

Research Framework for a Review of Community Justice
Community Justice – Punishment/Retribution

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1. **Key Themes** (to be explored)

- A challenge for restorative justice lies in the question of how to respond to these issues in the absence of punishment. - What is the role of punishment in a restorative community justice process?
- Does or should restorative community justice reject the idea of punishment?
- Should restorative community justice reject all coerciveness in interventions as being punitive?

- Does restorative community processes and obligations by their very nature actually constitute an alternative punishment rather than an alternative to punishment?

- The perception of leniency may be a reaction to the emphasis on healing and rehabilitation.
 - This complaint may have merit if the emphasis is only on the healing of the offender rather than of the community.
 - The case studies repeatedly show that part of their success is in the partnership between the official justice system which retains its punitive powers over the offender (or victimizer) and the healing processes which is community driven.

- People's ideas and feelings about punishment cannot be censored or willed away even if restorative justice advocates may wish otherwise.

- Is retribution is inherently backward-looking in focus, concerned with past acts and mental states rather than future conduct?

2. Research Questions

2.1. Definition of Punishment

Define punishment?

Is there a single meaning given to the term “punishment”?

2.2. Roles & Responsibilities

How does the conception of punishment take into account the offender, victim and the community?

Is there role and responsibility of other stakeholders?

2.3. Outcome

What is the outcome of a punished offender?

2.4. Process of Punishment

What are key aspects of the process of punishment – for the offender, the victim, and the community?

What are the recognizable steps/activities which tend to set in motion the process of punishment – in an offender?

2.5. Common Understanding/Language

Is there a common understanding/language of “punishment”?

Has there been any discussion with communities, government and other stakeholders about “punishment”?

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3. Relevant Documents, Studies and Practices – Yukon

4. Relevant Documents, Studies and Practices – Other Northern Territories

5. Relevant Documents, Studies and Practices – Other Canadian

5.1. Restorative Justice and the Problem of Punishment¹

Abstract

- Restorative justice is a new perspective with a growing currency in Western industrialized societies.
 - As a problem-solving approach to harmful behaviour that eschews violent and coercive methods, restorative justice theory displaces the phenomenon of punishment which is central to retributive justice.
 - Restorative justice theory and practice, however, have tended to overlook or de-emphasize the analyses of punishments which are primarily concerned with "the psychology of punitive justice" (Mead) or the sociological function of punishment to "maintain social cohesion intact" (Durkheim).
 - This paper considers the problem of punishment as an expression of collective, moral/legal censure motivated by the psychological sentiments of revenge and the sociopolitical foundations of retribution.
 - A challenge for restorative justice lies in the question of how to respond to these issues in the absence of punishment.

5.2. Beyond Punishment: Moving towards the Application of Conciliatory Justice in the Canadian Context – 1999 ²

¹ Liz Elliott, Simon Fraser University, Restorative Justice and the Problem of Punishment, <http://www.asc41.com/www/2000/abscc017.htm>

² Friesen, Krista, Beyond Punishment: Moving towards the Application of Conciliatory Justice in the Canadian Context 1999 <http://www.law.ualberta.ca/centres/civilj/full-text/friesen.htm>

6. Relevant Documents, Studies and Practices – USA

6.1. On Restorative and Punishment -2001 ³

Restoration and Punishment: Favorable Similarities and Fortunate Differences.

- The issue of punishment in relation to restorative justice constitutes a significant debate. For example,
 - does or should restorative justice theory reject the idea of punishment?
 - should restorative justice reject all coerciveness in interventions as being punitive?
 - do restorative processes and obligations by their very nature actually constitute an alternative punishment rather than an alternative to punishment?
- Addressing the similarities and differences between punishment and restoration, Walgrave argues for a criminal justice system that is as deeply and comprehensively restorative as possible, even while allowing for some degree of coercive judicial intervention.
 - In this perspective, he maintains that
 - restorative measures are not tantamount to punishment, and
 - he contends for the maximum possible restorative impact of even coercive judicial procedures and sanctions.

³ Lode Walgrave, On Restorative and Punishment, Allison Morris and Gabrielle Maxwell, Eds. Restorative Justice for Juveniles Conferencing, Mediation and Circles, June 2001, <http://www.restorativejustice.org/rj3/Reviews/RJforJuveniles/book.htm>

7. Relevant Documents, Studies and Practices – International

7.1. Reason and Emotion in Restorative Justice - 2000 ⁴

- As an American in New Zealand, it is only with some trepidation that I speak on the topic of today's lecture.
 - o Restorative justice can be generally described as an approach to crime that includes all stakeholders in a particular offense in a process of group decision-making on how to handle the effects of the crime and its consequences for the future.
 - o Although there are discrete programs in a few American communities, the United States has yet to undertake any large scale restorative model of criminal justice and instead remains largely wedded to the idea of retribution and what has been described as "constitutionalized revenge."
 - o In contrast, for more than a decade New Zealand has had an operational model of restorative justice in its approach to juvenile offenders and continues to debate the expansion of this approach to the adult criminal justice system.
 - o So with my thoughts and ideas come the necessary caveats of an outsider.
- As demonstrated in recent media accounts, restorative justice is an emotionally charged subject here in New Zealand.
 - o In announcing a \$4.9 million pilot program for adult offenders, Courts Minister Matt Robson described restorative justice as "our best chance at changing criminal behavior."
 - o Although welcomed by the Green Party, the Restorative Justice Network, and Victim Support, the proposal was subject to an impassioned attack by Opposition leaders.
 - o Law-and-order campaigner Norm Withers argued that the scheme was a "bloody insult" and one academic described the entire restorative justice movement as a "fad."
 - o Adversaries of restorative justice invariably point to last year's omnibus referendum on crime, where 92 percent of voters called for harsher penalties for violent offenders.
 - o The emotional nature of opposition to the program was probably best illustrated by this political cartoon.
 - A reporter asks, "Mr. Robson, Do you believe home detention and restorative justice can change hardened or brutal crimes?," to which Robson replies, "Yes! And my friends Santa and the Tooth Fairy would agree."
- My discussions with both legal experts and lay citizens only confirm that restorative justice is a highly emotional topic.
 - o Many of those who hold positions on the subject tend to be extreme and rather emotional in their attitudes toward restorative justice.
 - o This is not altogether surprising, as crimes are often acts of passion and always have emotional consequences for those involved.
 - o Likewise, individuals who violate the criminal law or widely held social norms are subject to visceral contempt by the public.
 - o It is only natural, then, that emotions are intrinsic to the process of sanctioning criminals.
- But the fact that punishing offenders is embedded with passion does not mean that the sanctioning process and the emotions involved cannot be evaluated with human reason.
 - o What is lacking, I believe, is a rational framework for the process and emotions involved in a successful sanctioning scheme.

⁴ Luna, Erik, Associate Professor, University of Utah College of Law Senior Fulbright Scholar and Lecturer, New Zealand Institute for Dispute Resolution, Victoria University of Wellington Faculty of Law, Reason and Emotion in Restorative Justice July 2000 <http://www.scoop.co.nz/archive/scoop/stories/51/19/200007051755.74daa57b.html>

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- Over the next 30 minutes or so, I would like to do precisely that—sketch out the theory of restorative justice as well as the prerequisites and stages in a successful restorative approach to criminal punishment.
- I will then apply the resulting standard to the traditional models of juvenile justice and a recently developed approach to youthful offenders, best exemplified by the family group conference pioneered here in New Zealand.
- My hope is that a rational sanctioning theory and framework will offer insight into the advantages of restorative justice and its treatment of the emotions evoked by crime.
- So let me begin with a brief overview of punishment philosophy.
 - Theories of the criminal sanction are, for the most part, founded on two presumptions:
 - factual or legal guilt, and
 - a predefined measure of success in sanctioning.
- By the time an individual reaches the formal punishment stage in the criminal process, he has either admitted guilt or been found guilty by a tier of fact, evolving in the eyes of the law from the "accused" to the "convicted."
 - The question, then, is not whether the man in the dock committed the crime but instead the sanction that must be levied for his offense.
- The second presumption imagines an agreeable gauge of success contemplated by the sanctioning theory.
 - In other words, sanctioning models are inevitably ends-oriented; rather than gratuitous infliction of punishment, there is some goal served by sanctioning the criminal for his offense.
 - This does not mean that the goal itself is tangible or measurable instead of metaphysical.
 - A retributive theory of criminal sanction, for example, argues for punishment as "just deserts," that penalties are inflicted on the offender solely because he deserves it.
 - This conception of justice punishes not in service of some greater societal goal but in proportion to the criminal's moral blameworthiness and the harm caused by his offense.
 - As such, retribution is inherently backward-looking in focus, concerned with past acts and mental states rather than future conduct.
- Nonetheless, traditional sanctioning theories usually incorporate instrumental values as the direct aim or a tangential but important benefit of punishment.
 - Succinctly stated, sanctioning might serve the utilitarian ends of deterring future crime by the particular offender and the general population; rehabilitating the offender as a law-abiding citizen for his own good and that of society at large; and incapacitating the offender by limiting his ability to commit crimes.
 - But whatever goal is espoused, instrumental sanctioning is always forward-looking—seeking to reduce the intensity and gravity of crime in society.

