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Resolving the Paradox of Holding People Responsible

Abstract

Regardless of justification, it is commonplace throughout the U.S. criminal justice system as in everyday life to teach our offenders and children alike that wrong actions “have consequences,” namely, those authority figures promise to impose upon them. We do so in the name of holding people responsible for their actions, or in legal parlance in civil law, holding them accountable or liable. I noticed that in Norwegian, responsibility, accountability and liability translate into one word, *ansvar*, which I have translated from Germanic to Latin roots as “responsiveness.” In practice, the state of being responsive to others with whom one conflicts occurs when empathy moves one to recognize and accommodate the interests of others, in Roger Fisher’s terms, to shift focus from position to interests, a shift I observed as a victim-offender mediator. When we hold people responsible, we dictate rules to replace rather than invite and encourage assumption of responsibility for how ones’ actions affect others; we require obedience in place of building capacity for self-control. In legal terms, we adjudicate rather than mediate our differences. I turn from the paradox to identifying ways in which responsibility is also engendered rather than taken in our relations, inside and outside the criminal justice system, in our daily lives. I seek to recognize and encourage transition in our political culture from control

by power over others to control by sharing power with others, in moments of conflict as in all our moments of cooperation.

Giving or Taking Responsibility

If you are hiring someone, you may well ask of references: Is s/he responsible? Implicitly, can s/he be trusted if given the power to make decisions that affect others? That is what my parents wanted to trust in me, that I would prepare and go to bed responsibly if they left me with a babysitter. Or when they asked me to repeat after them when I was spending time with my first cousin, two years my junior, “I will be a responsible leader.” Implicitly, putting people in positions of responsibility implies trust that they will notice and be respond empathically, acknowledging both what works for others, and especially, acknowledging one’s harms and mistakes, adjusting one’s own agenda or course of action accordingly. People requite, foster or earn trust by learning how not to repeat their mistakes, including pain and fear they cause in others. This is a world in which people assume responsibility for the consequences of their own actions, including redress or remedy for consequences of their own actions.

Contrast this to the common-law notion of responsibility: Because I find you responsible for injury or damage you have done, I will GIVE you adverse consequences, to teach you a lesson and to make you suffer in retaliation for the suffering you have caused. You will pay a penalty, you will be punished. Now, do as I say because I say so. Instead of asking you to be moved by your feeling for those who suffer your harms, I demand your obedience to my commands, because I find you irresponsible.

Bottom line: I can try to enable you to exercise responsibility—give you responsibility—or I can take it away and dictate your choices, orders to follow, lest I make you suffer further. Giving responsibility offers actors a chance to respond empathically to those one’s actions affect; responsibility is

taken when obedience to power is commanded (Pepinsky 1998). If you want people to be responsible, you have to give them room to exercise it.

My quest has been to understand how to invite and welcome assumption of responsibility, especially in matters of crime/violence—of harm one causes others. Globally among groups and nations, it is a foundation for “peace” or “trust-building,” “reconciliation,” “conflict resolution.” In and around criminal justice, acknowledgment of responsibility for one’s actions is a fundamental requirement for “restorative justice.” Richard Quinney and I (Pepinsky and Quinney 1990) have examined work by criminologists who do and study the process that includes victim-offender reconciliation “peacemaking” (Pepinsky and Quinney 1991; Pepinsky 2013). Peacemaking takes hold as we somehow acknowledge and try to help clean up messes we have made, with one another as in our ecosystem.

Responsibility, Accountability, and Liability

I often find it informative to translate ideas and concepts from one language to another. The mediator’s practice of “reframing” what someone says is a form of translation, ostensibly within a single language. When I returned to Norway in 1986 on a Fulbright to spend time especially with Nils Christie and to study Norway as a relatively “peaceful society,” I prepared a colloquium presenting the idea of the class bias in applying the law to those who have harmed others: Criminal prosecution concentrates on holding underclass people “responsible”; civil litigation holds predominantly higher-class people “liable”; people who betray trust from positions of power over others are held “accountable.” In Norwegian, responsibility, liability and accountability translate into one word, “*ansvar*.” In its Germanic roots, *ansvar* means “answer toward,” which in Latin translates more clearly in English as “responsiveness,” that is, shifting one’s idea of what’s at issue to accommodate the meaning or concern underlying others’ conflicting issues (Pepinsky 1988), manifestation of empathy. Action driven by empathy is responsive, also known as being or becoming responsible, assuming responsibility, for the consequences of one’s actions for others. We know “responsibility” in many terms, in many ways, as attitudes or motives we

