
VISITING EXPERTS' PAPERS

THE EVOLUTION OF RESTORATIVE JUSTICE

*John Braithwaite**



I. IMAGINING TWO ROBBERS

A teenager is arrested in Tokyo for a robbery. The police send him to court where he is sentenced to six months incarceration. As a victim of child abuse, he is both angry with the world and alienated from it. During his period of confinement he acquires a heroin habit and suffers more violence. He comes out more desperate and alienated than when he went in, sustains his drug habit for the next 20 years by stealing cars, burgles hundreds of houses and pushes drugs to others until he dies in a gutter, a death no one mourns. Probably someone rather like that was arrested in Tokyo today, perhaps more than one.

Tomorrow another teenager, Hiroshi, is arrested in Tokyo for a robbery. I have seen a number of cases like the story I will tell about Hiroshi. In fact he is a composite of several Hiroshis I have seen. The police officer refers Hiroshi to a facilitator who convenes a restorative justice conference. When the facilitator asks about his parents, Hiroshi says he is homeless. His parents abused him and he hates them. Hiroshi refuses to cooperate with a conference if they attend. After talking with the parents, the facilitator agrees that perhaps it is best not to involve the parents. What about grandparents? No they are dead. Brothers and sisters? No he hates his brothers too. Hiroshi's older sister, who was always kind to him, has long since left home and he has no contact with her. Aunts and uncles? Not keen on them either, because they would always put him down as the black sheep of the family and stand by his parents. Uncle Yamada was the only one he ever had any time for, but he has not seen him for years. Teachers from school? Hates them all. Hiroshi has dropped out. They always treated him like dirt. The facilitator does not give up: "No one ever treated you okay at school?" Well, the hockey coach is the only one Hiroshi can ever think of being fair to him. So the hockey coach, Uncle Yamada and older sister are tracked down by the facilitator and invited to the conference along with the robbery victim and her daughter, who comes along to support the victim through the ordeal.

These six participants sit on chairs in a circle. The facilitator starts by introducing everyone and reminding Hiroshi that while he has admitted to the robbery, he can change his plea at any time during the conference and have the matter heard by a court. Hiroshi is asked to explain what happened in his own words. He mumbles that he needed money to survive, saw the lady, knocked her over and ran off with her purse. Uncle Yamada is asked what he thinks of this. He says that Hiroshi used to be a good kid. But Hiroshi had gone off the rails. He had let his parents down so badly that they would not even come today. "And now you have done this to this poor lady. I never thought you would stoop to violence", continues Uncle Yamada, building into an angry tirade against the boy. The hockey coach also says he is surprised that Hiroshi could do something as terrible as this. Hiroshi was always a troublemaker at school. But he could see a kindly side in Hiroshi that left him shocked about the violence. The sister is invited to speak, but the facilitator moves on to the victim when Hiroshi's sister seems too emotional to speak.

The victim explains how much trouble she had to cancel the credit cards in the purse, how she had no money for the shopping she needed to do that day. Her daughter explains that the most important consequence of the crime was that her mother was now afraid to go out on her own. In particular, she is afraid that Hiroshi is stalking her, waiting to rob her again. Hiroshi sneers at this and is unmoved, callous throughout. His sister starts to sob. Concerned about how distressed she is, the facilitator calls a brief adjournment so she can comfort her, with help from Uncle Yamada. During the break, the sister reveals that

* Chair Regulatory Institutions Network Research,
School of Social Science,
Australian National University,
Australia

she understands what Hiroshi has been through. She says she was abused by their parents as well. Uncle Yamada has never heard of this, is shocked, and not sure that he believes it.

When the conference reconvenes, Hiroshi's sister speaks to him with love and strength. Looking straight into his eyes, the first gaze he could not avoid in the conference, she says that she knows exactly what he has been through with their parents. No details are spoken. But the victim seems to understand what kind of thing is spoken to by the knowing communication between sister and brother. Tears rush down her cheeks and over a trembling mouth.

It is his sister's love that penetrates Hiroshi's callous exterior. From then on he is emotionally engaged with the conference. He says he is sorry about what the victim has lost. He would like to pay it back, but has no money or job. He assures the victim he is not stalking her. She readily accepts this now and when questioned by the facilitator says now she thinks she will feel safe walking out alone. She wants her money back but says it will help her if they can talk about what to do to help Hiroshi find a home and a job. Hiroshi's sister says he can come and live in her house for a while. The hockey coach says he has some casual work that needs to be done, enough to pay Hiroshi's debt to the victim and a bit more. If Hiroshi does a good job, he will write him a reference for applications for permanent jobs. When the conference breaks up, the victim hugs Hiroshi and tearfully wishes him good luck. He apologises again. Uncle Yamada quietly slips a hundred dollars to Hiroshi's sister to defray the extra cost of having Hiroshi in the house, says he will be there for both of them if they need him.