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- Some contemporary scholars have begun to question the narrow focus of criminal punishment as state-versus-offender, outside of its social context, and exclusive of other interested parties such as victims, families, and community members.
 - o Traditional sanctioning theories largely neglect the needs of those directly injured by crime and the resulting damage done to social life within an interconnected community.
 - o At best, the duel between prosecutor and defendant can only tangentially serve a broader conception of justice in sanctioning.
 - o These theories also ignore the inescapable reality that criminals are made not born, that criminality is often a symptom of much deeper problems within the offender, his family, and the community.
 - o And finally, criminal justice systems guided by traditional sanctioning theories often fail at their theoretical goals.
 - o Systems that seek to deter crime or rehabilitate offenders frequently do neither and instead exacerbate the root causes of criminal behavior.

- In contrast, the restorative justice approach recognizes that a successful criminal sanction must be both backward-looking-condemning the offense and seeking to uncover its causes-and forward-looking-making amends to the victims and the general community while actively facilitating moral development and prosocial behavior in the offender.
 - o Restorative sanctioning, then, expands punishment theory along two dimensions: the timeline of offending and the stakeholders concerned with crime.
 - o It seeks the involvement of all affected parties, not merely the state and the offender, to address what has happened and what should happen.
 - o And, metaphorically, it views crime as a point in the middle of a motion picture, with action both before and after the criminal event, rather than a singular snapshot without the context of the past or a vision for the future.

- Restorative justice incorporates three basic principles in its approach to sanctioning.
 - o First, crime is not just an act against the state but against particular victims and the community in general.
 - Offending, then, is primarily a breach of human relationships and only secondarily a violation of the law. As such, the community, family members, and supporters, rather than the state and its justice machinery, are considered the locus of crime control. Toward these ends, the restorative model seeks the active participation of victims, families, and community representatives to address the causes and consequences of offending.
 - o Second, the primary aim of this approach is making amends for the offending, particularly the harm caused to the victim, rather than inflicting pain upon the offender.
 - Accountability is defined as recognizing the wrongfulness of one's conduct, expressing remorse for any resulting injury, and taking actions to repair the damage done by the offending. Crime creates positive obligations, this approach argues, that require affirmative action on the part of the offender.

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- Finally, restorative justice envisions a collaborative sanctioning process involving all stakeholders concerned with the offender and the offense.
 - The central feature is largely uninhibited dialogue among the parties, allowing all present to express their emotions and ideas in an open forum. Through discussion and deliberation, restorative sanctioning contemplates mutual agreement on the steps that must be taken to heal the victim and the community, as well as a plan to confront the factors contributing to the offender's conduct and to facilitate his development as a law-abiding citizen.
- What is needed, however, is a procedural framework for evaluating specific approaches to sanctioning.
 - It's not enough to point to the outcomes of punishment schemes as indicia of their success or failure at restorative sanctioning.
 - A procedural standard is also necessary to assess the design of criminal punishment, suggesting why a particular sanctioning model does or does not meet the more holistic objectives.
- Successful restorative sanctioning begins with a single principle that structures the entire process: respect.
 - As used here, respect is a sense of dignity, worth, and recognition accorded oneself, another individual, a physical object, or an abstract concept.
 - Crime and the criminal lifestyle are driven, to a large extent, by the pursuit of respect by the offender and a lack of respect for those affected by the offense.
 - From the viewpoint of the victim, crime is an ultimate statement of disrespect for her privacy, autonomy, property, security, and general well-being.
 - For the community and its members, offending is also a sign of disrespect—disrespect of law and authority, the concept of civility, the benefits of organized society, and so on.
 - The human tendency is toward reciprocity, to meet disrespect with disrespect, leading victims and community members to reject the offender as being worthy of dignity.
- In a study of former offenders, a New Zealand researcher found that the primary persuader for abandoning the criminal lifestyle was a sense of self-respect and personal worth.
 - In contrast, individuals who feel unjustly devalued and lacking respect by society are likely to harbor disrespect for the values and laws of the community and will actively seek out respect from an alternate subculture.
 - This is best illustrated by the "code of the streets" in the American inner-city.
 - As detailed by sociologist Elijah Anderson, poor minority youth are barraged by images of material success and status but are deprived of legitimate means to achieve these goals, such as jobs, education, and support networks.
 - So they turn to the deviant culture of the urban gang, where "juice"—the street-word for respect—is acquired by rejecting law-abiding values and creating an identity of violence and criminality.

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- Respect in this alter-world is achieved by showing disrespect for others and, in particular, law-abiding society and its members.
- Punishment schemes will achieve the goals of restorative sanctioning, then, only to the extent that they allow respect for all parties involved.
 - A process that creates respect for the victim and community representatives but not the offender, or vice versa, will inevitably neglect one or more of its admittedly ambitious goals-failing to rectify the harm to the victim, for instance, or further alienating the offender from the legitimate community and its values.
- At a minimum, five sub-principles are part of an atmosphere that fosters mutual respect.
 - The first is **inclusion**.
 - Physical inclusion in the sanctioning process is, in itself, a sign of respect. It reaffirms that a party has an important interest affected by the crime and the criminal sanction. Exclusion from the process, in contrast, signals that a party's concerns are minor or unworthy of consideration and constitutes an undeniable statement of disrespect for those whose interests are, in fact, at stake.
 - Related to the idea of inclusion is **voluntariness**-that a party is involved in the sanctioning process of his own freewill.
 - An individual is granted respect by providing him the power of choice, giving him the autonomy to participate in a decision-making process and the freedom to accept or reject a particular decision. The converse, mandatory involvement and forced outcomes, can demonstrate a lack of respect for those most intimately affected by the process and ultimate resolution.
 - The third sub-principle recognizes that the respect of voluntary involvement rings hollow for participants who feel alone in the process, lacking the **encouragement of respected and respectful supporters**.
 - Allowing the most fragile parties-most notably, victims and offenders-to be surrounded by their supporters buttresses the voluntariness of their involvement while ensuring a preliminary baseline of respect for all participants.
 - Within broad boundaries of due process, the fourth sub-principle argues that **some control over the sanctioning procedures can empower the participants** and demonstrate respect for their ability to craft a just approach to decision-making.
 - Process control offers a sense of "ownership" in the means and ends of punishment and may engender respect not only for the outcome but also for their fellow parties who worked together toward a resolution.
 - The final sub-principle might be the most important for successful restorative sanctioning: **freedom of discourse among all participants**.
 - Allowing parties a voice in the process provides a gesture of respect, that their concerns and ideas are important to the discussion. Likewise, uninhibited conversation ensures a level of ownership in the process and outcome, while demonstrating respect for other participants by openly communicating ideas and forging an agreeable resolution. The very act of undominated dialogue, in fact, is

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likely to lead parties to a consensus on the wrongfulness of a crime and an appropriate sanction.

- Assuming the presence of these prerequisites, it is possible to imagine a variety of specific strategies that might serve the goals of restorative sanctioning.
 - A successful process might use Socratic dialogue or a sequence of party monologues; it might include moments of prayer or silence; the offense and the offender might be addressed first or the victim's story might begin the process. As just suggested, the opportunity to control the sanctioning procedures empowers the participants and invests them in the process and its outcome. But despite the lack of a clear formula, successful restorative sanctioning will almost always involve five crucial stages: **censure, remorse, acceptance, planning, and facilitation.**
- Denouncing the offense is vital for all parties in a restorative sanctioning process.
 - First and foremost, censuring the crime affirms the victim's right not to be victimized. It is not uncommon for victims to feel that they are somehow to blame for the offense, that if they had done something differently the crime would never have occurred. A clear condemnation of the crime removes blame and begins the process of healing any damage done to the victim. Censuring the crime also confirms the values of a community and the limits of individual behavior. The condemnation of crime, as Emile Durkheim suggested, reaffirms the bonds of solidarity within a society.
 - Appropriate censuring can also be educational or constructive for the offender. By an expression of the harm to the victim, the pain experienced by family members of both the victim and the offender, and the decline in the sense of security among community members, the censuring process hopes to engage the offender in a rational dialogue on the wrongfulness of his conduct. The presence of the victim and the description of her injury prevents the offender from denying or neutralizing the harmfulness of his crime, while the attendance of the offender's supporters is likely to add credence to the censuring process.
 - But constructive censuring must be distinguished from destructive censuring-or, in Australian criminologist John Braithwaite's terms, "disintegrative shaming." Destructive censuring condemns the offender, rather than just the crime, as bad or evil. This type of denouncement stigmatizes the offender as unworthy of respect and designates him as an outcaste of society. Self-categorization or labeling theory predicts that destructive censuring will only further entrench the offender's identity as a deviant. Not surprisingly, condemnation of the offender often proves to be a self-fulfilling prophesy.
- The second stage in successful restorative sanctioning is an expression of genuine remorse by the offender.
 - Genuine remorse is the pain of recognizing the wrongfulness of one's conduct and the harm that it has caused; superficial remorse, in contrast, is regret only for having been caught or a feigned expression of sorrow without any internal belief in the immorality of the offense. The former is vital to repairing the damage done to the victim and community and beginning the moral development of the offender, while the latter largely forecloses the possibility of a successful outcome. In addition, genuine remorse must be felt not imposed, occurring as a result of moral reasoning rather than brute force. "An intention to shame is not respectful," one commentator argues. "An intention to help a person understand the harm they caused and to support them in taking full responsibility for that harm is respectful."
 - An expression of genuine remorse initiates healing in all participants. By accepting responsibility for the offense and acknowledging the harm he has caused, the offender

