist concept of Gade and aligns more with Chapman. To attribute a punitive character to restorative justice interventions does not remediate fundamentally the well-known 'problems with current forms of punishment,' as Gade argues, but does reconfirm these problems by not challenging the concept of punishment, in particular the self-evident idea that punishment implies the experience of pain. To assign punitive elements to restorative justice practices sucks these interventions into the predominating — retributive or utilitarian — rationality of penal law

and will limit the potential for offering an autonomous, neutral space free of power influences.

It goes without saying that our option (to offer a qualitative space for encounter) represents an deal-typical picture. It is more a perspective that we should keep in mind. In order to realise the implementation of such a *perspective* as broadly and effectively as possible, we will have to take care of some institutional or organisational conditions.

Organisation matters

Initially based on Belgian experiences, I have argued for an ‘intermediate’ position of restorative justice programmes (Aertsen, 2006). Observations of restorative justice developments in other countries have strengthened me in this belief. What do we mean, more precisely, by an ‘intermediate’ position of restorative justice programmes? And how can this be realised in practice? Theory can help us again to find the right way in practice.

Referring to the theory of ‘legal pluralism’ as developed in the sociology of law from the 1970s onwards, an understanding grew that many mutually influencing ‘systems of norms’ exist in society, with formalised law being only one of many. While a legal centralism approach considers justice only as a product of the state, legal pluralism looks at law to be more pluralistic than monolithic, both private and public in character, and considers the ordering role of the official legal system more secondary than primary. Regulation in society often takes place in between the private and the public sphere, in so-called ‘semi-autonomous social fields,’ which are structured along a variety of mutually penetrating networks (family, work, neighbourhood, leisure, religion, politics, social media, justice, ...). Such semi-autonomous social fields are areas of social life that generate rules and systems internally, but that also undergo influences from the surrounding institutional and societal world (that’s why they are *semi*-autonomous).

Now, the idea is to consider restorative justice as a ‘semi-autonomous social field,’ as it is situated at the intersection of justice mechanisms that appear at the private and community level on the one hand, and the public level on the other. To make this interplay possible and fruitful, restorative justice — where different rationalities must be able to meet on an equal footing — must adopt a neutral, intermediate and ‘empty’ position, not adhering to one dominating interpretation of the case at stake.

Translated to practice, it becomes clear that this intermediate position has to be pursued at two levels.

At the local level, such a position can be built on the basis of equal cooperation between all institutional stakeholders. This local ‘partnership for restorative justice’ consists of traditional actors such as the police, public prosecutors and judges, lawyers, victim support, probation and prison, but also involves community oriented actors that are usually not operating within or with criminal justice, including social, cultural and sport organisations, educational and research institutions, and private and public employers. These local partnerships must adopt a structure of mutual commitment that offers safety and guarantees for institutional non-domination, and that allows for the development of restorative justice practices through a common learning process. Initiatives on ‘restorative cities’ can offer network structures in this sense.

... the independent, intermediate position of restorative justice programmes should be integrated and confirmed by law.

At the central level, the independent, intermediate position of restorative justice programmes should be integrated and confirmed by law. The law should protect core principles of restorative justice processes, such as confidentiality, voluntariness and neutrality, but also principles at the organisational level, in order to ensure sufficient independence and autonomy.

Conclusion

‘To be inside or outside the criminal justice system’ is a too restrictive question. ‘Institutionalisation’ of restorative justice should not result in a process of co-option or subordination under an existing institution. At the same time, institutionalisation cannot be considered as a completely autonomous process outside the criminal justice system and other institutions. I have argued for a semi-autonomous and intermediate position, where different rationalities can meet, both from a *formal* justice and an *informal* justice perspective. In this way, restorative justice can provide a ‘type of normative dialogue between the citizen and the law’ (Mazzucato, 2017) — an idea also developed by Braithwaite and others (see for example Braithwaite and Parker (1999)).

In this way, restorative justice enters into a dialogue with the criminal justice system, as argued by Gade, but it does not become part of the system. A real dialogue is not possible from a subordinate position; it requires an independent and equivalent

position, in such a way that fundamental contradiction with the system becomes possible and is even encouraged. Restorative justice practices, such as mediation and conferencing, offer an adequate forum to confront the legal norm with the normative views and life world of citizens and their communities. In such an environment, the notion of punishment can be given its own interpretation, which is not necessarily an extension of the idea of intentional pain infliction.

This position is thus not a plea for broadening the field of restorative justice into a large and unlimited range of ‘restorative practices’ in society, as we witness in various countries. ‘Justice’ considered in a particular way as discussed above — as a participatory process or mechanism, not as a product to be delivered — remains central, also in restorative justice processes. I also do not adopt an abolitionist approach towards the criminal justice system. An abolitionist approach is not possible and not desirable. So-called alternatives under an abolitionist umbrella do not challenge existing punitive rationalities of the criminal justice system; they will not remove or fundamentally change this long-standing and persistent system. What is needed is an autonomous space for constructive and permanent ‘confrontation,’ a space where a ‘healthy tension’ between protagonists can be experienced in an ongoing common learning process.