Hiroshi has a rocky life punctuated by several periods of unemployment, but he finds work when he can, stays out of trouble and lives to mourn at the funerals of Uncle Yamada and his sister. A year later he has to go through another conference after he steals a bicycle. The victim gets her money back and enjoys taking long walks alone. Both she and her daughter say that as a result of the conference they feel enriched, have a little more grace in their lives.

Hiroshi's conference is an example of restorative justice. A new Western wave of restorative justice began with victim-offender mediation programmes in Canada and the United States in the 1970s. Then at the end of the 1980s family group conferences more like the one used in the story of Hiroshi were first developed in New Zealand. Since then there has been a proliferation of new and varied models of restorative justice. My contention is that the defining thing they have in common is that they are a process where all the stakeholders affected by a crime can come together to discuss the consequences of the crime and what can be done to right the wrong.

II. INSTITUTIONAL COLLAPSE

Few sets of institutional arrangements created in the West since the industrial revolution have been as large a failure as the criminal justice system. In theory it administers just, proportionate corrections that deter. In practice, it fails to correct or deter, just as often making things worse as better. It is a criminal *injustice* system that systematically turns a blind eye to crimes of the powerful, while imprisonment remains the best-funded labour market programme for the unemployed and indigenous peoples. It pretends to be equitable, when we know full well that one offender may be sentenced to a year in a prison where he will be beaten on reception and then systematically bashed thereafter, raped, even infected with AIDS, while others serve 12 months in comparatively decent premises, especially if they are white-collar criminals.

While I do believe that many criminal justice systems are more decent than ours in Australia, most criminal justice systems are brutal, institutionally vengeful, and dishonest to their stated intentions. The interesting question is why are they such failures. Given that prisons are vicious and degrading places, you would expect that fear of ending up in them would deter crime.

There are many reasons for the failures of the criminal justice system to prevent crime. I will give you just one, articulated in the terms of my theory in *Crime, Shame and Reintegration*.¹ The claim of this theory is that the societies that have the lowest crime rates are the societies that shame criminal conduct most

¹ John Braithwaite, *Crime, Shame and Reintegration*. Cambridge: Cambridge University Press, 1989.

effectively. There is an important difference between reintegrative shaming and stigmatization. While reintegrative shaming prevents crime, stigmatization is a kind of shaming that makes crime problems worse. Stigmatization is the kind of shaming that creates outcasts; it is disrespectful, humiliating. Stigmatization means treating criminals as evil people who have done evil acts. Reintegrative shaming means disapproving of the evil of the deed while treating the person as essentially good. Reintegrative shaming means strong disapproval of the act but doing so in a way that is respecting of the person. Once we understand this distinction, we can understand why putting more police on the street can actually increase crime. More police can increase crime if the police are systematically stigmatizing in the way they deal with citizens. More police can reduce crime if the police are systematically reintegrative in the way they deal with citizens.

We can also understand why building more prisons could make the crime problem worse. Having more people in prison does deter some and incapacitates others from committing certain crimes, like bank robberies, because there are no banks inside the prison for them to rob, though there certainly are plenty of vulnerable people to rape and pillage. While there are these crime-preventive effects of imprisonment, because prisons stigmatize, they also make things worse for those who have criminal identities affirmed by imprisonment, those whose stigmatization leads them to find solace in the society of the similarly outcast, those who are attracted into criminal subcultures, those who treat the prison as an educational institution for learning new skills for the illegitimate labour market. On this account, whether building more prisons reduces or increases the crime rate depends on whether the stigmatizing nature of a particular prison system does more to increase crime than its deterrent and incapacitative effects reduce it.

A lack of theoretical imagination among criminologists has been a reason for the failure of the criminal justice system. Without theorizing why it fails, the debate has collapsed to a contest between those who want more of the same to make it work and those who advance the implausible position that it makes sense to stigmatize people first and then help them or subject them to rehabilitation programmes in prisons or juvenile institutions. With juvenile justice in particular, the debate throughout the century has see-sawed between the justice model and the welfare model assuming the ascendancy. See-sawing between retribution and rehabilitation has got us nowhere. If we are serious about a better future, we need to hop off this see-saw and strike out in search of a third model.