impute to what we do. Among practitioners and theorists of restorative justice, bringing offenders' attitude of *shame* out into the open is a vital part of offenders' assumption of responsibility for harm they have done.

Apology as Acceptance of Responsibility

It is often a requirement of formal victim-offender mediation that offenders apologize for the harms they have done. Writing as an experienced Mennonite facilitator of victim-offender mediation between Canadian prisoners who have committed serious violent offenses including rape-murder, and victims or their loved ones, Gustafson (2017) recognizes offenders' apologies as a condition necessary to making meaningful amends to their victims which at least partially relieve their fears, pain and suffering: *acknowledgment* of harm done, displayed in *affect* as well as in words, making oneself emotionally *vulnerable*. Whatever words offenders use, these are the elements which when combined signify "apology" to victims.

Releasing Shame or Shaming

The most powerful way to shame anyone is by means of violence, just as the most powerful way to provoke anyone into committing violence is by shaming him. Our language itself tells us this.—Gilligan (1993)

James Gilligan wrote this from his experience as a psychiatrist treating those confined as violently, "criminally" insane. Meanwhile, the version of "restorative justice" known as "conferencing," with police officers functioning as well-scripted facilitators, was first introduced in Australia, based on Braithwaite's (1989) theory, inferred from Japanese mediation practices, that transformation of offenders' behavior entailed their being shamed by their victims' pain and loss. This process is illustrated by an award-winning documentary, "Facing the Demons" (Australian Broadcasting Corporation 1999) of a conference in prison between two men who participated in a robbery of a Pizza Hut in Canberra in which

an employee was shotgunned to death; one accompanied by his mother, the other by a chaplain; the since-divorced parents of the victim; and the victim's co-workers and close friends. The video is available together with ensuing interviews with participants. In the reception after the conference, the father of the victim recruits one of the offenders to join the work of the non-profit he has formed to oppose gun violence. In the follow-up interview, he reports feeling "lighter" after unburdening himself of the pain he felt for what he had done. The mother of the victim now remembers him as he lived rather than being haunted by identifying his body in the morgue, and generally, as the victim's girlfriend reports, emerge "happier." Healing appears to happen for all concerned.

If the conference in "Facing the Demons" represents Braithwaite's shaming process in action, I find it equally plausible to infer that the process enabled the offenders to release the sense of shame they brought into the conversation. There is no indication that the facilitator has done any shaming himself, let alone asked victims to do anything other than to tell the offenders what they have suffered and how else it makes them feel—anger, questions and all; in litigators' terms, he leads none of the witnesses. The crucial point is that insofar as shame emerges, it is elicited simply by hearing the fear, pain and anger—the harm—straight from those you have hurt, and having the chance to respond, to offer to make amends, to respond to need, to assume responsibility. It is for social phenomenologist Alfred Schütz (1970) a matter of "apperception," attribution of motives we feel or impute to others for our actions and theirs, which Schütz divides into "because" and "in-order-to" motives—what makes us do or say what we do, and what we are after. As a matter of social control, I see this as the distinction between our understanding of forces that restrain us, and how we pursue honest self-interest, self-expression, accomplishment...again a case in which we have many words for a similar attitude. I owe it to my mother, Pauline Pepinsky's (1970) insight, to have laid out what became to me as I entered law school the underlying model for distinguishing whether responsibility is assumed or one is being held responsible, whether shame is released or imposed, and more broadly, to distinguish the attitudes toward social control I have called "warmaking" and "peacemaking."

