

RESTORATIVE JUSTICE: THEORIES AND WORRIES

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I. THEORIES OF WHY RESTORATIVE JUSTICE MIGHT RESTORE

In this paper I consider a set of theories that increasingly seem to have strong relationships with one another – theories of reintegrative shaming, procedural justice, unacknowledged shame and defiance – that offer an explanation of why restorative justice processes might be effective in reducing crime and accomplishing other kinds of restoration. Some of these theoretical claims are sure to be proved untrue by the kind of R & D advocated here. Equally, where these theoretical claims turn out to be true, we will find that the potential of this truth has not been sufficiently built into the design of restorative justice programmes.

A. Reintegrative Shaming Theory

Crime, Shame and Reintegration (Braithwaite 1989) gives an account of why restorative justice processes ought to prevent crime more effectively than retributive practices. The core claims are: (1) tolerance of crime makes things worse; (2) stigmatization, or disrespectful, outcasting shaming of crime makes crime worse still; while (3) reintegrative shaming, disapproval of the act within a continuum of respect for the offender, disapproval terminated by rituals of forgiveness, prevents crime.

In developing the theory of reintegrative shaming, I was much influenced by the restorative nature of various Asian policing and educational practices, by what I saw as the effectiveness of restorative regulatory processes for dealing with corporate crime both in Asia and the West, and by the restorative nature of socialization in Western families that succeed in raising law abiding children. Essentially, what that child development literature shows is that both permissive parenting that fails to confront and disapprove of childrens' misconduct and punitively authoritarian parenting both produce a lot of delinquents; delinquency is less likely when parents confront wrongdoing with moral reasoning (Braithwaite 1989). One implication for restorative justice advocates of this substantial body of empirical evidence is that the justice system will do better when it facilitates moral reasoning by families over what to do about a crime as an alternative to punishment by the state.

Restorative justice conferences work by inviting victims and supporters (usually family supporters) of the victim to meet with the offender and the people who care most about the offender and most enjoy the offender's respect (usually including both the nuclear and extended family, but not limited to them). This group discusses the consequences of the crime, drawing out the feelings of those who have been harmed. Then they discuss how that harm might be repaired and any steps that should be taken to prevent reoffending.

In terms of reintegrative shaming theory, the discussion of the consequences of the crime for victims (or consequences for the offender's family) structures shame into the conference; the support of those who enjoy the strongest relationships of love or respect with the offender structures reintegration into the ritual. It is not the shame of police or judges or newspapers that is most able to get through to us; it is shame in the eyes of those we respect and trust.

Evidence from the first 548 adult and juvenile cases randomly assigned to court versus conference in Canberra, Australia, is that offenders both report and are observed to encounter more reintegrative shaming in conferences than in court, that conference offenders experience more remorse and more forgiveness than court offenders, and are more likely to report that they have learnt from the process that there are people who care about them (Sherman and Strang 1997a). Data such as these call into doubt what was a common

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early reaction to *Crime, Shame and Reintegration*. This was that contemporary urban societies are not places with the interdependence and community to allow the experience of shame and reintegration to be a reality in such societies (see Braithwaite 1993b).

B. Procedural Justice Theory

The idea of reintegrative shaming is that disapproval is communicated within a continuum of respect for the offender. A key way to show respect is to be fair, to listen, to empower others with process control, to refrain from bias on the grounds of age, sex or race. More broadly, procedural justice communicates respect (Lind and Tyler 1988; Tyler 1990). Conferences do not have all the procedural safeguards of court cases, yet there are theoretical grounds for predicting that offenders and victims will find them fairer. Why? Conferences are structurally fairer because of who participates and who controls the discourse. Criminal trials invite along those who can inflict maximum damage on the other side; conferences invite those who can offer maximum support to their own side, be it the victim side or the offender side. In other words those present are expected to be fair and therefore tend to want to be fair. They tend not to see their job as doing better at blackening the character of the other than the other does at blackening theirs.

Citizens are empowered with process control, rather than placed under the control of lawyers. There is now quite a bit of evidence that procedural fairness predicts subsequent compliance with the law. For example, in the Milwaukee domestic violence experiment (Bridgeforth 1990, p. 76), "arrestees who said (in lockup) that police had not taken the time to listen to their side of the story were 36% more likely to be reported for assaulting the same victim over the next 6 months than those who said the police had listened to them" (Sherman 1993, p. 463; see also Paternoster et al. 1997). More broadly, in *Why People Obey the Law*, Tyler (1990) found that citizens were more likely to comply with the law when they saw themselves as treated fairly by the criminal justice system. Sherman (1993) reviewed subsequent supportive evidence on this question as did Tyler and Huo (2001).

