

The Ancient Concept of Restitution

An Historical Analysis of Restorative Practices of Punishment in England

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Punishment: Ancient and Modern

- Rise of restorative justice has led to an increase in discussion of historical ways of dealing with harm
- Despite being described as a ‘new paradigm for doing justice’ (Walgrave, 2003, p.216) ancient practices of punishment are often used to assist claims for the legitimacy of restorative justice
- Often this involves the presentation of ‘origin myths’ leading Daly (2002, p. 57) to call for more authoritative histories which attend to the ‘murk and constraints’ of less mythical interpretations

Restoration and Anglo-Saxon Punishment

- Anglo-Saxon era in England – 5th century A.D. to Norman Conquest of 1066
 - Introduction of written law
 - Initial emergence of limitations to the right to pursue feuds, or the beginnings of a shift from victim-centred to state-controlled justice
- Controversy between two conflicting interpretations of this (see Weitekamp, 2003, p. 119):
 - ‘a humane penal sanction perceived as beneficial to the offender and his kinship, the victim and his kinship, and society in general’
 - ‘abused by people in power, misused by the rich people as a cheap way out of trouble, and led to chaos in society’

Aims

- Examines references to punishment within the law codes of the Anglo-Saxon period with two aims:
- Producing an authoritative history which explores the changing practices of punishment across the Anglo-Saxon law codes to assess the validity of the contrasting interpretations mentioned by Weitekamp (2003)
- Understand restorative and other penal practices during the Anglo-Saxon period from a Foucaultian perspective as mechanisms which exist with ‘their own specificity in the more general field of other ways of exercising power’ (Foucault, 1977, p. 73)

Rationality of the Feud

- Feud/Settlement acted as a form of social control because they socialised decision making
- A political tactic dependent on the idea of honour as a form of social power and situated within a definite hierarchical social structure
- “It is interesting to note that compensation was determined by the rank of the injured person” (Weitekamp, 2003, p. 116) – rank and status was fundamental to the process of seeking justice: “English law was finely attuned to ... [the] question of reputation” (Bartlett, 1999: 31)

Restoring 'Right' Relationships

- Restoration was concerned with restoring 'right relationships' which were profoundly unequal and was guided by values of loyalty, heroism, honour and gift exchange
- Rank, wealth and reputation determined the likelihood that an individual would be accused and considered blameworthy, the ways in which this would be decided and the amount an offender would have to restore
- If this was the 'golden age' of the victim then it was so only for some victims and was more of a dark age for the poor or friendless falsely accused

Sovereign Power and Restoration

- Overtime the law codes were increasingly concerned with inserting the power of the sovereign into mechanisms of justice
- This acted both to reduce the ability of powerful kinship groups to evade or control justice and to offer greater protection for those who fell outside the social bonds or were weak and powerless
- Sovereign power over punishment was extended and engagement in feuds was limited in part to assert the power of the monarch over that kinship and tribes

Alternative Penalties

- Increasing references to alternative penalties and construction of these as sanctions which were carried out under royal authority:
 - Physical penalties (including death)
 - Exclusion through banishment, outlawry and imprisonment
 - Spiritual penalties such as penance, excommunication and unconsecrated burial
- These alternative penalties were most frequently used to deal with persistent or problematic offenders or those who would not cooperate with the process of justice. They began to become an alternative coercive threat to replace the role of the feud as this became increasingly restricted.

Restorative Justice: Ancient and Modern

- Oppositional nature of ‘origin myths’ is problematic
 - Victims and communities vs the state
 - Humane vs brutal
- Idealised view of restoration and lack of critical attention to the role of power and inequality
 - Restoration was itself a political tactic
 - Victim as debtor is problematic in a modern context
 - Effects of uneven distribution of wealth on restorative practices need to be considered