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Decency and reconciliation as a basis for restorative justice, not consequentialism: a response to Christian Gade’s ‘Restorative Justice as Punishment’

1. Introduction

In his article ‘Restorative Justice as Punishment’, Christian Gade (2022a) raises several interesting issues about the analysis of restorative justice. The central question is whether restorative justice should be viewed as diametrically opposed to criminal justice. According to Gade, the confrontation with a victim can often be painful, and there may be obligations of restoration that require a great deal from the offender. Gade suggests that it might be more exact to conceptualise these obligations in terms of a constructive form of punishment. In his view, therefore, the difference between punishment and restorative justice would be a gradual one. I agree with this take on the matter, although my reasoning for it may be slightly different. What is important, in my view, is that there should be no taboo on the use of the term ‘punishment.’ While it is beneficial if an offender sees restorative mediation as assistance, there should also be room for those who perceive it as punitive. For a defence of this view see Geeraets (2018, p. 30).

It appears to me that the motivations of restorative justice proponents are not consequentialist but rather stem from a principled desire to deal decently with crime, treating both offenders and victims with respect, and aimed at reconciliation.

In this response, however, I would like to address another idea that Gade presents in his article. He argues for restorative justice from a *consequentialist* perspective. This is quite common in the restorative justice literature. Prominent restorative justice thinkers like John Braithwaite and Lode Walgrave often emphasise that their arguments are consequentialist in nature. However, it seems to me that this is a wrong turn, and I believe it is fruitful to explain why. It appears to me that the motivations of restorative justice proponents are not consequentialist but rather stem from a principled desire to deal decently with

crime, treating both offenders and victims with respect, and aimed at reconciliation. In the following, I will provide an analysis of consequentialism and explain why restorative justice proponents should not rely on it.

2. Why consequentialism does not fit restorative justice

Christian Gade identifies himself as a consequentialist in various parts of his article. For example, he writes:

As the starting point for this contribution, I would like to say that I consider myself part of the restorative justice movement, in the sense that I support restorative justice from a consequentialist perspective. This means that I support restorative justice only to the extent

that it has better outcomes than other mechanisms of crime control (2022a, p. 11).

Variations of this statement are often found in restorative justice literature. Lode Walgrave, for instance, presents himself as a consequentialist; for example, he states: 'Restorative justice is indisputably a consequentialist approach to offending' (2003, p. 64). But the originator of this idea is John Braithwaite. He connects his consequentialist view with the consequences of crime and the transformative power of restorative justice:

For most restorative justice advocates, restorative justice is consequentialist philosophically, methodologically, and politically. The restorative method is to discuss consequences of injustices and to acknowledge them appropriately as a starting point toward healing the hurts of injustice and transforming the conditions that allowed injustice to flourish (2002c, p. 564).

In a book, co-written with Philip Pettit, Braithwaite connects consequentialism with the philosophical idea of 'dominion' (Braithwaite and Pettit, 1990, chaps. 3, 5).

But what does the term 'consequentialism' actually mean? In the first place, this term could denote a particular *ambition*. The ambition within restorative justice is to be open to the results of empirical research. How do restorative justice practices work? What are the experiences of offenders and victims? What are the effects, for example, in terms of recidivism? Restorative justice thinkers are typically interested in these empirical questions. For example, the *Leuven Declaration*, drafted by Lode Walgrave and signed by many key figures in the restorative justice movement (including Braithwaite), illustrates this point:

In concert with practitioners, scientific research on restorative justice has to provide scientific feedback on the processes and outcomes of ongoing experiments and practices, and to make suggestions for new experiments' (1997, p. 121).

I believe that there can be hardly any objection to this ambition of openness. Social scientists can play a significant role in understanding and improving

restorative justice practices by studying how they actually function.

However, the term 'consequentialism' typically has a more precise meaning in philosophy. It serves as an umbrella term for a certain mode of reasoning. Characteristic of such reasoning is that it is focused on the *consequences* of actions. The aim is to achieve *good* consequences and to *maximise* them. Note that the use of the term consequentialism does not imply a specific theory. This might present a problem for restorative justice proponents. Hedonism, for instance, is a typical example of a consequentialist theory. Within hedonism, one's own happiness is central, and the individual is focused on creating as many good consequences as possible for herself. However, I do not think Gade intends to identify himself as a hedonist.

The most common consequentialist theory is utilitarianism. Within this theory, the happiness of everyone carries equal weight, and the goal is to maximise overall happiness. This signifies that an agent, in order to act morally, should always choose the action that produces the most happiness. However, there are significant and, in my view, convincing objections to utilitarianism. On one hand, utilitarianism places very high demands on a person. Can we expect of an agent that her actions are always aimed to maximising happiness for the greatest number? (Mackie, 1977, pp. 129–130). On the other hand, utilitarianism can also lead to unfair and unjust treatment. For example, within utilitarianism, it is conceivable that an individual could be sacrificed if it contributes to the happiness of others.

If something is inherently wrong, it should never be pursued, even in the occasional case when it has good consequences.