The key questions are whether citizens feel they are treated more fairly in restorative justice processes than in courts and whether they are more likely to understand what is going on. The answer seems to be yes. Early results from the Canberra conferencing experiment show that offenders are more likely to understand what is going on in conferences than in court cases, felt more empowered to express their views, had more time to do so, were more likely to feel that their rights were respected, to feel that they could correct errors of fact, to feel that they were treated with respect and were less likely to feel in conferences that they were disadvantaged due to "age, income, sex, race or some other reason" (Barnes 1999; Sherman and Barnes 1997; Sherman et al. 1998). The NSW Youth Conferencing Scheme seems to be even more successful than the Canberra programme on these dimensions (Trimboli 2000). Without the randomized comparison with court, a number of other studies have shown absolutely high levels of citizen satisfaction with the fairness of restorative justice processes, with such perceptions being higher the more restorative the programmes are.

Given that there is now strong evidence that restorative justice processes are perceived to be fairer by those involved and strong evidence that perceived procedural justice improves compliance with the law, it follows as a prediction that restorative justice processes will improve compliance with the law.

C. The Theory of Unacknowledged Shame

Scholars working in the affect theory tradition of Sylvan Tomkins (1962) have a theoretical perspective on why restorative justice should reduce crime based more on the nature of shame as an affect than on shaming, reintegration and stigmatization as practices. According to this perspective shame can be a destructive emotion because it can lead one to attack others, attack self, avoid or withdraw (Nathanson's (1992) compass of shame). All of these are responses which can promote crime. A profound deficiency of Braithwaite's (1989) theory is that it is just a theory of shaming, with the emotion of shame left undertheorised.

From this perspective, therefore, a process is needed that enables offenders to deal with the shame that almost inevitably arises at some level when a serious criminal offence has occurred. Denial, for example being "ashamed to be ashamed", in Scheff's words, is not an adaptive response. Shame is a normal emotion that healthy humans must experience; it is as vital to motivating us to preserve social bonds essential to our flourishing as is fear to motivating us to flee danger. Indeed Scheff (1990, 1994), Retzinger (1991) and Scheff

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and Retzinger (1991) finger by-passed shame as the culprit in the shame-rage spirals that characterize our worst violence domestically and internationally.

The evidence these authors offer for the promotion of anger through by-passed shame is voluminous but of a quite different sort from the more quantitative evidence adduced under the other propositions in this and the last chapter. It consists primarily of collections of clinical case notes (preeminently Lewis's 1971 research) and micro-analyses of conversations (preeminently Retzinger's 1991 marital quarrels). Yet the thrust of this work is also supported by Tangney's (1995) review of quantitative studies on the relationship between shame and psychopathology: guilt about specific behaviors, "uncomplicated by feelings of shame about the self", is healthy. The problem is "chronic self-blame and an excessive rumination over some objectionable behavior" (Tangney 1995, p. 1141). Scheff and Retzinger take this further, suggesting that shame is more likely to be uncomplicated when consequences that are shameful are confronted and emotional repair work is done for those damaged. Shame will become complicated, chronic, more likely to descend into rage if it is not fully confronted. If there is nagging shame under the surface, it is no permanent solution to lash out at others with anger that blames them. Then the shame and rage will feed on each another in a shame-rage spiral. Consistent with this analysis, Ahmed (2001) has shown in a study of bullying among 1200 Canberra school children, which has now been replicated in Bangladesh, that bullies deal with shame through transforming it (into anger, for example), victims acknowledge and internalise shame so that they suffer persistent shame, while children who avoid both bullying and being victimized by bullies have the ability to acknowledge and discharge shame so that shame does not become a threat to the self. Ahmed concludes that restorative processes may reduce crime because they create spaces where there is the time and the tolerance for shame to be acknowledged, something that is not normally facilitated in the formal courtroom context