For me, that third model is restorative justice. During the past decade a number of different labels - reconciliation (Dignan, 1992; Marshall, 1985; Umbreit, 1985), peacemaking (Pepinsky and Quinney, 1991), redress (de Haan, 1990) - have described broadly similar intellectual currents. Philip Pettit and I have sought to argue for republican criminal justice (Braithwaite and Pettit, 1990). Yet the label that has secured by far the widest consent during the past few years has been that employed by Zehr (1990), Galaway and Hudson (1990) and Cragg (1992), Walgrave, Bazemore and Umbreit² and Consedine³ - restorative justice. It has become the slogan of a global social movement. For those of us who see constructive engagement with social movement politics as crucial for major change, labels that carry meaning for activists matter.

III. WHAT IS RESTORATIVE JUSTICE?

Restorative justice means restoring victims, a more victim-centred criminal justice system, as well as restoring offenders and restoring community. First, what does restoring victims mean? It means restoring the property lost or the personal injury, repairing the broken window or the broken teeth (see Table 1). It means restoring a sense of security. Even victims of property crimes such as burglary often suffer a loss of security when the private space of their home is violated. When the criminal justice system fails to leave women secure about walking alone at night, half the population is left unfree in a rather fundamental sense. Victims suffer a loss of dignity when someone violates their bodies or shows them the disrespect of taking things which are precious to them. Sometimes this disrespectful treatment engenders victim shame. "He abused me rather than some other woman because I am trash." "She stole my dad's car because I was irresponsible to park it in such a risky place." Victim shame often triggers a shame-rage spiral wherein victims reciprocate indignity with indignity through vengeance or by their own criminal acts. By seeking to

² Gordon Bazemore and Mark S. Umbreit, *Balanced and Restorative Justice*. Office of Juvenile Justice and Delinquency Prevention. Washington, DC, 1994.

³ Jim Consedine, *Restorative Justice: Healing the Effects of Crime*. Lyttleton, New Zealand: Ploughshares Publications.

hold the offender dialogueically responsible for her crime, restorative justice seeks to absolve victims of feelings of responsibility which threaten their dignity.

Table 1: What Does Restoring Victims Mean?

- Restore property loss
- Restore injury
- Restore sense of security
- Restore dignity
- Restore sense of empowerment
- Restore deliberative democracy
- Restore harmony based on a feeling that justice has been done
- Restore social support

Disempowerment is part of the indignity of being a victim of crime. The lawyers, in the words of Nils Christie “steal our conflict”⁴. According to Pettit and Braithwaite’s republican theory of criminal justice⁵, a wrong should not be defined as a crime unless it involves some domination of us that reduces our freedom to enjoy life as we choose. It follows that it is important to restore any lost sense of empowerment as a result of crime. This is particularly important where the victim suffers structurally systematic domination. For example, some of the most important restorative justice initiatives we have seen in Australia have involved some thousands of Aboriginal victims of consumer fraud by major insurance companies⁶. In these cases, victims from remote Aboriginal communities relished the power of being able to demand restoration and corporate reform from “white men in white shirts”.

The western criminal justice system has, on balance, been corrosive of deliberative democracy, though the jury is one institution that has preserved a modicum of it. Restorative justice is deliberative justice; it is about people deliberating over the consequences of a crime, how to deal with them and prevent their recurrence. Deliberative means "based on discussion" or "based on conversation". So deliberative justice is conversational justice. Deliberative democracy is opposed to just deciding what to do by taking a vote (representative democracy). Representative democracy can be think democracy because it can be based on little discussion of the issues. This contrasts with the professional justice of lawyers deciding which rules apply to a case and then constraining their deliberation within a technical discourse about that rule-application.

Restorative justice aims to restore harmony based on a feeling that justice has been done. Restoring harmony alone, while leaving an underlying injustice to fester unaddressed, is not enough. “Restoring balance” is only acceptable as a restorative justice ideal if the “balance” between offender and victim that prevailed before the crime was a morally decent balance. There is no virtue in restoring the balance by having a woman pay for a bag of rice she has stolen from a rich man to feed her children. Restoring harmony between victim and offender is only likely to be possible in such a context on the basis of a discussion of why the children are hungry and what should be done about the underlying injustice of their hunger.

