

JOHN BRAITHWAITE

Restorative Justice and a Better Future¹

I WANT YOU TO IMAGINE two robbers. First, a teenager is arrested in Halifax 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 twenty years by stealing cars, burgles dozens 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 Halifax today, perhaps more than one.

Tomorrow another teenager, Sam, is arrested in Halifax for a robbery. He is a composite of several Sams I have seen. The police officer refers Sam to a facilitator who convenes a restorative justice conference. When the facilitator asks about his parents, Sam says he is homeless. His parents abused him and he hates them. Sam 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. Sam's older sister, who was always kind to him, has long since left home. 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 George was the only one he ever had any time for, but he has not seen him for

¹A longer version of this article will be appearing as "Restorative Justice" in *The Oxford Handbook of Crime and Punishment*, ed. Michael Tonry (Oxford UP). My thanks to Christine Baker and Heather Strang for helpful comments on an earlier draft of this paper, and to Tonia Vincent for her insightful research assistance.

years. Teachers from school? Hates them all. Sam has dropped out. They always treat 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 Sam can ever think of being fair to him. So the hockey coach, Uncle George 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 Sam 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. Sam 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 George is asked what he thinks of this. He says that Sam used to be a good kid. But Sam 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 George, building into an angry tirade against the boy. The hockey coach also says he is surprised that Sam could do something as terrible as this. Sam was always a troublemaker at school. But he could see a kindly side in Sam that left him shocked about the violence. The sister is invited to enter the conversation, but the facilitator moves on to the victim when Sam'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 is now afraid to go out on her own. In particular, she is afraid that Sam is stalking her, waiting to rob her again. Sam sneers at this and seems 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 George. During the break, the sister reveals that she understands what Sam has been through. She says she was abused by their parents as well. Uncle George has never heard of this, is shocked, and not sure that he believes it.

When the conference reconvenes, Sam'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 is spoken of by the knowing communication between sister and brother. Tears rush down the old woman's cheeks and over a trembling mouth.

It is his sister's love that penetrates Sam'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 Sam find a home and a job. Sam'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 Sam's debt to the victim and a bit more. If Sam does a good job, he will write him a reference for applications for permanent jobs. When the conference breaks up, the victim hugs Sam and tearfully wishes him good luck. He apologizes again. Uncle George quietly slips a hundred dollars to Sam's sister to defray the extra cost of having Sam in the house, and says he will be there for both of them if they need him.

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

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 program for the unemployed and indigenous peoples. It pretends to be equitable,

yet 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 twelve months in comparatively decent premises, especially if they are white-collar criminals. While I do believe that Canada's criminal justice system is more decent than ours in Australia, all western 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 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*.² The claim of this theory is that the societies that have the lowest crime rates are the societies that shame criminal conduct most 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 see why putting more police on the street can actually increase crime. More police can increase crime if they are systematically stigmatizing in the way they deal with citizens. More police can reduce crime if they 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. But because prisons stigmatize, they also make things worse for those who have criminal identities

²John Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge UP, 1989).

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 one underrated 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 later subject them to rehabilitation programs inside institutions. With juvenile justice in particular, the debate throughout the century has see-sawed between the justice model and the welfare model. 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,³ Marshall,⁴ Umbreit⁵), peacemaking (Pepinsky and Quinney⁶), redress (de Hann⁷)—have described broadly similar intellectual currents. Philip Pettit and I have sought to argue for republican criminal justice (Braithwaite and Pettit,⁸ Pettit with Braithwaite⁹). Yet the label that has secured by far the widest consent during the past

³J. Dignan, "Repairing the Damage: Can Reparation Work in the Service of Diversion?" *British Journal of Criminology* 32 (1992): 453–72.

⁴T.F. Marshall, *Alternatives to Criminal Courts* (Aldershot: Gower, 1985).

⁵M. Umbreit, *Crime and Reconciliation: Creative Options for Victims and Offenders* (Nashville, TN: Abigton Press, 1985).

⁶H.E. Pepinsky and R. Quinney, eds., *Criminology as Peacemaking* (Bloomington: Indiana UP, 1991).

⁷W. de Hann, *The Politics of Redress: Crime, Punishment and Penal Abolition* (London: Unwin and Hyman, 1990).

⁸John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Oxford UP, 1990).