According to Retzinger and Scheff's work, if we want a world with less violence and less dominating abuse of others, we need to take seriously rituals that encourage approval of caring behavior so that citizens will acquire pride in being caring and non-dominating. With dominating behavior, we need rituals of disapproval and acknowledged shame of the dominating behavior, rituals that avert disapproval-unacknowledged shame sequences. Retzinger and Scheff (1996) see restorative justice conferences as having the potential (a potential far from always realised) to institutionalize pride and acknowledged shame that heals damaged social bonds. Conferences in this formulation are ceremonies of constructive conflict. When hurt is communicated, shame acknowledged by the person(s) who caused it, respect shown for the victim's reasons for communicating the hurt and respect reciprocated by the victim, constructive conflict has occurred between victim and offender. It may be that in the "abused spouse syndrome", for example, shame is by-passed and destructive, as a relationship iterates through a cycle of abuse, manipulative contrition, peace, perceived provocation and renewed abuse (see Retzinger 1991). Crime wounds, justice heals; but only if justice is relational (Burnside and Baker 1994).

Moore with Forsythe (1995, p. 265) emphasise that restorative justice should *not*, in the words of Gipsy Rose Lee, accentuate the positive and eliminate the negative; rather it should accentuate the positive and confront the negative. Sylvan Tomkins (1962) adduces four principles for constructive management of affect: "(1) That positive affect should be maximised. (2) That negative affect should be minimised. (3) That affect inhibition should be minimised. (4) That power to maximise positive affect, to minimise negative affect, and to minimise affect inhibition should be maximised." (Moore with Forsythe 1995, p. 264). Nathanson (1998, p. 86) links this model to an hypothesized capacity of restorative justice processes to build community, where community is conceived as people linked by scripts for systems of affect modulation. Community is built by: "1) Mutualization of and group action to enhance or maximize positive affect; 2) Mutualization of and group action to diminish or minimize negative affect; 3) Communities thrive best when all affect is expressed so these first two goals may be accomplished; 4) Mechanisms that increase the power to accomplish these goals favor the maintenance of community, whereas mechanisms that decrease the power to express and modulate affect threaten the community."

In the most constructive conflicts, shame will be acknowledged by apology (reciprocated by forgiveness) (Tavuchis 1991). Maxwell and Morris (1996) found in New Zealand family group conferences that the minority of offenders who failed to apologise during conferences were three times more likely to reoffend than those who had apologised. Interpreting any direction of causality here is admittedly difficult.

Moore (1994, p. 6) observes that in courtroom justice shame is not acknowledged because it is “hidden behind impersonal rhetoric about technical culpability.” Both Moore with Forsythe (1995) and Retzinger and Scheff (1996) have applied their methods to the observation of restorative justice conferences, observing the above mechanisms to be in play and to be crucial to shaping whether conferences succeed or fail in dealing with conflicts in ways that they predict will prevent crime. For Retzinger and Scheff (1996) conferences have the ostensible purpose of material reparation; but underlying the verbal and visible process of reaching agreement about material reparation is a more non-verbal, less visible process of symbolic reparation. It is the latter that really matters according to their theoretical framework, so the emphasis in the early restorative justice literature on how much material reparation is actually paid becomes quite misguided.

The evidence now seems strong that unacknowledged shame contributes to violence; Sherman and Barnes’s (1997), Sherman et al’s (1998, pp. 127-9) and Harris’s (2001) admittedly preliminary evidence suggests that in conferences offenders may accept and discharge shame more than when they go through court cases. If both propositions are correct, conferences might do more to reduce crime than court cases.

D. Defiance Theory

“Disrespect begets disrespect”, claims Howard Zehr (1995), and few things communicate disrespect as effectively as the criminal exploitation of another human being. Lawrence Sherman (1993) has woven propositions from the foregoing sections about procedural justice, reintegrative shaming and unacknowledged shame into an integrated theory of defiance. It has three propositions:

1. Sanctions provoke future *defiance* of the law (persistence, more frequent or more serious violations) to the extent that offenders experience sanctioning conduct as illegitimate, that offenders have weak bonds to the sanctioning agent and community, and that offenders deny their shame and become proud of their isolation from the sanctioning community.
2. Sanctions produce future *deterrence* of law-breaking (desistance, less frequent or less serious violations) to the extent that offenders experience sanctioning conduct as legitimate, that offenders have strong bonds to the sanctioning agent and community, and that offenders accept their shame and remain proud of solidarity with the community.
3. Sanctions become *irrelevant* to future law breaking (no effect) to the extent that the factors encouraging defiance or deterrence are fairly evenly counterbalanced. (Sherman 1993, pp. 448-9).