Restorative justice cannot resolve the deep structural injustices that cause problems like hunger. But we must demand two things of restorative justice here. First, it must not make structural injustice worse (in the way, for example, that the Australian criminal justice system does by being an important cause of the

⁴ Nils Christie, “Conflicts as Property”, *British Journal of Criminology* 17: 1-15, 1978.

⁵ Philip Pettit and John Braithwaite, *Not Just Deserts: A Republican Theory of Criminal Justice*.

⁶ See Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability*. Cambridge: Cambridge University Press, 1993, pp. 218-23.

unemployability and oppression of Aboriginal people). Indeed, we should hope from restorative justice for micro-measures to ameliorate macro-injustice where this is possible. Second, restorative justice should restore harmony with a remedy grounded in dialogue which takes account of underlying injustices. Restorative justice does not resolve the age-old questions of what should count as unjust outcomes. It is a more modest philosophy than that. It settles for the procedural requirement that the parties talk until they feel that harmony has been restored on the basis of a discussion of all the injustices they see as relevant to the case.

Finally, restorative justice aims to restore social support. Victims of crime need support from their loved ones during the process of requesting restoration. They sometimes need encouragement and support to engage with deliberation toward restoring harmony. Friends sometimes do blame the victim, or more commonly are frightened off by a victim going through an emotional trauma. Restorative justice aims to institutionalise the gathering around of friends during a time of crisis.

A. Restoring Offenders, Restoring Community

In most cases, a more limited range of types of restoration is relevant to offenders. Offenders have generally not suffered property loss or injury as a result of their own crime, though sometimes they are a cause of the crime. Dignity, however, is generally in need of repair after the shame associated with arrest. When there is a victim who has been hurt, there is no dignity in denying that there is something to be ashamed about. Dignity is generally best restored by confronting the shame, accepting responsibility for the bad consequences suffered by the victim and apologising with sincerity⁷. A task of restorative justice is to institutionalize such restoration of dignity for offenders. When restorative justice works best, you get this core sequence of remorse-apology-forgiveness.

The sense of insecurity and disempowerment of offenders is often an issue in their offending and in discussion about what is to be done to prevent further offending. Violence by young men from racial minorities is sometimes connected to their feelings of being victims of racism. For offenders, restoring a sense of security and empowerment is often bound up with employment, the feeling of having a future, achieving some educational success, sporting success, indeed any kind of success. Many patches are needed to sew the quilt of deliberative democracy. Criminal justice deliberation is not as important a patch as deliberation in parliament, in trade unions, even in universities. But to the extent that restorative justice deliberation does lead ordinary citizens into serious democratic discussion about racism, unemployment, masculinist cultures in local schools and police accountability, it is not an unimportant element of a deliberatively rich democracy.

The mediation literature shows that satisfaction with the justice of the mediation of those who are complained against is more important to achieving mutually beneficial outcomes than the satisfaction of complainants⁸. Criminal subcultures are memory files that collect injustices⁹. Crime problems will continue to become deeply culturally embedded in western societies until we reinvent criminal justice as a process that restores a sense of procedural justice to offenders¹⁰

Finally, Frank Cullen¹¹ has suggested that there could be no better organizing concept for criminology than social support, given the large volume of evidence about the importance of social support for preventing crime. The New Zealand Maori people see our justice system as barbaric because of the way it requires the defendant to stand alone in the dock without social support. In Maori thinking, civilized justice requires the offender's loved ones to stand beside him during justice rituals, sharing the shame for what has happened. Hence the shame the offender feels is more the shame of letting his loved ones down than a western sense of individual guilt that can eat away at a person. The shame of letting loved ones down can be readily transcended by simple acts of forgiveness from those loved ones.

⁷ On this issue, I find the work of Tom Scheff and Suzanne Retzinger on by-passed shame illuminating. Tom Scheff and Suzanne Retzinger, *Emotions and Violence: Shame and Rage in Destructive Conflicts*. Lexington Books, 1991.

⁸ Pruitt

⁹ David Matza, *Delinquency and Drift*, New York: Wiley, 1964, p. 102.

¹⁰ Tom Tyler, *Why People Obey the Law*, New Haven: Yale University Press, 1990.

¹¹ Francis T. Cullen, *Social Support as an Organizing Concept for Criminology*, *Justice Quarterly*

Restoring community is advanced by iterated restorative justice rituals in which social support around specific victims and offenders is restored. At this micro level, restorative justice is an utterly bottom-up approach to restoring community. At a meso level, important elements of a restorative justice package are initiatives to foster community organization in schools, neighbourhoods, ethnic communities, churches, through professions and other NGOs who can deploy restorative justice in their self-regulatory practices. At a macro level, we must better design institutions of deliberative democracy so that concern about issues like unemployment and the effectiveness of labour market programmes have a channel through which they can flow from discussions about local injustices up into national economic policy-making debate.