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shows respect for the victim and her right not to be victimized. As such, it may revive feelings of self-worth in the victim and can be the most powerful form of reparation. Often times the victim seeks an apology rather than monetary compensation, an affirmation of her respect and dignity by the individual who misappropriated it through his crime. Genuine remorse also signals the offender's affirmation of the legal norms of a community and his desire to be part of legitimate society. It thereby provides the first step towards incorporating the offender into the community.

- Finally, genuine remorse is a prerequisite to the moral development of the offender. Without understanding the wrongfulness of his conduct, he will retain his deviant identity and connection to an antisocial subculture. In contrast, an offender who recognizes the immorality of his behavior and feels sorrow for having violated both the legal norm and the victim is, as an empirical matter, less likely to recidivate.
- The desired response of participants to an offender's remorse is their acceptance of that expression as genuine and meaningful.
 - It is, in fact, the typical reply when an individual demonstrates a state of "perfect defenselessness" by admitting their wrongdoing and communicating true, sorrowful regret. The acceptance of his genuine remorse demonstrates respect for the offender by validating his emotions and recognizing him as an individual capable of taking responsibility for his actions. But accepting his expression is not done solely for the benefit of the offender but also for the victim's emotional well-being. It empowers the victim by placing her in a position of control, even for a split-second, and allows her to release some of the pent-up anger and pain resulting from the crime.
- After the "core sequence" of remorse and acceptance, participants in successful restorative sanctioning will forge a plan that makes amends to the victim, meets the community's desire for security and value affirmation, and addresses the factors that contributed to the crime and the obstacles the offender will face in becoming a law-abiding citizen.
 - When achieved through open input and group deliberation, the planning stage gives the participants an ownership interest in the end result.
 - To the extent that offenders feel that they participated in the process and that the outcome was just, they are more likely to follow through with the plan. And to the extent that victims believe that the level of compensation redresses their injury and constitutes a just outcome, the more likely they will walk away from the process feeling better about themselves, the offender, and the sanctioning process. In sum, then, an appropriate sanctioning plan will be respected by all participants.
- The final stage of a restorative sanctioning process holds the key to attaining its goals.
 - Success at all previous stages will be for not unless the offender receives the necessary support to fulfill the charted plan. Most offenders will lack the means to achieve the goals without the assistance of family members, supporters, and welfare professionals. If a contributing factor to the criminal behavior was a dysfunctional family life, psychological disorders, or substance abuse, the offender will need relevant treatment and counseling. If the core issue is a lack of self-worth or job opportunities, the offender will require skills training and gainful employment. And to the extent that deviant conduct is related to peer pressure or insufficient role modeling, the offender will need positive mentoring and opportunities to become involved with prosocial peer groups. In addition to providing the means to achieve the sanctioning plan, a successful facilitation requires supporters to follow-up on the offender's progress and to help in overcoming unforeseen obstacles.

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- The standard for successful restorative sanctioning is just that—a standard or measure.
 - It is not a detailed program ready-made for legislative adoption nor a comprehensive blueprint for a better criminal justice system. Instead, the standard provides a means of assessing an operational punishment model. In particular, it offers a gauge for restorative sanctioning goals and criteria for diagnosing a scheme's successes or failures.
- Punishment schemes for juvenile offenders provide fertile grounds for applying the restorative sanctioning standard. As products of the American Progressive Movement at the turn of the previous century, specialized youth courts and juvenile treatment facilities were intended to meet the unique needs of youthful offenders and to confront those factors that contributed to their offending. Since that time, juvenile justice schemes have vacillated between two sanctioning models—what I will call the "treatment" model and the "punishment" model.
- Neither approach, however, has proven effective at addressing juvenile crime. The public is continuously bombarded with media accounts of youthful offending and recidivism, leading many to believe that the juvenile justice system has miserably failed at its objectives. Likewise, some juvenile justice experts have adopted the dour criticism previously leveled against adult criminal justice: "nothing works." But a new model has brought a sense of hope to juvenile justice experts, youth court judges, and concerned practitioners. This approach, rooted in the restorative justice movement, seeks participation, dialogue, and healing for all parties affected by juvenile offending. The "conferencing" model, as I will call it, incorporates restorative goals largely ignored by traditional approaches to youth crime.
- What I would like to do, then, is briefly detail the traditional models for sanctioning juvenile offenders and apply the restorative sanctioning standard to these models in an attempt to understand the general disillusionment with contemporary juvenile justice. I will then consider the conferencing model's most heralded manifestation, the family group conference, to assess its potential under the standard for successful restorative sanctioning.
- The first approach to youthful offenders, the treatment model, is firmly grounded in the medical treatment conception of justice, viewing the juvenile delinquent as being "sick" or disturbed and therefore requiring treatment and health services. Under this model, the offender is not held accountable for his actions. Instead, his sickness, rather than conscious choice, is considered the precipitating cause of the juvenile's offending.
- Under its paternalistic authority, the state takes possession of the child for his own good and seeks to rehabilitate him into a law-abiding member of society. This typically involves involuntary counseling and medical care and, in some circumstances, institutionalization in a residential treatment facility. In sum, then, the treatment model argues that: (1) the juvenile offender suffers from a medical and/or psychological disorder; (2) he is not responsible for the offense because it is a symptom of the disorder; (3) the state must take possession of the offender for his best interests; (4) and the juvenile offender must be subjected to medical and/or psychological treatment to cure his disorder.
- Using the standard of successful restorative sanctioning, the problems inherent in the treatment model of juvenile justice become fairly obvious. It is singularly focused on the young offender and is concerned solely with his rehabilitation. Victims and community members are necessarily excluded from the process, as their interests are irrelevant to the treatment of the offender. The direct victim is denied reparation, either symbolic or material, for any harm caused by the crime. She is, in other words, persona non grata in the treatment model. Equally significant is the exclusion of the juvenile's family and supporters. The important bonds of respect that are vital to the offender's moral development are severed through the isolation of concentrated treatment. As such, all responsibility for the juvenile's care is appropriated by the state and its medical professionals.

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- The treatment model does not envision open dialogue with the individuals most concerned with the offender or his offending; victims, family members, and community representatives play no part in crafting a plan for the juvenile. Instead, the process and outcome are solely controlled by juvenile justice and health care officials. Nor does the offender have a say in the matter, as treatment is imposed rather than negotiated. And because the juvenile is deemed unaccountable for his deeds, he is not censured for the offense. The treatment model therefore provides no opportunity for the reaffirmation of community values and norms, for an expression of genuine remorse on the part of the offender, and for the cathartic acceptance of that remorse by the victim or other concerned parties. What is worse, the entire treatment process facilitates the labeling of the offender as disordered, thereby further entrenching his deviant identity. It confirms-and even provides a medical basis-for his position as a social outcaste.
- In response to the perceived failures of the treatment model, many American jurisdictions shifted to a youth court system grounded in the "just deserts" theory of justice. The punishment model of juvenile justice is, in large part, a miniaturized version of the traditional adult court system. The primary focus is on the procedures for determining guilt and then punishing the offender for his moral blameworthiness. The central actors are legal professionals-judges and attorneys-and the process involves an adversarial contest between the state and the juvenile defendant.
- Once guilt is established through legalistic rules and formal deliberation, the court imposes punishment in proportion to the gravity of the crime. Concerns such as treatment or moral education are, at best, secondary considerations. Instead, the primary aim is to inflict an equivalent amount of suffering on the juvenile offender as that caused by his offense. Neither the community nor the victim are included in the process, except to the extent that they are needed as witnesses or their interests are tangentially met by punishing the juvenile. Offender accountability is meted out and measured solely by the juvenile serving his sentence.