Sherman hypothesises that restorative justice processes are more likely to meet the conditions of proposition 2 than traditional punitive processes. The evidence to date supports this. We have already seen that restorative processes are accorded high legitimacy by citizens, that they are better designed to empower those with strong bonds with the offender and that they outperform court in inducing the acknowledgement and discharging of shame for wrongdoing .

While Sherman (1993) reviews some suggestive evidence that law breaking might vary under the conditions that are hypothesized to vary defiance, a systematic test of defiance theory remains to be undertaken. Results from the RISE experiment are still very preliminary here, only laying the foundations for the test of this theory. One published early result encouraging to defiance theory, however, was that while 26% of drink drivers randomly assigned to court felt bitter and angry after court, only 7% of offenders felt bitter and angry after a conference (Sherman and Strang 1997b).

Hagan and McCarthy (1997, pp. 191-7) have tested Sherman’s defiance theory against the prediction that children who have been humiliated, treated unfairly and had bonds severed by virtue of being victims of sexual abuse or physical violence (with bruising or bleeding) will have their criminal behaviour amplified by traditional criminal justice processing more than offenders who have not been abused. Their data, collected among homeless children in Toronto and Vancouver, supported the defiance theory prediction.

Sherman’s defiance theory is not an armchair theory, but one grounded in the preliminary R & D on conferencing in Australia. It is therefore important to illustrate the kind of case that motivated the prediction that restorative justice will prevent crime by reducing defiance. Rage and Restorative Incapacitation (Box 1) is a recent case from the RISE experiment in Canberra.

Box 1: Rage and Restorative Incapacitation

One man assaulted another very seriously; the victim was left lying in a litre and a half of his own blood and required \$3000 in dental work. The outcome of the conference was simply an agreement for the offender never to go within an agreed distance of the victim. On the face of it, this seems a totally inadequate remedy for a life-threatening assault; a court would likely have imposed prison time for it. But the participants in the conference would have seen such a court outcome as less just.

The victim asked for compensation for his dental bills from the offender. The offender had no money and no job, so he felt he could not agree to this. He had just come out of prison for another offence and he was about to go back to prison for a third matter. A court, given his record, would likely have extended this sentence for such a serious assault. During his last prison term, the offender cultivated a spiral of rage against the victim of the assault. He believed the victim had raped his fiancée. The fiancée did not want to lay charges, partly because all involved were part of a heroin subculture in which one simply didn't press charges against others. Secondly, the circumstances of the alleged rape were that the rape victim had been making love to another friend of her fiancée, which her alleged rapist took to be a signal that it was okay for him to do the same. It seemed plausible to our observer and to the police that this rape had occurred, especially when the assault victim said during the conference; "I didn't go out of my way to rape her." However, others at the conference did not believe that the rape had occurred.

It seemed to be the case that the victim and offender were thrown into regular contact because they purchased heroin from the same place, though this was never explicitly said. The victim was terrified that the offender would get angry again back in prison, come out and kill him this time. If the offender got an extra few months in jail for the assault, this would make such rage even more likely. So the victim and his supporters were well pleased with an outcome that guaranteed him a secure distance from the offender. The offender never rationally planned to do such damage to the victim. He had "lost it", knew he was strong enough to kill the victim if he did the same again. He and his supporters wanted to secure him against a shame-rage spiral that would put him back in prison for a third term. While the conference failed to restore harmony, it did restore peace in a way that both sides saw as just in the circumstances.

My hypothesis is that the participants are right; this was better justice than the court would have delivered, and a justice that may have prevented a murder by defusing defiance and putting in place a permanent voluntary segregation regime that was more effective incapacitation than the temporary compulsory segregation of a prison. In the four years since the conference, neither the victim nor the offender have been arrested for anything.