⁹Philip Pettit with John Braithwaite, "Not Just Deserts Even in Sentencing," *Current Issues in Criminal Justice* 4 (1993): 225–39.

few years has been that employed by Zehr,¹⁰ Galaway and Hudson,¹¹ Cragg,¹² Walgrave,¹³ Bazemore,¹⁴ Umbreit,¹⁵ Consedine,¹⁶ Peters and Aertsen,¹⁷ Messmer and Otto,¹⁸ Marshall,¹⁹ McElrea,²⁰ McCold,²¹

¹⁰Howard Zehr, *Changing Lenses: A New Focus for Criminal Justice* (Scottsdale, PA: Herald Press, 1990); Howard Zehr, "Retributive Justice, Restorative Justice," *New Perspectives on Crime and Justice: Occasional Papers of the MCC Canada Victim Offender Ministries Program and the MCC US Office of Criminal Justice*, issue 4, Sept. 1985.

¹¹B. Galaway and J. Hudson, *Criminal Justice, Restitution and Reconciliation* (Monsey, NY: Criminal Justice Press, 1990); B. Galaway and J. Hudson, eds., *Restorative Justice: International Perspectives* (Monsey, NY: Criminal Justice Press, 1996).

¹²W. Cragg, *The Practice of Punishment: Towards a Theory of Restorative Justice* (London: Routledge, 1992).

¹³Lode Walgrave, "Restorative Justice for Juveniles: Just a Technique or a Fully Fledged Alternative?" *The Howard Journal* 34.3 (1995): 228–49; Lode Walgrave, "In Search of Limits to the Restorative Justice for Juveniles," unpublished paper presented to the International Congress on Criminology, Budapest, 23–27 Aug. 1993.

¹⁴G. Bazemore, *Balanced and Restorative Justice for Juvenile Offenders: An Overview of a New QJJD Initiative* (Washington, DC: Office of Juvenile Justice and Delinquency Prevention, 1993).

¹⁵M. Umbreit, "Holding Juvenile Offenders Accountable: A Restorative Justice Perspective," *Juvenile and Family Court Journal* (Spring 1995): 31–42; M. Umbreit, *Victim Meets Offender: The Impact of Restorative Justice and Mediation* (Monsey, NY: Willow Tree Press, 1994); M. Umbreit, "Crime Victims Seeking Fairness, not Revenge: Towards Restorative Justice," *Federal Probation* 53.3: 52–57.

¹⁶Jim Consedine, *Restorative Justice: Healing the Effects of Crime* (Lyttleton, New Zealand: Ploughshares Publications, 1995).

¹⁷Tony Peters and Ivo Aertsen, "Restorative Justice: in Search of New Avenues in the Judicial Dealing with Crime: The Presentation of a Project of Mediation for Reparation," in C. Fijnaut et. al., eds., *Changes in Society, Crime and Criminal Justice in Europe* (Antwerp: Kluwer Law and Taxation Publishers, 1995).

¹⁸Heinz Messmer and Hans-Uwe Otto, "Restorative Justice: Steps on the Way Toward a Good Idea," in Heinz Messmer and Hans-Uwe Otto, eds., *Restorative Justice on Trial* (Dordrecht: Kluwer Academic Publishers, 1992).

¹⁹Tony Marshall, "Grassroots Initiatives Towards Restorative Justice: The New Paradigm?" unpublished paper for the Fullbright Colloquium, "Penal Theory and Penal Practice," University of Stirling, Sept. 1992.

²⁰F.W.M. McElrea, "Restorative Justice—The New Zealand Youth Court: A Model for Development in Other Courts," *Journal of Judicial Administration* 4.1 (1994): 33–54.

²¹Paul McCold, "Restorative Justice and the Role of Community," unpublished paper presented to the Academy of Criminal Justice Sciences Annual Conference, Boston, March 1995.

Maxwell,²² Carbonatto,²³ Crawford, Strong, Sargent, Souryal and Van Ness,²⁴ Denison,²⁵ Knopp,²⁶ Mackey,²⁷ Morrell,²⁸ Van Ness,²⁹ and Young³⁰—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. In this spirit, I now wish that I had called reintegrative shaming, restorative shaming.