B. The Universality of Restorative Traditions

I have yet to discover a culture which does not have some deep-seated restorative traditions. Nor is there a culture without retributive traditions. Retributive traditions once had survival value. Cultures which were timid in fighting back were often wiped out by more determinedly violent cultures. In the contemporary world, as opposed to the world of our biological creation, retributive emotions have less survival value. Because risk management is institutionalized in this modern world, retributive emotions are more likely to get us into trouble than out of it, as individuals, groups and nations.

The message we might communicate to all cultures is that in the world of the twenty-first century, you will find your restorative traditions a more valuable resource than your retributive traditions. Yet sadly, the hegemonic cultural forces in the contemporary world communicate just the opposite message. Hollywood hammers the message that the way to deal with bad guys is through violence. Political leaders frequently hammer the same message. Yet many of our spiritual leaders are helping us to retrieve our restorative traditions - the Dalai Lama, for example or Archbishop Desmond Tutu of South Africa.

All of the restorative values in Table 1 are cultural universals. All cultures value repair of damage to our persons and property, security, dignity, empowerment, deliberative democracy, harmony based on a sense of justice and social support. They are universals because they are all vital to our emotional survival as human beings and vital to the possibility of surviving without constant fear of violence. The world's great religions recognise that the desire to pursue these restorative justice values is universal, which is why our spiritual leaders are a hope against those political leaders who wish to rule through fear and by crushing deliberative democracy. Ultimately, those political leaders will find that they will have to reach an accommodation with the growing social movement for restorative justice, just as they must with the great religious movements they confront. Why? Because the evidence is now strong that ordinary citizens like restorative justice¹².

The virtues restorative justice is about restoring are viewed in admittedly different ways in different cultures and opinion about the culturally appropriate ways of realising the virtues differ greatly. Hence, restorative justice must be a culturally diverse social movement that accommodates a rich plurality of strategies in pursuit of the truths it holds to be universal. It is about different cultures joining hands as they discover the profound commonalities of their experience of the human condition; it is about cultures learning from each other on the basis of that shared experience; it is about realising the value of diversity, of preserving restorative traditions that work because they are embedded in a cultural past. Scientific criminology will never discover any universally best way of doing restorative justice. The best path is the path of cultural plurality in pursuit of the culturally shared restorative values in Table 1.

C. A Path to Culturally Plural Justice

A restorative justice research agenda to pursue this path has two elements:

1. Culturally specific investigation of how to save and revive the restorative justice practices that remain in all societies.
2. Culturally specific investigation of how to transform state criminal justice both by making it more restorative and by rendering its abuses of power more vulnerable to restorative justice.

¹² See, for example, Alison Morris and Gabrielle Maxwell, "Juvenile Justice in New Zealand: A New Paradigm", Australian and New Zealand Journal of Criminology 26: 72-90, 1992; Donald Clairmont, "Alternative Justice Issues for Aboriginal Justice", Atlantic Institute of Criminology, November, 1994.

123RD INTERNATIONAL SENIOR SEMINAR
VISITING EXPERTS' PAPERS

On the first point, I doubt that neighborhoods in our cities are replete with restorative justice practices that can be retrieved, though there are some. Yet in the more micro context of the nuclear family, the evidence is overwhelming from the metropolitan US that restorative justice is alive and well and that families who are more restorative are likely to have less delinquent children than families who are punitive and stigmatizing¹³.

Because families so often slip into stigmatization and brutalization of their difficult members, we need restorative justice institutionalized in a wider context that can engage and restore such families. In most societies, the wider contexts where the ethos and rituals of restorative justice are alive and ready to be piped into the wider streams of the society are schools, churches and remote indigenous communities. If it is hard to find restorative justice in the disputing practices of our urban neighbourhoods, the experience of recent years has been that they are relatively easy to locate in urban schools¹⁴. This is because of the ethos of care and integration which is part of the educational ideal (which, at its best, involves a total rejection of stigmatization) and because the interaction among the members of a school community tends to be more intense than the interaction among urban neighbours. Schools, like families, have actually become more restorative and less retributive than the brutal institutions of the nineteenth century. This is why we have seen very successful restorative conferencing programmes in contemporary schools¹⁵ We have also seen anti-bullying programmes with what I would call a restorative ethos which have managed in some cases to halve bullying in schools.