II. WORRIES ABOUT RESTORATIVE JUSTICE

A. Restorative Justice Practices can Increase Victim Fears of Re-Victimization

The research of Heather Strang and Kathy Daly in Australia shows that some victims of crime are actually worse off as a result of going into a restorative justice process, particularly in terms of fear of being re-victimized. However, these studies also establish that reduction of victim's fears of re-victimization appear to be about twice as common. While victims are mostly surprised to learn how shy, ashamed and inadequate offenders are, some offenders are formidable and scary. Such cases can destabilize restorative justice programmes in the media. Our worst case in Canberra involved an offender who threatened a woman with a syringe filled with blood. The conference was not well run and feelings between offender and victim deteriorated. Subsequently, the victim found a syringe left on the dashboard of her car, which she took to be a threat from the offender (though this allegation was never proved). The case was covered by a local television station. Out of two thousand Canberra conferences (some with no victims, some with 20) this is the only case of escalated victim fear that hit the media. But one can be enough! Restorative justice programmes need to offer much more comprehensive support to the victims who face such traumas.

A related worry is that restorative justice programmes can treat victims as no more than props for efforts to rehabilitate victims. This concern became acute with a number of British mediation programmes

during the 1980s where it was common for the offender and victim not to meet face to face, but rather for the mediator to be a go-between. Where no meeting occurs, Retzinger and Scheff's (1996) symbolic reparation, which we have seen is more important to most victims than material reparation, is more difficult. In these circumstances we can expect the dissatisfaction of victims to focus on the limits of the material reparation they get: "projects which claim to provide reparation for victims actually operating to maximise the potential for diversion of children from prosecution" (Haines 1998, p. 6).

Victims are often enticed into restorative justice before they are ready. Pressure to achieve "speedy trial" objectives for offenders can be quite contrary to the interests of victims. Indeed, even in terms of the interests of offenders, rushing into a restorative justice meeting can be counterproductive with a victim who with a bit more time would be ready to forgive rather than to hate. Best practice is probably to offer victims of serious crime a healing circle with victims only before proceeding to a victim-offender circle. The key judgement for the victim support circle is whether the victim is ready (if ever) to meet the offender.

B. Restorative Justice can be a "Shaming Machine" that Worsens the Stigmatization of Offenders

The "shaming machine" concern has been well articulated in Retzinger and Scheff's (1996) essay, "Strategy for Community Conferences: Emotions and Social Bonds", written after their observation of a number of Australian conferences, from which they came away concerned about the damaging effects of sarcasm, moral superiority and moral lecturing in particular:

The point about moral indignation that is crucial for conferences is that when it is repetitive and out of control, it is a defensive movement in two steps: denial of one's own shame, followed by projection of blame onto the offender... For the participants to identify with the offender, they must see themselves as like her rather than unlike her (There but for the grace of God go I). Moral indignation interferes with the identification between participants that is necessary if the conference is to generate symbolic reparation. In our judgement, uncontrolled repetitive moral indignation is the most important impediment to symbolic reparation and reintegration. But on the other hand, to the extent that it is rechannelled, it can be instrumental in triggering the core sequence of reparation...Intentional shaming in the form of sustained moral indignation or in any other guise brings a gratuitous element into the conference, the piling of shame on top of the automatic shaming that is built into the format. This format is an automatic shaming machine...in a format that is already heavy with shame, even small amounts of overt shaming are very likely to push the offender into a defensive stance, to the point that she will be unable to even feel, much less express, genuine shame and remorse.

Restorative justice processes are "already heavy with shame" as a result of the simple process of victims and their supporters talking about the consequences of the crime. In effect, that is all one needs. Umbreit (1994, p. 4) makes a similar point on victim defensiveness: "For individual victims, use of such terms as 'forgiveness' and 'reconciliation' are highly judgmental and preachy, suggesting a devaluing of the legitimate anger and rage the victims may be feeling at that point." The ideal in terms of avoiding labels is beautifully articulated from the Canadian First Nations experience by Ross (1996, p. 170):

How would you react if a victim kept piling judgmental labels on you, one after the other, calling you "vicious, perverted, deranged, vile, sickening" and so forth? Are they the kinds of conclusions you'd want to accept about your "whole" self? Or are they conclusions you'd want to fight about? Or if you didn't feel like fighting, would you simply stop listening to them, let them wash over you, never really let them penetrate?...On the other hand, what if you were an offender who sat in a circle with others and listened to someone simply relive their own reactions: their sense of violation and vulnerability, their fear of strangers, their inability to sleep, their sudden eruptions into tears and shaking at work, their sense of isolation from family and friends, their feelings of dirtiness, their gnawing suspicion that there was something so wrong with them that they deserved to be hurt and hated. What if you then heard all the relatives and friends of your victim speak in the same way, from their hearts, painting pictures of their own confusions, their powerlessness to help, their fear for the future of their daughter, sister, aunt or mother? Would you be able to shut that out as easily, to just stop listening? It is the experience of Hollow Water that careful heart speaking, with its nonjudgmental disclosure of feelings, no matter how intense, is ultimately irresistible to the vast majority of offenders.