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. 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 loss of dignity when someone violates their bodies or shows them the disrespect of taking things which are

²²Gabrielle Maxwell, "Some Traditional Models of Restorative Justice from Canada, South Africa and Gaza," in McElrea, F.W.M., ed., *Rethinking Criminal Justice*, vol. 1: *Justice in the Community* (Auckland: Legal Research Foundation, 1995).

²³H. Carbonatto, *Expanding Options for Spousal Abuse: The Use of Restorative Justice*, Occasional Papers in Criminology, New Series 4 (Wellington: Institute of Criminology, 1995).

²⁴T. Crawford, K. Strong, K. Sargeant, C. Souryal and D. Van Ness, *Restorative Justice: Principles* (Washington, DC: Justice Fellowship, 1990).

²⁵K. Denison, *Restorative Justice in Ourselves: New Perspectives on Crime and Justice* (Akron, PA: Mennonite Central Committee Office of Criminal Justice, 1991).

²⁶F.H. Knopp, "Restorative Justice For Juvenile Sex Offenders," paper presented to the National Council of Juvenile and Family Court Judges, Lake Tahoe/Reno, 16 Nov. 1992.

²⁷V. Mackey, *Restorative Justice: Towards Nonviolence* (Louisville, KY: Presbyterian Criminal Justice Program, 1990).

²⁸V. Morrell, "Restorative Justice: An Overview," *Criminal Justice Quarterly* 5 (1993): 3–7.

²⁹D. Van Ness, "New Wine and Old Wineskins: Four Challenges of Restorative Justice," *Criminal Law Forum* 4.2 (1993): 251–76.

³⁰M. Young, *Restorative Community Justice: A Call to Action* (Washington, DC: National Organization for Victim Assistance, 1995).

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 through vengeance or by their own criminal acts.

Disempowerment is part of the indignity of being a victim of crime. According to Pettit and Braithwaite's republican theory of criminal justice,³¹ 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 companies.³² 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 way that western legal systems handle crime compounds the disempowerment that victims feel, first at the hands of offenders and then at the hands of a professional, remote justice system that eschews their participation. The lawyers, in the words of Nils Christie, "steal our conflict."³³ 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. 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. So restorative justice restores the *deliberative control of justice by citizens*.

Restorative justice aims to *restore harmony based on a feeling that justice has been done*. Restoring harmony alone, while leaving

³¹*Not Just Deserts: A Republican Theory of Criminal Justice* (1990).

³²See Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge UP, 1993) 218–23.

³³Nils Christie, "Conflicts as Property," *British Journal of Criminology* 17 (1978): 1–15.

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 loaf of bread 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 unemployability and oppression of Aboriginal people). Indeed, we should hope from restorative justice for micro-measures that 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 institutionalize the gathering around of friends during a time of crisis.

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 loss or injury is 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 apologizing with sincerity.³⁴ A task of restorative justice is to institutionalize such *restoration of dignity* for offenders.

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 the 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 of complainants with the justice of the mediation is less important than the satisfaction of those who are complained against in achieving mutually beneficial outcomes.³⁵ Criminal subcultures are memory files that collect injustices.³⁶ 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 offenders.³⁷

Finally, Francis T. Cullen 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

³⁴On this issue, especially the question of by-passed shame, see Tom Scheff and Suzanne Retzinger, *Emotions and Violence: Shame and Rage in Destructive Conflicts* (Lexington: Lexington Books, 1991).

³⁵Dean G. Puritt, "Research Report: Process and Outcome in Community Mediation," *Negotiation Journal* Oct. 1995: 374.

³⁶David Matza, *Delinquency and Drift* (New York: Wiley, 1964) 102.

³⁷Tom Tyler, *Why People Obey the Law* (New Haven: Yale UP, 1990).

support for preventing crime.³⁸ The New Zealand Maori people see our justice system as barbaric because 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. The shame of letting loved ones down can be readily transcended by simple acts of forgiveness from those loved ones.

Restoring community is advanced by a proliferation of 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 programs have a channel through which they can flow from discussions about local injustices up into national economic policy-making debate.

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 restorative traditions a more valuable resource than retributive traditions. Yet sadly, the hegemonic cultural forces in the contemporary world

³⁸Francis T. Cullen, "Social Support as an Organizing Concept for Criminology: Presidential Address to the Academy of Criminal Justice Sciences," *Justice Quarterly* 11.4 (1994): 527-59.