As with the treatment approach, the punishment model of juvenile justice appears to fail the standard of successful restorative sanctioning. The adversarial nature of the punishment model creates a hostile environment where concern for mutual respect is replaced with the desire for victory in a pure winner-take-all scenario. There are only two cognizable parties in this court-centered form of criminal justice: the state and the juvenile defendant. In this binary system, the victim, community representatives, various supporters and family members are excluded from the process.

For the most part, the concept of voluntariness is foreign to the punishment model; there is no choice but to participate as directed by the court. Likewise, the process is predefined by statutes and judge-made rules and are not subject to modification even by party agreement. Although the juvenile offender may have a formal right to address the court, he is typically advised to remain silent while his counsel ostensibly speaks on his behalf. Even then, dialogue is strictly limited in its form and format and laced with a type of legal-ease that tends to be incomprehensible to all but trained attorneys. The juvenile's participation in the process is, by and large, nominal.

More often than not, the post-adjudication censure received by the juvenile is destructive and stigmatizing; the offense and the offender are denounced as being wrongful and immoral, confirming the offender's label as a delinquent. A typical sanction under the punishment model, custodial sentence to a juvenile facility, has the potential to solidify his deviant identity by placing him in an environment filled with other youthful offenders. Juvenile detention centers are frequently little more than colleges for criminals.

The punishment model largely precludes the possibility of the offender expressing genuine remorse to the victim and others he has injured by his crime; prior to the adjudication of guilt, in fact, he will be advised not to admit anything, let alone convey a sense of personal sorrow. Without a statement of remorse, there can be no acceptance of heartfelt regret. And because reparation is either non-existent or highly formalized, the victim must suffice with the offender's conviction as a means of healing her

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injuries. In the end, the punishment model of juvenile justice proves disrespectful to the needs of those intimately affected by crime.

So although they are posed as opposite ends of the sanctioning spectrum, the treatment and punishment models of juvenile justice have much in common -their fundamental inconsistencies with the standard of successful restorative sanctioning. Both models exclude parties with important interests in the sanctioning process; reject the concept of voluntary participation; deprive the juvenile of important supporters; place process control solely within the ambit of professionals; prevent free dialogue among stakeholders; and thwart the pivotal sanctioning stages of constructive censure, genuine remorse, and stakeholder acceptance. It is no wonder, then, that offenders, victims, families, supporters, and community members are largely dissatisfied with the traditional approaches to juvenile justice.

Hope, nonetheless, spring eternal. In response to the perceived deficiencies in the traditional approaches to youth offending, a third vision of juvenile justice has emerged from theoretical scholarship, ethnographic studies of non-Western cultures, and the sheer tenacity of thoughtful jurists and practitioners. This conferencing model is best illustrated by its most concrete and celebrated form: New Zealand's Family Group Conference, or FGC for short. The FGC is at the heart of a revolutionary piece of legislation, the Children, Young Persons and Their Families Act of 1989. This statute was a response to a number of serious complaints about the treatment of juvenile offenders in the New Zealand justice system. As a general matter, experts, politicians, and the public had become disillusioned with six decades of paternalistic welfare legislation that was seen as both costly and largely ineffective at preventing youth crime.

There was also a widely held notion that state paternalism had done more harm than good for the families and support networks that are vital to the moral development of children. In particular, the heavy emphasis on institutionalizing juvenile offenders had two negative effects: removing children from their families and the accompanying affective bonds, and exacerbating juvenile crime by placing offenders in a custodial setting conducive to the criminogenic influences of delinquent peer pressure. In addition, the process largely excluded involvement or input from the victims of youth crime and community members concerned with the offending. And there were mounting complaints from the Maori community that the existing approach was wholly foreign to its traditional values and destructive of the kinship networks essential to Maori society.

The 1989 Act attempted to address these concerns by creating a new vision and approach to youth justice. Although it is an intricate piece of legislation, including both general principles and specific rules, the Act's core component is the FGC. Except for informal police warning or diversion, an acquittal by court hearing, or charges of certain serious crimes such as murder and manslaughter, the family group conference is the prescribed means of addressing youth crime in New Zealand.

The chief organizer and facilitator of the FGC is the youth justice co-ordinator. He is responsible for consulting with the juvenile, his family, the victim, police, and other relevant stakeholders to determine the desirability of a family group conference, who should be invited to the FGC, whether the parties and invitees plan to attend, and a suitable time and place to hold the conference. It is also incumbent on the co-ordinator to ensure that all parties are adequately informed about the necessary background of the offense, how the FGC is likely to proceed, and other information relevant to both voluntary attendance and informed participation.

Although the FGC is an inherently flexible process that can be adjusted to the needs of the parties, they tend to follow a fairly standard pattern. Two leading experts on family group conferencing, Gabrielle Maxwell and Allison Morris, suggest that the process generally involves the following:

- introductions of the parties and participants
- an explanation of the procedure by the youth justice co-ordinator

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- the presentation of the summary of facts of the offense by the police
- an opportunity for the offender to comment on the accuracy of the police statement
- an opportunity for the victim or her representative to present her view if the offender admits the offense
- a general discussion of possible outcomes
- a discussion of options among the offender's family
- the formulation of a plan, response or outcome by the offender's family
- general negotiation among the parties and participants
- agreement from the enforcement agency and victim
- and recording the agreed plan and closure of the meeting

This general FGC process is necessarily subject to variation and, as noted by various researchers and youth justice co-ordinators, no two conferences are alike. Nonetheless, there are two mandatory ingredients to the successful completion of a conference: the juvenile must not deny responsibility for the offense, and all parties must consent to the FGC plan. If either of these conditions are not met, the juvenile's case will typically be referred to the youth court. Although not a statutory requirement, the success of a conference agreement is also dependent on the youth justice coordinator's follow-up, ensuring that the necessary services are provided the juvenile, that the agreed restitution is being made, and that all other details in the plan are being met.

Using the restorative sanctioning standard, it becomes clear why family group conferences are, at least in theory, better able to satisfy the needs of offenders, victims, families, and community members than the traditional approaches to juvenile justice. The basic structure of the FGC provides an environment of respect for the parties and stakeholders. It is an inclusive process, offering victims and community members a forum to express the harms caused by the crime, the concerns they have with the offender, and their ideas for an appropriate resolution. Likewise, the process allows the participation of family members and supporters of the most vulnerable parties—the juvenile offender and the victim. More importantly, the participation of all parties is strictly voluntary; even the offender has the option of refusing to attend the FGC. Although offenders invariably do attend their conferences and, conversely, FGC's are rarely held without the juvenile, the mere fact that the option exists is a sign of respect toward the offender.

Unlike the procedural rigidity of the traditional approaches to juvenile crime, the FGC vests substantial latitude in the participants to shape the process into a form most amenable to their needs and the problem at hand. The FGC need not occur in a government facility, for instance, or during business hours; instead, the conference can be held in a private home, on a marae or church, and at a time and date most convenient to all parties involved. Process control is also vested in the key participants—the victim and the offender—by allowing them to choose supporters to join them during the FGC. Likewise, the FGC is premised on the free discourse among the participants, allowing them an opportunity to air their thoughts and emotions. Through the flow of undominated dialogue, the participants tend to gain a sense of respect and understanding for one another, a sense of ownership in the process, and are more likely to reach a satisfactory outcome for the offender, the victim, their supporters, and the community.

In addition to the basic prerequisites, the FGC is more likely to incorporate the pivotal stages of a successful restorative sanctioning process. The inclusive, informal, and dialogic nature of the FGC tends to produce constructive censuring of the offense rather than destructive condemnation or disintegrative shaming of the offender. The focus of censure is the wrongfulness of the crime and the

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harm to the victim and community. Like the Native American healing circles, it is the offense-not the offender-that is placed in the symbolic center of discussion. The presence of the juvenile's family and supporters gives the process credence while ensuring that his positive identities-as a son, a brother, a rugby player, or a student-are reinforced by the words and presence of those who care most about the young person.

But the inclusive, dialogic aspect of constructive censuring also provides benefits to the other participants as well. Family members can air their concerns and the painful emotions that have accompanied the juvenile's conduct, express their hopes and fears for the young person's future, and convey the empathy and sorrow they feel for the victim. Community members and law enforcement can openly discuss the larger effects of the offense and the rationale for its criminalization, thereby validating both the moral values of the community and the limits of individual behavior. Most importantly, the constructive censuring of the FGC reaffirms the victim's right not to be victimized. An unambiguous denouncement of the offense coupled with the opportunity to voice the pain she has suffered tends to be a cathartic experience for the victim and a major step toward healing the damage caused by the crime.