Braithwaite and Mugford (1994) think that the best protection against the vices of moral lecturing and sarcasm is to do a good job of inviting a large number of caring supporters for both the victim and the

offender, a point also discussed by Retzinger and Scheff (1996). If these invitees really do care about the offender, they will counter moral lecturing with tributes to the sense of responsibility and other virtues of the offender. Then, even if the sort of connection with the moral lecturer that would allow productively reparative communication is severed, the bond with the other participant who comes to her defence is strengthened in the same sequence.

C. Restorative Justice is Prone to Capture by the Dominant Group in the Restorative Process

Indigenous justice can empower elders to tyrannize the young of their tribe. Critics have alleged this in a most alarming way in Canada through allegations by women from a reserve that project leaders of a programme of Indigenous justice administered by a panel of elders: “manipulated the justice system to protect family members who had committed violent rapes, had intimidated victims and witnesses into withdrawing charges, had perjured themselves during the trial of the project leader’s son (for rape), had slashed tyres of community members who tried to speak out and sent the alleged ‘rape gangs’ to their homes, and generally had used the project to further their strangle-hold on the community and the justice system.”¹

In New Zealand, I saw one tragic conference where the state funded the travel of an offender to another community because his *whanau* (extended family) wanted to separate him from a liaison with a girlfriend it did not want. In pushing for this the Youth Justice Advocate was not an advocate for the youth, who was heartbroken by this outcome, but was captive of the *whanau* which was the repeat player in the use of his legal services.

Observational work on juvenile justice conferences quite regularly reports lower levels of offender involvement than involvement by their family members. Maxwell and Morris’s (1993, p. 110-12) interviews found fully 45% of young offenders, compared to 20% of family members saying they were not involved in making the conference decision. In Canberra and South Australia, Daly (1996) reported 33% of offenders not to be engaged with the process. The Maxwell and Morris (1993) data showed family members of the offender having by far the largest influence on the decision, followed by professionals who were present, the young offender and the victim (not surprising since the victim was absent from a majority of the conferences in this study). Haines (1997) critique of conferences as a “room full of adults” who dominate a child is therefore often correct. All such failures are relative, however: the RISE experiment in Canberra shows that young offenders are considerably more likely to believe that they could express their views when they went to a conference than when they went to court (Sherman and Barnes 1997; Sherman et al. 1998, pp. 121-2). McGarrell, Olivares, Crawford and Kroovand (2000, p. 44) found that 84% of young offenders “felt involved” in their conference compared to 47% of the control group who felt involved in their alternative diversion. 86% of conferenced youth felt that they had been given a chance to express their views compared to 55% of controls. The least negative results on this question are from the Queensland conferencing programme, where Hayes, Prenzler with Wortley (1998, p. 20) report 97% of young offenders as “not pushed into being at the conference” and “NOT pushed into things in the conference” and 99% saying both that “I got to have my say at the conference” and that “People seemed to understand my side of things”.

The best remedy to this problem is systematic attention in the restorative justice preparatory process to empowerment of the most vulnerable parties - individual victims and offenders - and systematic disempowerment of the most dominant parties - the police, school authorities, state welfare authorities and sometimes large business corporations. How is this accomplished? The most critical thing is to give the individual offender and the individual victim the one-on-one power in a meeting in advance of the conference to decide who they do and do not want to be there to support them. Unfortunately, the practice is often to empower the parents of young offenders to decide who should be there. They can certainly have a legitimate say; but on the offender side it is only the offender who should make the final decision about who will make her most comfortable, who she most trusts. To the extent that one is concerned here with

¹ This is a quote that I treat as anonymous with respect to person and place. I was able to confirm the same broad story from two other sources.

imbalances of power between children and adults, men and women, major corporations and consumers, dyadic victim-offender mediation cements an imbalance. Imbalances are muddled, though hardly removed, by conferences between two communities of care, both of which contain adults and children, men and women, organized interests and disorganized individuals.