Loci of Impulse Expression and Impulse Control

From social science to fiction to everyday life as reported in the news and as she otherwise encountered it as among newly made friends, my mother (P. Pepinsky, 1970) inferred that the prevailing political formal and informal culture of social control in the United States and in Norway differed in one key respect: In the United States, people typically saw control coming from outside, implicitly, from the top down; while “impulse expression,” creativity, achievement and failure thereof, was seen to be in the individual, which she (a social psychologist by training) called “Mode A” of social interaction, or as I came to see it, as a paradigm for trying to achieve social control. In Norway, “Mode B,” by contrast, achievement and failure were gauged by what the group achieved together (as in reducing economic inequality), and controlled by people containing themselves from “sticking out,” whether by hurting others or by displaying wealth, who thrived on cooperation, as in substantial representation of labor required on corporate boards, and from my later point of view, dropped to one of the world’s lowest incarceration rates by the end of the 19th century, where it very nearly remains. The locus of impulse expression is the group; the locus of impulse control rests predominantly in the individual.

There are many stories about coming home from a foreign culture and seeing one’s homeland in a new light. I began to see many instances of “Mode B” ways people had, especially in the supposedly politically conservative Midwest, in which I grew up and to which I returned for most of my teaching/learning career. Consider for instance the idea of training for and promoting “teamwork” in U.S. daily life, from competitive sports to private enterprises and formal organizations of all sorts. Ideally, you listen and learn as freely as you participate in creating a group product or idea, measuring success and failure by what the group accomplishes together, acknowledging self-discipline in contributing rather than inhibiting the collective enterprise. Ideally, each member becomes responsible for controlling his or her actions, over which impulses to restrain (anger? distrust? retaliation? competition?), and which to offer as one’s own contribution to the common good one expresses, in words and in other action—which impulses to express to accommodate and contribute to the needs and interests of others.

Perhaps Howard Zinn (2015) is best known for pointing out, in the United States, the usual descriptions of political culture we receive are from a literate elite, while if we pay attention, “the people” who have inhabited this country have shown considerable variation, as among the aboriginal inhabitants of what became the Massachusetts colony, or on the island that became Hispaniola. From (trans-)national to our personal relations in daily life, the “modes” of social control we adopt vary considerably, if only we notice. Mode A and Mode B represent the attitudes toward one another we adopt in moments of difference including conflict, whether we assume responsibility for hearing, expressing and addressing consequences of one another’s behavior we have given and received; or seek to have responsibility imposed or taken by an outside, superior authority, as by law enforcement and prosecution or parental discipline.

As in writing social history, we tend to overlook routine ways we resolve differences in our daily relations, as in conflicts and wanting to do different things with close and trusted friends, companions and confidants. For many of us, we respond so habitually with those we trust that we become scarcely aware, whether or not we find it easy to say “I’m sorry,” that when we notice our friend’s hurt or anger, we are motivated to change course and do something to help make it better, to go through steps of acknowledgment of responsibility and shift course toward trying to repair any hurt or offense, rather than persisting or ignoring the harm done. It is when our conflicts are with strangers, or with those we fear and don’t trust, that the elements of the process of transforming our relations from conflictual to cooperative become severable as stages of acknowledgment of personal responsibility and accountability for harm done, to assumption of responsibility for doing something to relieve the psychic, physical or material damage on one side, and letting go of the fear and pain one has suffered, a “forgiveness” that transforms one’s status from victimhood to survivorship, an expression of impulse or release from inside oneself rather than feeling imposed from outside. In this paradigm of eliciting rather than imposing responsibility, victims’ forgiveness (and potentially, collateral victimization suffered by those labeled offenders too)

implies that they throw off something of the control fear and anger has held over their ensuing lives, while offenders are relieved of being controlled by shame.

If the process results in resolution of conflict, it is because all parties' social reality has shifted from one of being controlled by circumstance to having agency in their relations—to having self-control and the opportunity to be appreciated and accepted by others for one's social belonging as one emerges from the process. For the group in these circumstances, the locus of control has shifted to each individual, the measure of accomplishment the sense of safety, security and trust they have achieved together. It is the challenge of those of us who seek to facilitate this transformation of our conflicts to identify and create the social conditions under which parties to conflict feel safe enough to share the pain and loss, and to assume responsibility for one's actions and feelings and their consequences to others, and gain recognition of consequences one has suffered, to the point at which what has led them to the present turns focus to discussion of where we go next.