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. Archbishop Desmond Tutu in his Foreword to Jim Consedine's forthcoming new edition of *Restorative Justice*, correctly sees a "very ancient yet desperately needed truth" as underlying restorative justice processes, "rooted as they are in all indigenous cultures, including those of Africa." He sees his Truth and Reconciliation Commission as an example of restorative justice.

The restorative values I have been describing 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 recognize that the desire to pursue these restorative justice values is universal, which is why some of 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 justice.³⁹ When the major political parties did their door-knocking during our last election in Canberra, they found that the thousands of citizens who had participated in a restorative justice conference mostly liked the justice they experienced.

³⁹See, for example, Allison Morris and Gabrielle Maxwell, "Juvenile Justice in New Zealand: A New Paradigm," *Australian and New Zealand Journal of Criminology* 26 (1992): 72–90; Mary Hyndman, Margaret Thorsborne and Shirley Wood, *Community Accountability Conferencing: Trial Report* (Department of Education, Queensland, 1996); Tim Goodes, "Victims and Family Conferences: Juvenile Justice in South Australia," unpublished paper, 1995; David Moore with Lubica Forsaythe, *A New Approach to Juvenile Justice: An Evaluation of Family Conferencing in Wagga Wagga: A Report to the Criminology Research Council* (Wagga Wagga: The Centre for Rural Social Research, 1995); Donald Clairmont, "Alternative Justice Issues for Aboriginal Justice," unpublished paper, Atlantic Institute of Criminology, Nov. 1994.

It is true that the virtues restorative justice restores are viewed differently in different cultures and that opinion about the culturally appropriate ways of realizing them 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 realizing 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 culturally shared restorative values.

A Path to Culturally Plural Justice

A restorative 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.*

On the first point, I doubt that neighbourhoods 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 stigmatizing.⁴⁰

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

⁴⁰See the discussion of the evidence on this in Braithwaite, *Crime, Shame and Reintegration* 54–83.

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 schools.⁴¹ This is because of the ethos of care and integration which is part of the western 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 programs in contemporary schools.⁴² We have also seen anti-bullying programs with what I would call a restorative ethos which have managed in some cases to halve bullying in schools.⁴³

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 tyrannical power, the political imperative to allow some separation of church and state has left churches as enclaves where restorative traditions could survive. Religions like Islam and Christianity have strong retributive traditions as well, of course, though they have mostly been happy to leave it to the state to do the "dirty work" of temporal retribution.

When I spoke at a conference on restorative justice in Indonesia, 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

⁴¹Mary Hyndman, Margaret Thorsborne and Shirley Wood, *Community Accountability Conferencing: Trial Report* (Department of Education, Queensland, 1996).

⁴²*Ibid.*

⁴³Dan Olweus, "Annotation: Bullying at School: Basic Facts and Effects of a School Based Intervention Program," *Journal of Child Psychology and Psychiatry* 35 (1994): 1171–90; David P. Farrington, "Understanding and Preventing Bullying," in M. Tonry, ed., *Crime and Justice: Annual Review of Research*, Vol. 17 (Chicago: U of Chicago P, 1993); John Pitts and Philip Smith, *Preventing School Bullying*, Police Research Group: Crime Detection and Prevention Series Paper 63 (London: Home Office, 1995); Debra J. Pepler, Wendy Craig, Suzanne Ziegler, and Alice Charach, "A School-based Antbullying Intervention," in Delwin Tatum, ed., *Understanding and Managing Bullying* (London: Heinemann, 1993).

to restorative justice when a number of Native Canadians visited Canberra this year. There is something important to learn about native North-American spirituality and how it enriches restorative justice.

Your Canadian indigenous 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 your continent supplies the entire world a genetic resource. The very people who by virtue of their remoteness have succumbed least to the western justice model, who have been insulated from Hollywood a little more and for a little longer, the very people who are most backward in western eyes, are precisely those with the richest cultural resources from which the restorative justice movement can learn.