More of the momentum for the restorative justice movement has come from the world's churches than from any other quarter. Even in a nation like Indonesia where the state has such coercive power, the political imperative to allow some separation of church and state has left religious communities as enclaves where restorative traditions could survive, just as they are also sites where fundamentalist retributivism can flourish. Religions like Islam and Christianity have strong retributive traditions as well as restorative ones.

When I spoke at a conference on restorative justice in Indonesia in the late 1990s, I was struck in a conversation with three Indonesians - one Muslim, one Hindu and one Christian - that in ways I could not understand as an agnostic, each was drawing on a spirituality grounded in their religious experience to make sense of restorative justice. Similarly, I was moved by the spirituality of Cree approaches to restorative justice when a number of native Canadians visited Canberra. I know there is something important I need to learn about native American spirituality and how it enriches restorative justice. It seems clear to me that it does enrich it, but I do not understand how. I suppose unless there are things that one can see are important without understanding them, one is not really an intellectual.

Asian communities are a cultural resource for the whole world. Because they have not been totally swamped by the justice codes of the West, they are a cultural resource, just as the biodiversity of the Australian continent supplies the entire world a genetic resource. The very people who have succumbed least to the Western justice model, who have been insulated from Hollywood a little more and for a little longer, are precisely those with the richest cultural resources from which the restorative justice movement can learn.

Point 2 of the agenda is to explore how to transform state criminal justice. In our multicultural cities I have said that we cannot rely on spontaneous ordering of justice in our neighbourhoods. There we must be more reliant on state reformers as catalysts of a new urban restorative justice. In our cities, where neighbourhood social support is least, where the loss from the statist takeover of disputing is most damaging, the gains that can be secured from restorative justice reform are greatest. When a police officer with a restorative justice ethos arrests a youth in a tightly knit rural community who lives in a loving family, who enjoys social support from a caring school and church, that police officer is not likely to do much better or worse by the child than a police officer who does not have a restorative justice ethos. Whatever the police do, the child's support network will probably sort the problem out so that serious reoffending does not

¹³ See the discussion of the evidence on this in Braithwaite, *Crime, Shame and Reintegration*, pp. 54-83.

¹⁴ Thorsburn.

¹⁵ *Ibid.*

occur. But when a police officer with a restorative justice ethos arrests a homeless child in the metropolis like Hiroshi, who hates parents who abused him, who has dropped out of school and is seemingly alone in the world, it is there that the restorative police officer can make a difference that will render him more effective in preventing crime than the retributive police officer. At least that is my hypothesis, one we can test empirically and are testing empirically.

In the alienated urban context where community is not spontaneously emergent in a satisfactory way, what the criminal justice system can do is construct a community of care around a specific offender or a specific victim who is in trouble. We need an individual-centred communitarianism that can practically be accomplished in the modern metropolis. That is what the story of Hiroshi is about. With the restorative justice conferences being convened in multicultural metropolises like Auckland, Adelaide, Sydney, Singapore, London, Toronto and Minneapolis the selection principle as to who is invited to the conference is the opposite to that with a criminal trial. We invite to a criminal trial those who can inflict most damage on the other side. With a conference we invite those who might offer most support to their own side - Hiroshi's sister, uncle and hockey coach, the victim's daughter on the other side.

In terms of the theory of reintegrative shaming, the rationale for who is invited to the conference is that the presence of those on the victim's side structures shame into the conference, the presence of supporters on the offender's side structures reintegration into the ritual. Conferences can be run in many different ways from the story of Hiroshi's conference. Maori people in New Zealand tend to want to open and close their conferences with a prayer. The institutions of restorative justice we need to build in the city must be culturally plural, quite different from one community to another depending on the culture of the people involved. It is the empowerment principle of restorative justice that makes this possible - empowerment with process control.

From a restorative perspective, the important thing is that we have institutions in civil society which confront serious problems like violence rather than sweep them under the carpet, yet which do so in a way that is neither retributive nor stigmatizing. Violence will not be effectively controlled by communities unless the shamefulness of violence is communicated. This does not mean that we need criminal justice institutions that set out to maximise shame. On the contrary, if we set out to do that we risk the creation of stigmatizing institutions¹⁶ All we need do is nurture micro-institutions of deliberative democracy that allow citizens to discuss the consequences of criminal acts, who is responsible, who should put them right and how. Such deliberative processes naturally enable those responsible to confront and deal with the shame arising from what has happened. And if we get the invitation list right by inviting along people who enjoy maximum respect and trust on both the offender and victim side, then we maximize the chances that shame will be dealt with in a reintegrative way.