Given the emphasis on constructive rather than destructive censuring, the FGC tends to generate genuine remorse on the part of the juvenile offender and, as a result, acceptance by the participants of that heartfelt expression. Two key factors contribute to the young offender's feelings of genuine remorse. First, the presence of the victim and her articulation of the harm she has suffered frustrate an offender's attempt to neutralize his offense. The juvenile cannot, in other words, rationalize his crime as being minor or harmless when a real person stands in front of him describing the physical and emotional pain directly flowing from his behavior.

Second, the presence of the young person's family members, their personal condemnation of the offense, and the visible signs of anguish felt by family members confronted by the harm caused by their own kin all provide exceptionally powerful signals to the juvenile on the wrongfulness of his conduct. And once the young offender communicates genuine remorse, it is only natural that participants accept that expression as sincere and meaningful. The completion of the "core sequence" of remorse and acceptance creates an environment of respect in the FGC-an offender's respect for the victim by his genuine statement of remorse and validation of her right not to be victimized, and a victim's respect for the offender as an individual capable of feeling true emotions and taking responsibility for his actions.

The final stages in successful restorative sanctioning, planning and facilitation, are also incorporated into the family group conference. The discussion of the possible outcomes among the participants empowers the offender, the victim, the families, and supporters by giving them a voice in the planning stage, while the process of negotiation aims at forging a satisfactory resolution through rational discourse. When participants feel that their opinions and ideas were recognized and respected, they become vested with an ownership interest in the outcome and its fulfillment. If the victim believes that the planned reparation compensates for her injury while the totality of the sanction offers a just resolution, she will leave the FGC feeling better about herself, the juvenile, his family, and the agreement reached with her consent. And to the extent that the young offender feels that he participated in the discussion and that the resulting plan was fair, the more likely he will perform the reparations and complete his obligations under the agreement.

The follow-up after the FGC, of course, is vital to the plan's success. The conference itself offers the first step towards facilitating the agreement. The same individuals that surround the juvenile in an ethic of care during the FGC-his family and supporters-also offer the best parties to ensure that the youthful offender follows through with his responsibilities while helping him to overcome unforeseen obstacles along the way. The youth justice co-ordinator, community members, and sometimes even the victim can provide means of completing reparation, acquiring necessary skills and psychological treatment, and assisting the juvenile in reaching personal goals. The only limit, of course, is the

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public's willingness to finance both the family group conference process and the accompanying social services.

- In closing, then, it seems to me that the conferencing model provides an approach to juvenile crime and, quite possibly, adult offending that better meets the needs of victims, offenders, families, and communities than the traditional models guided by either rehabilitation or retribution.
 - o But what I have suggested here is a theoretical framework, not empirical support.
 - o The jury is still out as to whether the conferencing model does, in fact, work as measured by restorative sanctioning goals or even traditional measures of criminal punishment.
 - o In the coming years, we can expect experts such as John Braithwaite, Lawrence Sherman, and Victoria University's own Gabrielle Maxwell and Allison Morris to provide answers to the empirical questions posed by restorative justice.
- In the meantime, communities and their leaders should continue to challenge the underlying principles and consequences of traditional sanctioning schemes:
 - o Does stigmatizing offenders under current punishment regimes cause more harm than good?
 - o Does the exclusion of victims, families, and community members from the criminal justice system serve any real sanctioning goal or merely cause alienation and more damage?
 - o And are the needs of crime victims met by inflicting pain on the offender or labeling him as disordered?
- What I have found so appealing about New Zealand, its people, and its culture is a willingness to question the seemingly unquestionable and to embark on noble programs grounded in reason despite emotional appeals and belligerent opposition.
- And it is this willingness to think outside of the box, to challenge the dominant paradigm, that I will endeavor to take back with me to the United States.

7.2. Revisiting the Relationship between Retributive and Restorative Justice -1999⁵

- In this essay, I raise a complex and contentious question: what is the role of punishment in a restorative justice process?
 - o I raise the question to invite discussion and debate in the field, not to assert a clear and unequivocal answer.

Definition of Punishment

- The term punishment evokes strong images and feelings in people; it has no singular meaning.
 - o This is especially the case when it is linked to a restorative justice process, that is, an informal legal process that includes lay and legal actors, which is partly, but not entirely state punishment.
- Those interested in the idea of restorative justice need to grapple with the idea of punishment.
- I start with several caveats and definitions.
 - o I am working within the terms of what Cohen (1985: 251)⁶ calls "the liberal consensus".

⁵ Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/cji/kdaly_docs/kdpaper6.pdf

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- This means that I assume that there is individual autonomy (or personal responsibility) in committing crime and a moral legitimacy of criminal law.
 - These assumptions can be easily challenged by critical legal scholars, who call attention to the injustices of criminal law and justice system practices as they are applied in unequal societies.
 - For pragmatic reasons, however, we need to think about what is possible and workable today, even as a more radical critique reminds us of the limits of liberal law and legal reform.
- Finally, when I discuss restorative justice processes, I have in mind a particular application: what are variously termed family conferences and diversionary conferences as practiced in the response to youth crime in Australia and New Zealand.
- From time to time, I'll draw from my knowledge of observing conferences and interviewing participants.
- My argument addresses these points:
- 1. We should stop comparing retributive justice and restorative justice in oppositional terms.
 - Such a strong, oppositional contrast cannot be sustained empirically.
 - Moreover, seemingly contrary justice practices -- that is, of punishment and reparation - can be accommodated in philosophical arguments.
 - 2. There are some key differences between restorative justice and other traditional modes of justice.
 - 3. We should embrace (not eliminate) the concept of punishment as the main activity of the state's response to crime.
 - Using Duff's (1992)⁷ terms, restorative justice processes and sanctions should be seen as "alternative punishments" rather than "alternatives to punishment".
 - 4. Philosophical argument and empirical study suggest a complex meshing of censure, symbolic reparation, and restorative or reparative processes and outcomes for victims, offenders, and their supporters.
 - Empirical work suggests that citizens draw from a large justice vernacular, which includes ideas of punishing offenders, deterring them from future offending, and helping them to reform.
 - 5. Some argue that the role of a criminal justice process should be to censure the offence only (von Hirsch 1993)⁸, whereas others say that more should be elicited from a wrongdoer such as "acknowledged shame" (Braithwaite 1989⁹; Retzinger and Scheff 1996¹⁰) or a "repentant understanding" (Duff 1992¹¹) for committing a wrongful act.

⁶ Cohen, S (1985) *Visions of Social Control: Crime, Punishment and Classification*, Cambridge University Press, Cambridge. *cited in* Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice, To appear in Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁷ Duff, R A (1992) "Alternatives to punishment - or alternative punishments?", in Cragg, W (ed) *Retributivism and Its Critics*, Franz Steiner, Stuttgart, pp 44-68 *cited in* Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice, To appear in Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁸ von Hirsch, A (1993) *Censure and Sanctions*, Oxford University Press, New York *cited in* Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice, To appear in Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁹ Braithwaite, J (1989) *Crime, Shame and Reintegration*, Cambridge University Press, Cambridge *cited in* Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice, To appear in Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

¹⁰ Retzinger, S & Scheff, T (1996) "Strategy for community conferences: emotions and social bonds" in Galaway, B & Hudson, J (eds) *Restorative Justice: International Perspectives*, Criminal Justice Press, Monsey, New York, pp 315-36 *cited in* Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice, To appear in*

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- It is believed that without such expression (or a "sign" of such expression), complete reparation is not possible.
- An ethical question arises in the practice of restorative justice: should symbolic reparation be coerced or would this be considered contrary to the tenets of a restorative justice process?

Point 1: The retributive-restorative justice oppositional contrast is wrong.

- We should stop comparing retributive justice and restorative justice in oppositional terms.
 - Such a strong, oppositional contrast cannot be sustained empirically.
- Moreover, seemingly contrary justice practices -- that is, of punishment and reparation -- can be accommodated in philosophical arguments.
- The oppositional contrast between retributive and restorative justice has become a permanent fixture in the field: it is made not only by restorative justice scholars, but increasingly, one finds it canonised in criminology and juvenile justice text books.
 - During the first phase of work in the field (i.e., 1970s to mid 90s), this contrast may have served a useful purpose, but now that we have moved into a second phase of consolidation and reflection, it stymies us.
 - The retributive-restorative contrast builds on the retributive-rehabilitative contrast, which preceded it (see Zehr 1990¹²; Bazemore and Umbreit 1995¹³; Walgrave 1995¹⁴) and which is associated with these elements:

Table 1. Retributive and Rehabilitative Justice

Retributive	Rehabilitative
focuses on the offense	focuses on the offender
focuses on blame for past behaviour	focuses on changing future behaviour
Aim: to punish the offence	Aim: to treat the offender

- Restorative justice advocates have proposed that restorative justice be viewed as a "third way" (Bazemore and Walgrave, forthcoming), as representing a break from the elements associated with retributive and rehabilitative justice.