In addition to these objections, it is perhaps even more important to note that restorative justice proponents generally do not use a consequentialist style of argumentation. The language of restorative justice is infused with a more principled way of reasoning. Lode Walgrave (2008, pp. 53–56), for example, asserts that punishment is always wrong because it intentionally inflicts harm. This categorical stance has no basis in consequentialism but aligns much better with another major ethical approach, namely deontology, also called duty-based ethics. Deontology assumes that some things are inherently right or wrong. If something is inherently wrong, it should never be pursued, even in the occasional case when it has good

consequences. There can be no compromise, and this connects well with Walgrave's categorical rejection of intentionally imposing harm on offenders.

3. Decency and reconciliation as a basis for restorative justice

In a deontological approach, the emphasis typically lies on considerations of justice. A slogan that is typical of deontology is the Latin phrase '*fiat justitia ruat caelum*', which means that justice must be done even if the heavens fall (or: the world ends). This slogan appears in the thinking of the most famous deontological philosopher, Immanuel Kant. He interprets retribution in terms of '*ius talionis*' (an eye for an eye, a tooth for a tooth) and sees it as an absolute requirement of justice. Notorious in this context is his island example. If islanders were to decide to part ways, according to Kant, they may only do so after they have first executed the last murderer (2009, p. 157). Kant does not allow for exceptions to the (harsh) principle of retribution.

It hardly needs to be argued that Walgrave's principled rejection of intentional infliction of harm clashes with Kant's principled view on retribution. This clash indicates a difference in focus in thinking about the response to crime. Kant emphasises *justice*. In his view, retributive punishment is a proper and just response to crime. It is perhaps questionable whether this is the correct view — in my view, the principle of retribution can be no more than a rudimentary principle of justice (Geeraets, 2021) — but what matters more is that Walgrave—and I believe many restorative justice proponents—are not primarily focused on justice. I would posit that *decency* and *reconciliation* drive the restorative justice movement.

... restorative justice thinkers aim for a humane response to crime which aims at reconciliation between the various parties involved.

It appears to me that a viable distinction can be made between three normative registers: expediency, justice and decency. Within restorative justice, I believe that decency is the dominant normative register. I develop this distinction in Geeraets (2022). It seems to me that restorative justice thinkers aim for a humane response to crime which aims at reconciliation between the various parties involved.

I will consider decency first. A significant indication that this normative register is important in thinking about restorative justice is the idea that only the

crime, not the person, should be condemned. This idea, central to Braithwaite's theory of 'reintegrative shaming' (Braithwaite, 1989), is embraced by many restorative justice thinkers and serves as a fundamental principle. Even if in an individual case there were reasons to believe that condemning the person might have a positive result (for example, in terms of reducing recidivism), I suspect that restorative justice proponents would still find such condemnation unacceptable. Another indication is that values such as respect, inclusion and safety (within the restorative mediation process itself) are almost always mentioned when restorative justice is discussed. The basis for these values, in my opinion, lies not so much in their contribution to an effective and efficient conflict resolution but rather in the conviction that the response to crime should be civilised and humane.

... most restorative justice thinkers consider the conversation between the offender and the victim intrinsically valuable, regardless of the results.

At first glance, it might be thought that reconciliation fits well with a consequentialist orientation. After all, restorative mediation brings parties together with the hope that they will relate to each other in a normal way again, and can move forward together in the future. Reconciliation is clearly future-oriented. However, I do not believe that this teleological orientation should be given a consequentialist interpretation. Within consequentialism, the focus is on maximising good consequences, with effectiveness and efficiency at the forefront. For example, an ideal punishment (from a consequentialist perspective) ensures maximum safety at the lowest possible cost. But this is typically not how the discourse around reconciliation operates within restorative justice. It would be strange, for instance, to claim that restorative justice is about maximising reconciliation. Additionally, I believe that most restorative justice thinkers consider the conversation between the offender and the victim intrinsically valuable, regardless of the results. The attempt to find common ground in a conversation has intrinsic meaning, even if the goal of reconciliation is not achieved.

It still seems crucial to me to understand how restorative justice works, what the experiences of offenders and victims are and what effects can be observed.

Rejecting consequentialism and emphasising decency and reconciliation does not mean that the ambition empirically to research restorative justice should be suspended. It still seems crucial to me to understand how restorative justice works, what the experiences of offenders and victims are and what effects can be observed. Moreover, I think that explicitly stating the principles of restorative justice can guide this research and help in interpreting and valuing the results.

4. Conclusion

In this response, I have argued that consequentialism does not align well with restorative justice. Instead, it is more appropriate to look for the foundation of restorative justice in ideas about decency and reconciliation. The mission of restorative justice is to offer a civilised response to crime, where all parties can expect respect. This does not imply that the effects of restorative justice are irrelevant or that research into, for example, recidivism should not take place. However, what I do argue is that, for example, the principled demand for respect for parties ultimately stands apart from such consequentialist considerations. I believe that this is where Christian Gade's reasoning may have gone astray. In his article, he places such a strong emphasis on crime control recidivism, and economic costs that he seems to lose sight of the primary concerns of restorative justice proponents: offering a humane response to crime that provides the possibility of reconciliation.

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