D. Decline and Revival in Restorative Traditions

The traditions of restorative justice that can be found in all the world's great cultures have been under attack during the past two centuries. Everywhere in the world, restorative ideals have suffered serious setbacks because of the globalization of the idea of a centralized state that takes central control of justice and rationalizes it into a punitive regime. Control of punishment strengthened the power and legitimacy of rulers¹⁷. So did control of mercy, the power of royal or presidential pardon. What rulers really wanted was the political power of controlling the police, the prisons and the courts. However, abuse of that power proved at times such a threat to their legitimacy that they were forced by political opponents to institutionalize certain principles of fairness and consistency into the state system. Of course, the new democratic rulers were no more enthusiastic about returning justice to the people than were the tyrants they succeeded; the secret police continued to be important to combating organized threats to the state monopoly of violence, the regular police to disorganized threats. The pretence that the state punished crime in a consistent, politically even-handed way, was part of the legitimation for democratically centralized justice. Citizens continue to see this as a pretense. They realise that whatever the law says, the reality is one law for the rich, another for the poor; one set of rules for the politically connected, another for the powerless.

¹⁶ Tom Scheff and Suzanne Retzinger.

¹⁷ See, for example, Michel Foucault, *Discipline and Punish: The Birth of the Prison*. London: Allen Lane, 1977.

123RD INTERNATIONAL SENIOR SEMINAR
VISITING EXPERTS' PAPERS

While it is a myth that centralized state law enabled greater consistency and lesser partiality than community-based restorative justice, it is true that abuse of power always was and still is common in community justice. And it is true that state oversight of restorative justice in the community can be a check on abuse of rights in local programmes, local political dominations and those types of unequal treatment in local programmes that are flagrantly unacceptable in the wider demos¹⁸. Equally it is true that restorative justice can be a check on abuse of rights by the central state. We see it in restorative justice conferences in Canberra when a mother asks during the conference that something be done about the police officers who continue to use excessive force in their dealings with her son, who continue to victimize her son for things done by others. The restorative justice ideal could not and should not be the romantic notion of shifting back to a world where state justice is replaced by local justice. Rather, it might be to use the existence of state traditions of rights, proportionality and rule of law as resources to check abuse of power in local justice and to use the revival of restorative traditions to check abuse of state power. In other words, restorative justice constitutionalized by the state can be the stuff of a republic with a richer separation of powers¹⁹, with less abuse of power, than could be obtained either under dispute resolution totally controlled by local politics or disputing totally dominated by the state.

The key elements of North Atlantic criminal justice that have globalized almost totally during the past two centuries are:

1. Central state control of criminal justice.
2. The idea of crime itself and that criminal law should be codified.
3. The idea that crimes are committed against the state (rather than the older ideas that they were committed against victims or god).
4. The idea of having a professionalized police who are granted a monopoly over the use of force in domestic conflicts.
5. The idea of moving away from compensation as the dominant way of dealing with crime by building a state prisons system to systematically segregate the good from the bad and a complementary system of asylums to segregate the mad from both the bad and the good.
6. The idea that fundamental human rights should be protected during the criminal process.

Like abolitionists, restorative justice theorists see most of these elements of the central state takeover of criminal justice as retrograde. However, unlike the most radical versions of abolitionism, restorative justice sees promise in preserving a state role as a watchdog of rights and concedes that for a tiny fraction of the people in our prisons it may actually be necessary to protect the community from them by incarceration. While restorative justice means treating many things we presently treat as crime simply as problems of living, restorative justice does not mean abolishing the concept of crime. In restorative justice rituals, being able to call wrongdoing a crime can be a powerful resource in persuading citizens to take responsibility, to pay compensation, to apologise, especially with corporate criminals who are not used to thinking of their exploitative conduct in that way²⁰. Restorative justice does not mean abolishing the key elements of the state criminal justice system that has globalized so totally this century; it means shifting power from them to civil society, keeping key elements of the statist revolution but shifting power away from central

¹⁸ Jeremy Webber makes this point in the Canadian context: “the challenge is to reinvent aboriginal institutions so that they draw upon indigenous traditions and insights in a manner appropriate to the new situation. This may mean inventing checks to prevent abuse that were unnecessary two hundred years ago or which existed in a very different form”. Jeremy Webber, “Individuality, Equality and Difference: Justification for a Parallel System of Aboriginal Justice in Robert Silverman and Marianne Nielsen (eds.) *Aboriginal Peoples and Canadian Criminal Justice*. Toronto: Butterworths, 1992, p. 147.