Important scholarly work is being done to unlock the cultural codes of restorative justice in your indigenous communities. "Healing circles," what a profound cultural code that is to unlock for the rest of the world.⁴⁴ How much we all have to learn from the experience of the Hollow Water community in dealing with an epidemic of child abuse through healing circles. Thérèse Lajeunesse's report on Hollow Water is already a wonderful resource for the world.⁴⁵ Joan Pennell and Gale Burford⁴⁶ have done a splendid job in their reports which document the conferences for dealing with family violence in Newfoundland, which are quite distinctive from, and doubtless superior to, the conferencing models we have applied in the southern hemisphere. I have already remonstrated with them about

⁴⁴A.P. Melton, "Indigenous Justice Systems and Tribal Society," *Judicature* 79.3 (1995): 126–33; Four Worlds Development Project, *The Sacred Tree* (Alberta: Four Worlds Development Press, 1984).

⁴⁵Thérèse Lajeunesse, *Community Holistic Circle Healing: Hollow Water First Nation* (Solicitor General: Ministry Secretariat, 1993).

⁴⁶Gale Burford and Joan Pennell, *Family Group Decision Making: New Roles for 'Old' Partners in Resolving Family Violence* (St. John's: Memorial University of Newfoundland, 1995); Joan Pennell and Gale Burford, "Attending to Context: Family Group Decision Making in Canada," in J. Hudson et. al., eds., *Family Group Conferences: Perspectives on Policy and Practice* (Monsey, NY: Criminal Justice Press, 1994); Joan Pennell and Gale Burford, "Widening the Circle: Family Group Decision Making," *Journal of Child and Youth Care* 9.1: 1–11; Gale Burford and Joan Pennell, "Family Group Decision Making: An Innovation in Child and Family Welfare," in B. Galaway and J. Hudson, eds., *Child Welfare Systems: Canadian Research and Policy Implications* (forthcoming).

the need to pull all this illuminating research together into a book that can also have a massive effect internationally, as could a book on *Hollow Water*. So point one of the reform agenda of restorative justice is a research program to retrieve the restorative justice practices of not only native communities, but also of the schools and churches of dominant urban cultures. Scholars like Carol LaPrairie and Don Clairmont are among the Canadian scholars who are doing vital work in advancing point one of this agenda.

Point two 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 occur. But when a metropolitan police officer with a restorative justice ethos arrests a homeless child like Sam, 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, a criminal justice system aimed at restoration can construct a community of care around a specific offender or a specific victim who is in trouble. That is what the story of Sam is about. With the restorative justice conferences being convened in multicultural metropolises like Auckland, Adelaide, Sydney and Singapore, 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—Sam’s sister, uncle and hockey coach, the victim’s daughter.

In terms of the theory of reintegrative shaming, the rationale for who is invited to the conference is that the presence of supporters 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 Sam’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 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 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 maximize shame. On the contrary, if we set out to do that we risk the creation of stigmatizing institutions.⁴⁷ All we need to 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.

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

⁴⁷Suzanne Retzinger and Tom Scheff, “Strategy for Community Conferences: Emotions and Social Bonds,” in B. Galaway and J. Hudson, eds., *Restorative Justice: International Perspectives* (Monsey, NY: Criminal Justice Press, 1996).

centralized state that takes central control of justice and rationalizes it into a punitive regime. Control of punishment strengthened the power and legitimacy of rulers.⁴⁸ 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. Yet 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 pretence. They realize 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. Philip Pettit and I have sought to show that proportionality in practice is proportional punishment for the poor and impunity for the white-collar criminals.⁴⁹ Restorative justice, we contend, has a better chance of being made equitably available to rich and poor than just deserts.

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, as Carol La Prairie's work shows for Canada.⁵⁰ And it is true that state oversight of restorative justice in the community can be a check on abuse of rights in local programs, local political dominations and those types of unequal treatment in local programs that are flagrantly unacceptable.⁵¹ Equally it is true that restorative justice can be a check on abuse of rights by the

⁴⁸See, for example, Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (London: Allen Lane, 1977).

⁴⁹*Not Just Deserts: A Republican Theory of Criminal Justice*, ch. 9.

⁵⁰Carol La Prairie, "Community Justice or Just Communities: Aboriginal Communities in Search of Justice," 1993.

⁵¹Jeremy 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

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 powers,⁵² 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;*
6. *The idea that fundamental human rights should be protected during the criminal process.*

existed in a very different form." See "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) 147.

⁵²John Braithwaite, "On Speaking Softly and Carrying Sticks: Neglected Dimensions of a Republican Separation of Powers," unpublished paper, 1996.