Restorative Justice: From Philosophy to Practice (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

¹¹ Duff, R A (1992) "Alternatives to punishment -- or alternative punishments?", in Cragg, W (ed) Retributivism cited in Braithwaite, J (1989) Crime, Shame and Reintegration, Cambridge University Press, Cambridge cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in Restorative Justice: From Philosophy to Practice (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

¹² Zehr, H (1990) Changes Lenses, Herald Press, Scottsdale, Pennsylvania cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in Restorative Justice: From Philosophy to Practice (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

¹³ Bazemore, G & Umbreit, M (1995) "Rethinking the sanctioning function in juvenile court: retributive or restorative responses to youth crime", Crime & Delinquency, vol 41, pp 296-316 cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in Restorative Justice: From Philosophy to Practice (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

¹⁴ Walgrave, L (1995) "Restorative justice for juveniles: just a technique or a fully fledged alternative?", The Howard Journal, vol 34, pp 228-49 cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in Restorative Justice: From Philosophy to Practice (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

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- In my view, restorative justice is best characterised as a practice that flexibly incorporates "both ways" -- that is, it contains elements of retributive and rehabilitative justice -- but at the same time, it contains several new elements that give it a unique restorative stamp.

Table 2. Retributive, Rehabilitative and Restorative Justice

Retributive	Rehabilitative	Restorative
focuses on the offense	focuses on the offender	focus on the offence and the offender
focuses on blame for past behaviour	focuses on changing future behaviour	concerned with censuring past behaviour and with changing future behaviour
Aim: to punish the offence	Aim: to treat the offender	are concerned with sanctions or outcomes that are proportionate and that also "make things right" in individual cases

- Restorative justice practices assume:
 - mentally competent and hence
 - morally culpable actors,
 - who are expected to take responsibility for their actions, not only to the parties directly injured, but perhaps also to a wider community.
- As such, restorative justice practices
 - embrace retributive justice assumptions of individual culpability and
 - they also include a wider notion of community (or, at times, familial) responsibility for those acts.
- Ideas of "reintegrating" offenders (Braithwaite 1989)¹⁵ by members of relevant communities of care tap into a stronger vision of rehabilitation, in which broader networks of people associated with a lawbreaker, not just state actors, get involved and have a role.
 - Thus, restorative justice should not be viewed in opposition to retributive or rehabilitative justice.
 - Instead, this recent justice practice borrows and blends many elements from traditional practices of retributive and rehabilitative justice in the past century, and it introduces some new terms.

Point 2: There are key differences in traditional and restorative justice.

- There are some key differences between restorative justice and other traditional modes of justice.
 - There are differences, some more apparent than real, between traditional and restorative justice practices, and these are shown in Table 3.

Table 3. Traditional and Restorative Justice

	Traditional Justice (retributive & rehabilitative)	Restorative Justice
Victims	victims are peripheral to the process	victims are to take a more central role in the process;
Focus	the focus is on punishing or on treating an offender	the focus is on repairing the harm between an offender and victim, and perhaps also an offender and a wider community
Community	the community is represented by the state	Community members or organisations take a more active role in the justice process, working with state organisations;
Process	the process is characterised by adversarial relationships among the parties	the process is characterised by dialogue and negotiation among the major parties with a stake in the dispute.

¹⁵ Braithwaite, J (1989) *Crime, Shame and Reintegration*, Cambridge University Press, Cambridge cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

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- These distinctive features of what should occur in a restorative justice process stem from differences in the scope and associated decision-making processes of traditional and restorative justice, together with their stated aims.

	Traditional Justice (retributive & rehabilitative)	Restorative Justice
Scope	cover a wider array of decision-making possibilities at least to date.	
Fact Finding	address the fact-finding	in almost all restorative justice practices to date, there is no fact-finding phase
Process	adversarial process in which the state assumes the role of a wronged individual,	consequently, the need for an adversarial process is diminished; negotiated justice
Meanings of repairing harm and retribution		some suggest that the idea of repairing the harm or the injuries caused by crime is amorphous and vague. It moves imprecisely between criminal and civil liability, it seems to ignore the state's public censuring role in responding to crime, and it overlooks the importance of serious crimes that are attempted but not completed (see Ashworth 1993: 282-86, in response to van Ness 1993). ¹⁶
Penalty Phase	address penalty phases for guilty (or admitted) offenders; the penalty is decided by a judicial authority after hearing arguments by prosecution and defence	focus on the penalty phase alone
Concept of Punishment	some use the term to describe a justification for punishment (i.e., intended to be in proportion to the harm caused), whereas others use it to describe a form of punishment (i.e., intended to be of a type that is harsh or painful).	It is unclear how restorative justice practices will relate to this already modified criminal sanctioning picture, in which compensation to victims is already part of sentencing. Moreover, in light of this modified picture, we may ask, how (if at all) is restorative justice distinctive? Restorative justice advocates would likely say that in a restorative justice framework, reparation to the victim (or to the

¹⁶ van Ness, D (1993) "New wine and old wineskins: four challenges of restorative justice", and "A reply to Andrew Ashworth", *Criminal Law Forum*, vol 4, pp 251-76, 301-6. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999.
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	Traditional Justice (retributive & rehabilitative)	Restorative Justice
Stated aims	those of traditional justice (that is, both retributive and rehabilitative) are many and varied, including punishing and reforming lawbreakers; and emerging in the 1960s, providing restitution to victims.	community) are the primary aims, and punishment is minimised. to repair the harm or the injuries caused by a crime to the person victimised, and perhaps also, to a broader community.

- Thus, a key difference in the stated aims of retributive and restorative justice turns on the meaning (of repairing the harm and retribution) and purpose of punishment (fits into justice practices)
- If we narrow the comparison to retributive and restorative justice, we find that scholars disagree on the relationship between them (for review, see Daly and Immarigeon 1998).¹⁷
 - To simplify, some see a sharp disjuncture in the two justice modes, and others do not.
- Key differences are apparent among restorative justice advocates on the place of retributivism and proportionality in the response to crime: whereas some (e.g., Braithwaite and Pettit 1990)¹⁸ eschew retributivism as a justification for punishment, favouring instead a free-ranging consequentialist justification and highly individualised responses, others wish to limit restorative justice responses to a desert-based, proportionate criteria (Walgrave and Aertsen 1996¹⁹; van Ness 1993²⁰).
- For (2) and the concept of punishment, in the past three decades, there has been a blurring of boundaries between civil and criminal liability, as compensation to victims and punishment of offenders have increasingly been used, alone and together, insentencing (Ashworth 1986²¹).

Point 3: Restorative justice processes and outcomes are alternative punishments, not alternatives to punishment.

- Restorative justice advocates typically set themselves against the idea of punishment, that what they are doing is punishing an offender.

¹⁷ Daly, K & Immarigeon, R (1998) "The past, present, and future of restorative justice: some critical reflections", *Contemporary Justice Review*, vol 1, No 1, pp 21-45 cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/cji/kdaly_docs/kdpaper6.pdf.

¹⁸ Braithwaite, J & Pettit, P (1990) *Not Just Deserts: A Republican Theory of Justice*, Oxford University Press, New York. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/cji/kdaly_docs/kdpaper6.pdf

¹⁹ Walgrave, L & Aertsen, I (1996) "Reintegrative shaming and restorative justice: interchangeable, complementary or different?", *European Journal on Criminal Policy and Research*, vol 4, pp 67-85. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/cji/kdaly_docs/kdpaper6.pdf

²⁰ van Ness, D (1993) "New wine and old wineskins: four challenges of restorative justice", and "A reply to Andrew Ashworth", *Criminal Law Forum*, vol 4, pp 251-76, 301-6. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/cji/kdaly_docs/kdpaper6.pdf

²¹ Ashworth, A (1986) "Punishment and compensation: victims, offenders and the state", *Oxford Journal of Legal Studies*, vol 6, No 1, pp 86-122. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/cji/kdaly_docs/kdpaper6.pdf