¹⁹ John Braithwaite, *On Speaking Softly and Carrying Sticks: Neglected Dimensions of a Republican Separation of Powers*, unpublished paper, 1996.

²⁰ See John Braithwaite, “Corporate Crime and Republican Criminological Praxis”, in F. Pearce and L. Snider (eds.), *Corporate Crime: Ethics, Law and State*. University of Toronto press, 1995.

institutions and checking the power that remains by the deliberative democracy from below that restorative justice enables.

So you see I have an analysis that is unfashionably universal. I believe that restorative justice will come to be a profoundly influential social movement throughout the world during the next century firstly because it appeals to values that are shared universally by humanity, secondly because it responds to the defects of a centralized state criminal justice model that itself has totally globalized and utterly failed in every country where it gained the ascendancy. Everywhere it has failed, there are criminologists or lawyers within the state itself who are convinced of that failure. And given the global imperatives for states to be competitive by being fiscally frugal, large state expenditures that do not deliver on their objectives are vulnerable to social movements who claim they have an approach which will be cheaper, work better and be more popular with the people in the long run.

IV. BEYOND COMMUNITARIANISM VERSUS INDIVIDUALISM

Some criminologists in the West are critical of countries like Singapore, Indonesia and Japan where crime in the streets is not the problem it is in the West because they think individualism in these societies is crushed by communitarianism or collective obligation. Their prescription is that Asian societies need to shift the balance away from communitarianism and allow greater individualism. I don't find that a very attractive analysis.

Some Asian criminologists are critical of countries like the US and Australia because they think these societies are excessively individualistic, suffering much crime and incivility as a result. According to this analysis, the West needs to shift the balance away from individualism in favour of communitarianism, shift the balance away from rights and toward collective responsibilities. I don't find that a very attractive analysis either.

Both sides of this debate can do a better job of learning from each other. We can aspire to a society that is strong on rights and strong on responsibilities, that nurtures strong communities and strong individuals. Indeed, in the good society strong communities constitute strong individuals and vice versa. Our objective can be to keep the benefits of the statist revolution. Community justice is often oppressive of rights, often subjects the vulnerable to the domination of local elites, subordinates women, it can be procedurally unfair and tends to neglect structural solutions. Mindful of this, we might reframe the two challenges posed earlier in the lecture:

1. Helping indigenous community justice to learn from the virtues of liberal statism - procedural fairness, rights, protecting the vulnerable from domination.
2. Helping liberal state justice to learn from indigenous community justice - learning the restorative community alternatives to individualism.

This reframed agenda resonates with the ideas of Marianne Nielsen, when she writes that Canadian native communities "will have the opportunity of taking the best of the old, the best of the new and learning from others' mistakes so that they can design a system that may well turn into a flagship of social change"²¹. Together these two questions ask how we save and revive traditional restorative justice practices in a way that helps them become procedurally fairer, in a way that respects fundamental human rights, that secures protection against domination? The liberal state can be a check on oppressive collectivism, just as bottom-up communitarianism can be a check on oppressive individualism. A healing circle can be a corrective to a justice system that can leave offenders and victims suicidally alone; a Charter of Rights and Freedoms a check on a tribal elder who imposes a violent tyranny on young people. The bringing together of these ideals is an old prescription - not just liberty, not just community, but liberte, egalite, fraternite. Competitive individualism has badly fractured this republican amalgam. The social movement for restorative justice does practical work to weld an amalgam that is relevant to the creation of contemporary urban multicultural republics. Day to day it is not sustained by romantic ideals in which I happen to believe

²¹ Neilsen, Marianne, "Criminal Justice and Native Self-Government", in Robert Silverman and Marianne Nielsen (eds.) *Aboriginal Peoples and Canadian Criminal Justice*. Toronto: Butterworths, 1992, p. 255.

123RD INTERNATIONAL SENIOR SEMINAR
VISITING EXPERTS' PAPERS

like deliberative democracy. They want to do it for Hiroshi and for an old woman who Hiroshi pushed over one day. That is what enlists them to the social movement for restorative justice; in the process they are, I submit, enlisted into something of wider political significance.