Like abolitionists,⁵³ 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 apologize, especially with corporate criminals who are not used to thinking of their exploitative conduct in that way.⁵⁴ 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 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, first 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 that claim they have an approach which will be cheaper, work better and be more popular with the people in the long run. Hence we should not be

⁵³Herman Bianchi and Rene van Swaaningen, eds., *Abolitionism: Towards a Non-Repressive Approach to Crime* (Amsterdam: Free University Press, 1986); Nils Christie, *Limits to Pain* (Oxford: M. Robertson, 1982).

⁵⁴See John Braithwaite, "Corporate Crime and Republican Criminological Praxis," in F. Pearce and L. Snider, eds., *Corporate Crime: Ethics, Law and the State* (Toronto: U of Toronto P, 1995).

surprised at the irony that some of the most savvy conservative governments in the world, who are most imbued with the imperatives for fiscal frugality, like New Zealand⁵⁵ and Singapore,⁵⁶ are early-movers in embracing the restorative justice movement against the grain of their traditional commitment to state punitiveness. In August of 1996, we even saw a US Assistant Attorney-General espousing a need to reinvent justice as restorative justice.⁵⁷

While I am cautiously optimistic that the empirical evidence will continue to be encouraging about the efficacy and decency of restorative justice compared with retributive justice, the evidence is also clear that restorative justice often fails. Victims sometimes resent the time involved in deliberation; sometimes they experience heightened fear from meeting offenders; sometimes they are extremely vengeful, though more often I am moved by how forgiving they are when genuinely empowered with process control. We need quality research on when and why restorative justice fails and how to cover the weaknesses of restorative justice with complementary strengths of deterrence and incapacitation.⁵⁸

⁵⁵Gabrielle M. Maxwell and Allison Morris, *Family Participation, Cultural Diversity and Victim Involvement in Youth Justice: A New Zealand Experiment* (Wellington: Institute of Criminology, 1992); Allison Morris and Gabrielle M. Maxwell, "Juvenile Justice in New Zealand: A New Paradigm," *Australian and New Zealand Journal of Criminology* 26 (1993): 72–90.

⁵⁶Lim Li Hsien, "Family Conferencing Good for Young Delinquents: Report," *Straits Times*, from IMAGE database, 6 March 1996; Wai Yin Chan, "Family Conferences in the Juvenile Justice Process: Survey on the Impact of Family Conferencing on Juvenile Offenders and Their Families," *Subordinate Courts Statistics and Planning Unit Research Bulletin* (Feb. 1996).

⁵⁷"At the same time that communities across the country are mustering broad-based coalitions to tackle crime and youth justice, innovative efforts are under way to 'reinvent' the justice system itself. 'Restorative'—or community—justice experimentation is taking place in jurisdictions across the country Community justice is also being incorporated into community policing programs . . . like the program in Australia that replaces formal prosecution with a 'family group conference' designed to shame the offender and explain the full impact of the crime on the victim and the community" (Laurie Robertson, "Linking Community-Based Initiatives and Community Justice: The Office of Justice Programs," *National Institute of Justice Journal* [Aug. 1996]: 6–7).

⁵⁸John Braithwaite, "Beyond Positivism: Learning from Contextual Integrated Strategies," *Journal of Research in Crime and Delinquency* 30 (1993): 383–99.

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 a major problem, 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 this 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 at the same time as we rediscover community-based justice. Community justice is often oppressive of rights, often subjects the vulnerable to the domination of local elites, subordinates women, can be procedurally unfair and tends to neglect structural solutions. Mindful of this, we might reframe the two challenges posed earlier in the paper:

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 writing of Canadians such as Donald Clairmont⁵⁹ and Marianne Nielsen, who writes that native

⁵⁹Donald Clairmont, "Alternative Justice Issues for Aboriginal Justice," unpublished paper, Atlantic Institute of Criminology, Nov. 1994.

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.”⁶⁰ 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 *liberté, égalité, fraternité*. 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, like deliberative democracy. They want to do it for Sam and for an old woman whom Sam 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.

⁶⁰Marianne Nielsen, “Criminal Justice and Native Self-Government,” in Robert Silverman and Marianne Nielsen, eds., *Aboriginal Peoples and Canadian Criminal Justice* (Toronto: Butterworths, 1992) 255.