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- Even the term itself may be unspeakable to some.
 - Why might this be the case?
- I shall not endeavour to answer the question fully, but I suspect that it is part of a broader development in the history of punishment, in which justice elites have increasingly come to imagine and announce that what they intend to do in responding to crime is not to punish, but rather to guide, correct, educate, or instruct offenders.
- These elites -- the normative theorists and practitioners -- want to exercise their power in a different, more humane way.
- Such intentions are fine, but they need to be mindful of the Empirical world.
 - Do those who are not justice elites or who are on the receiving end of this new penal imagination see it in the same way?
 - Does their experience matter to the justice elites?
 - More generally and of utmost significance: what is and should be the place of punishment in restorative justice practices?
- As an interim step between the familiar world of retributive justice (or traditional justice, more generally) and the ideal world of restorative justice, I propose that punishment remain part of restorative justice (in addition to Garvey 1999, see Barton 1999 on this point).
 - My proposal will meet some opposition, and one major point of contention will turn on a key question: what is meant by punishment?
 - Related points of contention are whether any sanction imposed in a criminal legal process⁹ should, by definition, be considered punitive, and whether one can argue that there are non-punitive criminal sanctions.
- Some say that punishment practices are the "intentional" or "deliberate imposition of pain" on offenders, by which they would include incarceration and fines, but not rehabilitative or reparative measures.
 - This is the position taken by Wright (1991: 15)²², who wishes to distinguish the intentions of legal authorities:
 - he argues that whereas punishment is an intended deprivation, non-punishment is intended to be constructive.
 - As an empirical matter, I am not convinced by the distinction he makes in that it overlooks decades of critique of the rehabilitative ideal, with its associated treatment-oriented intervention.
 - Wright equates punishment with being punitive and non-punishment with being non-punitive.
 - His argument exemplifies how elites may delude themselves into thinking that what they intend to do (that is, not to punish) is in fact experienced that way by those at the receiving end.
- Cavadino and Dignan (1997: 307)²³ make similar assumptions.
 - They suggest that "reparative measures [could be seen to be the] normal response to offending, with punitive measures being very much the exception".
 - Further they say, "it is possible to envisage a perfectly workable future criminal justice system which made minimal use of imprisonment".
 - Here we find that reparative sanctions are contrasted with those considered to be¹⁰ punitive, and that punitive measures are equated solely with prison.
 - While prison would surely be experienced as punitive, can we assume that non-custodial sentences are not experienced as punitive or as punishment?
- Another way to define punishment practices is anything that is unpleasant, a burden, or an imposition of some sort on an offender.

²² Wright, M (1991) *Justice for Victims and Offenders*, Open University Press, Philadelphia. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

²³ Cavadino, M & Dignan, J (1997) *The Penal System, An Introduction* (2nd ed.), Sage, London. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

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- Thus, compensation is a punishment, as is having to attend a counselling program, paying a fine, or having to report to a probation officer on a regular basis (see, more generally, Duff 1992²⁴, 1996²⁵); Davis 1992²⁶).
- This is, in my view, a better way to define punishment.
- If this more inclusive definition were used, it would be impossible to eliminate the idea of punishment from a restorative response to crime, even when a meaningful nexus is drawn between an offence and the ways that an offender can "make amends" to a victim.¹⁰
- Now, of course, punishment as a social institution is considerably more than the array of sanctions or penalties imposed for crime.
 - Garland (1990: 17)²⁷ suggests that "punishment is a legal process ... where violators are condemned and sanctioned in accordance with specified legal categories ... The process is ... complex and differentiated, ... involv[ing] discursive frameworks of authority and condemnation; ritual procedures ...; a repertoire of penal sanctions, institutions, and agencies ...; and a rhetoric of symbols, figures, and images by ... which the penal process is represented to its various audiences".
 - The variety of sites and practices of punishment lead Garland to conclude that punishment has "a whole range of possible referents" and "is likely to exhibit internal conflicts and ambiguities".
- Using Garland's definition, we could all agree that restorative justice is one practice in a broader conceptualisation of punishment as a social institution.
- But if we shift from Garland's broad conceptualisation of punishment to the more narrow one of a "repertoire of penal.11 sanctions", we may wonder, why does punishment have negative connotations in people's minds?
 - Perhaps it is associated with humiliating, harming, or degrading people?
 - Surely, we know this is true historically and today.
 - There is no reason to assume, however, that this must be the case, unless one argues that any sanction imposed by a legal authority on a convicted (or admitted) offender is, by definition, harmful or unjust because the criminal justice system is unjust.
 - Restrictions and prohibitions for a range of penalties (including those associated with restorative justice) can be identified that address their potentially "degrading or intrusive character" (von Hirsch and Narayan 1993: 80-87).²⁸
- There are other reasons why punishment has come to have negative connotations.

²⁴ Duff, R A (1992) "Alternatives to punishment -- or alternative punishments?", in Cragg, W (ed) *Retributivism* cited in Braithwaite, J (1989) *Crime, Shame and Reintegration*, Cambridge University Press, Cambridge cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

²⁵ Duff, R A (1996) "Penal communications: recent work in the philosophy of punishment", in Tonry, M (ed) *Crime and Justice: A Review of Research*, University of Chicago Press, Chicago, pp. 1- 97. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

²⁶ Davis, G (1992) *Making Amends: Mediation and Reparation in Criminal Justice*, Routledge, London. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

²⁷ Garland, D (1990) *Punishment and Modern Society*, University of Chicago Press, Chicago. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

²⁸ von Hirsch, A & Narayan, U (1993) "Degradingness and intrusiveness", chap 9 in von Hirsch (1993), pp 80-87. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

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- Drawing from British penal history, Duff (1992: 56)²⁹ suggests one historical strand: the pre-statutory emergence of probation in the 19th century.
- The "early police court missions, from which statutory probation then grew, sought to save offenders from imprisonment by offering to supervise" them, offering a "merciful second chance".
- In its pre-statutory form, probation was considered an alternative to punishment, more precisely an alternative to imprisonment.
- Duff suggests that the view of probation as an "essentially non-punitive measure" was reinforced by "the growth of the 'treatment model' that dominated the probation service's self-conception after 1945".
- As such, whereas "'punishment' [was] conceived as bare retribution or deterrence, probation was seen as a mode of non-punitive treatment ... [and thus] ... the coercive elements of probation [e.g., reporting to a probation officer] [were] not seen ... as punishment ..". (p. 57).
- Duff (1992: 71)³⁰ suggests that reparative justice should be seen as containing alternative punishments rather than as an alternative to punishment.
 - Here, he is concerned to address the penal abolitionist stance that punishment should be rejected, by proposing instead that we distinguish "the very concept of punishment itself" from "certain conceptions of punishment".
 - Put another way, Duff wants to retain the concept of punishment and to see the development of alternative conceptions and modes of punishment.
 - I find Duff's argument persuasive in characterizing the current meaning and place of punishment in the response to crime, including responses that are termed restorative.
- For restorative justice advocates, a key question is this: what is to be gained by saying that restorative justice is an alternative to punishment?
 - In raising this question, I am concerned specifically with the sanction itself (e.g., compensation, community service, apology), not the process of deciding that sanction, which as I suggested in Point 2, can differ from traditional justice practices and in that way could modify the meaning of punishment to an offender and victim.
- Following the lead of some philosophers (like Duff) and several socio-legal scholars (e.g., Ashworth 1986, 1993; ³¹Campbell 1984³²; Davis 1992³³; Zedner 1994³⁴), I find it difficult to see how one can distinguish

²⁹ Duff, R A (1992) "Alternatives to punishment -- or alternative punishments?", in Cragg, W (ed) *Retributivism and Its Critics*, Franz Steiner, Stuttgart, pp 44-68. *cited in* Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999.

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³⁰ Duff, R A (1992) "Alternatives to punishment -- or alternative punishments?", in Cragg, W (ed) *Retributivism and Its Critics*, Franz Steiner, Stuttgart, pp 44-68. *cited in* Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999.

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³¹ Ashworth, A (1986) "Punishment and compensation: victims, offenders and the state", *Oxford Journal of Legal Studies*, vol 6, No 1, pp 86-122. and Ashworth, A (1993) "Some doubts about restorative justice", *Criminal Law Forum* vol 4, pp 277-99. *cited in* Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

³² Campbell, T (1984) "Compensation as punishment" *University of New South Wales Law Journal*, vol 7, pp 338-61. *cited in* Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

³³ Davis, G (1992) *Making Amends: Mediation and Reparation in Criminal Justice*, Routledge, London. *cited in* Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

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what is punishment and non-punishment in traditional or restorative justice practices, and even more so from the point of view of those who receive those sanctions.

- From the perspective of lawbreakers, the distinction will seem no different from (and just as disingenuous as) that between punishment and treatment.
 - From the point of view of victims, it denies legitimate emotions of anger and resentment toward a lawbreaker and some sign of expiation.
 - And from the point of view of the community, certain harms may appear to be condoned, not censured as wrong, if they are not punished.
 - The weight of philosophical and legal argument and empirical inquiry suggests to me that punishment, broadly defined to include retributive censure, should form part of what occurs in a restorative justice process.
- I hasten to add that I am not arguing that justice and punishment are the same or that justice is done when punishment is delivered.
- My point is more subtle and in a subjective sense, more complex than that.
 - It is to say that the ability of victims to be generous and forgiving and for offenders to "make amends" to victims -- elements that are desirable objectives in a restorative justice process -- can only come about during or after a process when punishment, broadly defined, occurs.