D. Restorative Justice Practices can Trample Rights Because of Impoverished Articulation of Procedural Safeguards

Robust critiques of the limitations of restorative justice processes in terms of protection of rights have been provided by Warner (1994), Stubbs (1995), Barga (1996) and Van Ness (1998). There can be little doubt that courts provide superior formal guarantees of procedural fairness than conferences.

At the *investigatory stage*, Warner (1994, p. 142) is concerned:

Will police malpractice be less visible in a system which uses FGCs [family group conferences]? One of the ways in which police investigatory powers are scrutinised is by oversight by the courts. If the police act unlawfully or unfairly in the investigation of a case, the judge or magistrate hearing the case may refuse to admit the evidence so obtained or may criticise the police officer concerned. Allegations of failure to require parental attendance during questioning, of refusal to grant access to a lawyer, of unauthorized searches and excessive force could become hidden in cases dealt with by FGCs.

These are good arguments for courts over restorative justice processes in cases where guilt is in dispute. But the main game is how to process that overwhelming majority of cases where there is an open and shut admission of guilt. Here no such advantage of court over conference applies, quite the reverse. As Warner herself points out, a guilty plea “immediately suspends the interests of the court in the treatment of the defendant prior to the court appearance” (Hogg and Brown 1985). In the production line for guilty pleas in the lower courts there is not time for any of that. In restorative justice conferences there is. Mothers in particular do sometimes speak up with critical voices about the way their child has been singled out, has been subject to excessive police force, and the like. Police accountability to the community is enhanced by the conference process. And such deterrence of abuse of police power that comes from the court does not disappear since the police know that if relations break down in the conference, the case may go to court as well.

Police therefore have reason to be more rather than less procedurally just with cases on the conference track than with cases on the court track. The preliminary RISE data from Canberra suggest they are. In about 90% of cases randomly assigned to a conference, offenders thought the police had been fair to them (“leading up to the conference” and “during”); but they only thought this in 48-78% (depending on the comparison) of the cases randomly assigned to court (Sherman et al. 1998). Offenders were also more likely to say they trusted the police after going through a conference with them than after going through a court case with them.

At the *adjudicatory stage*, Warner (1994) is concerned that restorative justice will be used as an inducement to admit guilt. In this restorative justice is in no different a position than any disposition short of the prospect of execution or life imprisonment. Proffering it can induce admissions. Systemically though, one would have thought that a shift from a punitive to a restorative justice system would weaken the allure of such inducements. In the preliminary data from the four RISE experiments in Canberra, there is a slight tendency for court offenders to be more likely than conference offenders to agree that “The police made you confess to something which you did not do in this case”. But in the preliminary results this difference was only statistically significant in the Juvenile Personal Property experiment (Sherman et al. 1998, pp. 123-4).

Warner (1994) is right, however, to point out that guilt is not always black and white. Defendants might not understand self-defence, intoxication and other defences that might be available to them. Even so, it remains the case that such matters are more likely to be actually discussed in a conference lasting about 80 minutes (Canberra data) than in a court case averaging about 10 minutes (Canberra data). This may be a simple reason why Canberra offenders who go through a conference are more likely to believe that the proceedings “respected your rights” than offenders who went through court (Sherman and Barnes 1997; Sherman et al. 1998).

At the *dispositional or sentencing stage*, Warner (1994) makes some good points about the care needed to ensure that sentences reflect only offences the evidence in this case has shown to have been committed and

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only damage the evidence shows to have been done. We have had conferences in Canberra where victims have made exaggerated claims of the damage they have suffered, in one case many thousands of dollars in excess of what more thorough subsequent investigation proved to be the truth. Warner (1994) and Van Ness (1998) are both concerned about double jeopardy when consensus cannot be reached at a conference and the matter therefore goes to court, though Warner (1994) concedes it is not "true double jeopardy". Indeed it is not. The justice model analogue would seem to be to retrial after a hung jury or appeal of a sentence decision (which no one would call double jeopardy) rather than retrial after acquittal. Moreover, it is critical that defendants have a right to appeal in court an unconscionable conference agreement they have signed, to have lawyers with them at all stages of restorative justice processes if that is their wish and that they be proactively advised of these rights.