Balancing the Yin and Yang of Social Control

In the West, Lady Justice holds a scale, a balance. Likewise, the basic Chinese character for “peace,” is a balance, with a people on each side, tilted at the top to symbolize that dynamically, the balance always tilts between human forces one way and another. And in classical Chinese cosmology, those social forces are known as *yin*—the womanhood, the moon, the silver, creative, receptive, tacitly cohesive force, and *yang*—the manhood, the sun, the golden, dominant, both constructive and destructive force. Justice and peace entail balancing our dependence on participating in an established social order; and accommodating and embracing individual and social change—a balance between accommodating diversity and depending on conformity to social expectations, between adapting to chaos and imposing order: in Pauline Pepinsky's (1970) terms between modes of action in which we control ourselves to produce results for a common good, or simply live by the rules of feeding, sheltering, of who's in charge, and of performing what legal or customary duties are laid down for us. In everyday life from personal to

organizational levels, we co-exist in a balance between living within imposed order, and accommodating and embracing change.

Consider the process of successful victim-offender mediation Gustafson (2017) describes. Participants enter the dialogue speaking for themselves alone—describing what they have done and what has happened to them, controlled only by rules upheld by the mediator. When the process works, the focus shifts toward mutual acceptance of responsibility for creating a way forward, where the tangible product is an agreement the parties have created together, where parties have become self-controlled in the process of creating a joint product.

In turn, terms of agreement are themselves accommodations to established social and material order. What can offenders reasonably be expected to do to make amends? Practically speaking, what result can victims reasonably expect offenders to accomplish, and how can they help it happen rather than standing in the way or having unreasonable expectations, that really makes a difference to you? A settlement becomes a synthesis of change and acceptance of what over time can become a shifting societal balance, as reflected for instance in sustained decarceration. Occasions for restorative justice arise when conflict, or social disorder or entropy, becomes heated within the parameters of established order, and ideally, cools or synergizes the conflict or chaos into cooperation. As between victims and offenders, it transforms pain, fear, anger, guilt and shame and distrust into trust and mutual liberation...for the moment at least—where irresponsibility and its consequences are replaced by assumption of responsibility by all concerned going forward. It is just that in the political culture of the United States where the dialogue of control by power over others prevails in public discourse, the ways we resolve conflict by mutual accommodation in our institutions as in everyday life remain *yin*, unnoticed, unconscious, so that when conflict becomes overt, we tend to resort to the *yang* of assigning blame and holding those blameworthy responsible for their actions, subjugating them to the will of others by negative and positive reinforcement, by punishment and extrinsic reward. We all live some balance of

both. In a political culture where the *yang* of holding people responsible by reward and punishment (as by incarceration) prevails in public discourse and action, denial of personal responsibility for one's actions becomes the overriding generator of social conflict and disorder. The challenge of transforming the damage we do each other out of selfish interest and disregard for those harmed is to set conditions which enable people to acknowledge freely harm they have done and suffered to one another, and to assume responsibility for coming to terms which leave everyone involved feeling safer and more secure—to move from competing to mutual interests. Identifying and creating processes which enable people to become responsible/liable/accountable for deciding and doing what it takes to relieve the pain, loss, fear, and distrust at hand—to become mutually empathic, responsive to one's another's needs and interests. In Norwegian Nils Christie's (1981) terms, it is a matter of giving parties ownership of their disputes, disrupted by modernized police failure to know those they police in many respects. Today it remains manifested in Norway where mediation mechanisms and boards are available for every level conflict and dispute in the private and public sphere, from personal to the corporate levels. For international conflicts, the process of process why which conflicting groups undertake joint responsibility for coming to terms is described by Fisher et al. (1992) as *Getting to Yes*. It is a process of balancing accommodation to structure as it is, and creative, adaptive response to emergent social need and circumstance, for the sake of social safety and security, built on trust, embracing diversity, and assuming ownership of, responsibility for, conflict management. Holding people responsible for wrongdoing impedes the process.

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