Most restorative justice programmes around the world do not legally guarantee the American Bar Association's (1994) guideline that "statements made by victims and offenders and documents and other materials produced during the mediation/dialogue process[should be] inadmissible in criminal or civil court proceedings". This is a problem that can and should be remedied by appropriate law reform.

Van Ness (1998) has systematically reviewed the performance of restorative justice programmes for juveniles against the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"). Restorative justice programmes are certainly found wanting in the review though he concludes that they often tend to outperform traditional court processes on rules such as the right to a speedy trial. For example, the New South Wales Young Offenders Act 1997 has the following requirement: "43. Time Limit Holding Conferences: A conference must, if practical, be held not later than 21 days after the referral for the conference is received." While Van Ness's work certainly affirms our hypothesis that restorative justice processes can trample on rights, whether rights will be better or worse protected after the introduction of a restorative justice programme is a contextual matter. For example, when in South Africa prior to the Mandela Presidency thirty thousand juveniles a year were being sentenced by courts to flogging, who could doubt that the institutionalization of restorative justice conferences might increase respect for childrens' rights, as Sonnekus and Frank (1997, p. 7) argue:

[Under Apartheid] the most common sentence given was corporal punishment and children often preferred a whipping instead of residential care in a reformatory or school of industry. The time children spent in prison while awaiting trial and placement was not applied towards their sentence, thus a child may have served double and even triple sentences.

Nevertheless, rights can be trampled because of the inferior articulation of procedural safeguards in restorative justice processes compared to courts. The conclusion will seek to grapple with how justice might be enhanced in the face of this critique by a creative interplay between restorative fora and traditional western courts.

CONCLUSION

We have seen that there are theoretical grounds for believing that restorative justice can be effective, but also grounds for worry that restorative justice can trample the rights of offenders and victims, can dominate them, lack procedural protections and can give police, families or welfare professionals too much unaccountable power. Braithwaite and Parker (1999) suggest three civic republican remedies to these problems:

- (1) Contestability under the rule of law; a legal formalism that enables informalism while checking the excesses of informalism;
- (2) De-individualising restorative justice, muddying imbalances of individual power by preferring community conferences over individual-on-individual mediation;
- (3) Vibrant social movement politics that percolates into the deliberation of conferences, defends minorities against tyrannies of the majority, and connects private concerns to campaigns for public transformation.

Lawyers who work for advocacy groups - for Indigenous peoples, children, women, victims of nursing home abuse - have a special role in the integration of these three strategies. Lawyers are a strategic set of eyes and ears for advocacy groups that use specific legal cases to sound alarms about wider patterns of domination. When appropriate public funding is available for legal advocacy, advocates can monitor lists of conference outcomes and use other means to find cases where they should tap offenders or victims on the shoulder to advise them to appeal the conference agreement because they could get a better outcome in the courts. They thus become a key conduit between rule of law and rule of community deliberation. It is a mistake to see their role as simply one of helping principles of natural justice and respect of rights to filter down into restorative justice. It is also to assist movement in the other direction - to help citizens to percolate up into the justice system their concerns about what should be restored and how. A rich deliberative democracy is one where the rule of law shapes the rule of the people and the concerns of the people reshape the rule of law. Top-down legalism unreconstructed by restorative justice from below is a formula for a justice captured by the professional interests of the legal profession (the tyranny of lawyers). Bottom-up community justice unconstrained by judicial oversight is a formula for the tyranny of the majority. When law and community check and balance each other, according to Braithwaite and Parker (1999), prospects are best for a rich and plural democracy that maximizes freedom as non-domination.

Communitarianism without rights is dangerous. Rights without community are vacuous. Rights will only have meaning as claims the rich can occasionally assert in courts of law unless community disapproval can be mobilized against those who trample the rights of others. Restorative justice can enliven rights as active cultural accomplishments when rights talk cascades down from the law into community justice.

None of the problems I have discussed in this paper have been satisfactorily solved. Decades of R & D on restorative justice processes will be needed to explore all these worries properly. For the moment, we can certainly say that the research does demonstrate both the promise and the perils of restorative justice. It is, however, an immature literature, short on theoretical sophistication, on rigorous or nuanced empirical research, far too dominated by self-serving comparisons of "our kind" of restorative justice programme with "your kind" without collecting data (or even having observed "your kind" in action!). That disappoints when the panorama of restorative justice programmes around the globe is now so dazzling, when we have so much to learn from one another's contextual mistakes and triumphs.