Point 4: Philosophical argument and empirical evidence suggest a complex meshing of censure, symbolic reparation, restorative processes, and "just-ness".

- For philosophical argument, I draw from Duff's (1992³⁵, 1996³⁶) work on punishment as communication and the relationship between punishment and reparative justice.
- There are a variety of positions on the relationship between punishment and reparative/restorative justice, and I would place Duff on the continuum between a mainly desert-based view of censure (von Hirsch 1993³⁷; Narayan 1993³⁸) and a highly consequentialist view (Braithwaite and Pettit 1990), although he is closer to a desert-based position.
- Duff (1992: 53-54)³⁹ suggests that ideally punishment should be

³⁴ Zedner, L (1994) "Reparation and retribution: are they reconcilable?", *Modern Law Review*, vol 57, pp 228-50. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

³⁵ Duff, R A (1992) "Alternatives to punishment -- or alternative punishments?", in Cragg, W (ed) *Retributivism and Its Critics*, Franz Steiner, Stuttgart, pp 44-68. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

³⁶ Duff, R A (1996) "Penal communications: recent work in the philosophy of punishment", in Tonry, M (ed) *Crime and Justice: A Review of Research*, University of Chicago Press, Chicago, pp. 1- 97. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

³⁷ von Hirsch, A (1993) *Censure and Sanctions*, Oxford University Press, New York. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

³⁸ Narayan, U (1993) "Appropriate responses and preventative benefits: justifying censure and hard treatment in legal punishment", *Oxford Journal of Legal Studies*, vol 13, No 2, pp 166-82. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

³⁹ Duff, R A (1992) "Alternatives to punishment -- or alternative punishments?", in Cragg, W (ed) *Retributivism and Its Critics*, Franz Steiner, Stuttgart, pp 44-68. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming,

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- communicative, not merely "expressive" because it should be a two-way communication, not a one-way directive aimed at a passive wrongdoer and
- retributive in that it aims to impose on the offender "the suffering (the pain of condemnation and of recognised guilt; the burden of reparation), which s/he deserves for his/her crime".
- Precisely because punishment is retribution for a past offence, Duff argues that it is forward-looking in that it aims to "induce and manifest that process of repentance, reform, and reparation which will restore the offender's moral standing in the community" (Duff 1992: 54⁴⁰).
 - For Duff, punishment ideally is "a penance ... that is, something which a wrongdoer imposes on [themselves], as a painful burden to which [they] subject [themselves] because [they have] done wrong" (p. 52).
- Duff imagines that an offender would be involved in the determination of their own punishment, in discussion with legal authorities and, where appropriate, a victim.
 - Although he does not have the conferencing model specifically in mind in his 1992 publication, his scenario of "communicative punishment" is what ideally is supposed to occur in the conference process.
 - The relationship between censure, as retributive and backward looking, is connected to its forward-looking capacity in a key passage in Duff (1996)⁴¹.
 - Just before this passage, he signals agreement with Braithwaite (1989)⁴² and Braithwaite and Pettit (1990)⁴³ that censure ought not be exclusionary or stigmatising, and that "our condemnation or blame must ... be such as to allow and assist the process" of "enabl[ing] [an offender] to repair [their] relationship with a victim and ... community". He continues:
 - That is, "don't you see what you have done" which is the central message of blame should not be our final word, the end of our engagement with the wrongdoer; it should, rather, be the beginning of a process whose final aspiration is to reconcile [the wrongdoer] with those whom [s/he] has wronged. So too with communicative punishments. ... They aim ... to induce the pain of accepted censure and recognised guilt. But the point of doing this is precisely to work toward the goals of repentance, reparation, reconciliation, and rehabilitation. Such goals are not distinct from "punishment"; rather, they are the proper goals of punishment itself, and goals that ... can be properly achieved only through a punitive, communicative process (Duff 1996: 82-83; emphasis in original).⁴⁴

2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999.

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⁴⁰ Duff, R A (1992) "Alternatives to punishment -- or alternative punishments?", in Cragg, W (ed) *Retributivism and Its Critics*, Franz Steiner, Stuttgart, pp 44-68. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999.

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⁴¹ Duff, R A (1996) "Penal communications: recent work in the philosophy of punishment", in Tonry, M (ed) *Crime and Justice: A Review of Research*, University of Chicago Press, Chicago, pp. 1- 97. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999.

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⁴² Braithwaite, J (1989) *Crime, Shame and Reintegration*, Cambridge University Press, Cambridge. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁴³ Braithwaite, J & Pettit, P (1990) *Not Just Deserts: A Republican Theory of Justice*, Oxford University Press, New York. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁴⁴ Duff, R A (1992) "Alternatives to punishment -- or alternative punishments?", in Cragg, W (ed) *Retributivism and Its Critics*, Franz Steiner, Stuttgart, pp 44-68. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming,

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- What this means is that before it is possible to consider "repairing the damage caused by crime", the offender must give some "sign" to a group that s/he has wronged another.
 - If that does not happen, then initial movement toward reparation may not be possible.
 - In plain language, we might ask, did an offender "show remorse" (more precisely "genuine remorse") for their wrongdoing?
- Empirical studies of conferencing can show how this works in practice.
 - Braithwaite and Mugford (1994)⁴⁵ give examples of interactions among participants in conferences they observed in Wagga, Wagga (New South Wales, Australia) and in Auckland (New Zealand) in the early 1990s.
 - The authors agree that wrongdoing should be censured ("denounced") in a conference, and they emphasise that the act, not the actor should be denounced.
 - In depicting the effectiveness of a victim to describe the impact of a crime to an offender, Braithwaite and Mugford (1994: 144)⁴⁶ consider an offender who has "developed a capacity to cut themselves off from the shame [of] exploiting other human beings":
 - [These offenders] deploy a variety of barriers against feeling responsibility. But what does not affect the offender directly may affect those who have come to support [the offender]. The shaft of shame fired by the victim in the direction of the offender might go right over the offender's head, yet it might pierce like a spear through the heart of the offender's mother. ... So while the display of the victim's suffering may fail to hit its intended mark, the anguish of the offender's mother ... may succeed in bringing home to the offender the need to confront rather than deny an act of irresponsibility (emphasis added).
- There is such dramatic emotional imagery here, with "shafts of shame" and "spears" flying about in the conference process!
 - These emotional elements can be present in conferences, although not uniformly in such a heightened dramatic form.
 - Such imagery gives us an idea of what should happen in a conference: offenders should feel a vicarious sense of punishment via seeing the anguish of their mothers receiving a "shame of shame".
 - I think it unfortunate that conferences are termed reintegration ceremonies because the term does not reflect the fact they contain both a "shaming phase" (as illustrated above) and a "reintegration phase" (Braithwaite and Mugford 1994: 146).⁴⁷
 - The latter depends on the former, and indeed, is meaningless without it.
- While censure and denunciation are terms used by both Duff and Braithwaite, they use different words to describe the result of that action: for Duff, it is the "pain of accepted censure" and for Braithwaite, a "shaft of shame" or "acknowledged shame".
 - Whereas Duff wishes to separate shame and guilt, Braithwaite focuses on shame alone, perhaps assuming that it is an emotion state that incorporates guilt.
 - Retzinger and Scheff's research on the role of shame in conferences brings out more of the emotional elements involved.

2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999.

http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁴⁵ Braithwaite, J & Mugford, S (1994) "Conditions of successful reintegration ceremonies", *British Journal of Criminology*, vol 4, pp 139-71 *cited in* Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf.

⁴⁶ Braithwaite, J & Mugford, S (1994) "Conditions of successful reintegration ceremonies", *British Journal of Criminology*, vol 4, pp 139-71. *cited in* Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁴⁷ Braithwaite, J & Mugford, S (1994) "Conditions of successful reintegration ceremonies", *British Journal of Criminology*, vol 4, pp 139-71. *cited in* Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

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- Retzinger and Scheff (1996: 316-317)⁴⁸ suggest that while material reparation (e.g., compensation or community service) may result from a conference, "symbolic reparation" is the "more ambiguous" though "vital element" that needs to occur if the conference is to be successful at all.
- Two steps in the "core sequence" are required, they say, to achieve symbolic reparation.
 - In the first, the offender "clearly expresses genuine shame and remorse over his or her actions".
 - And next, "in response, the victim takes at least a first step towards forgiving the offender for the trespass".
 - The authors suggest that this core sequence generates repair and restoration of the bond between victim and offender; it may be quite brief, "perhaps only a few seconds", but they propose, it is "the key to reconciliation, victim satisfaction, an decreasing recidivism" (p. 316).
- The core sequence also affects the ability to reach an amicable settlement.
 - Without it, they suggest that "the path toward settlement is strewn with impediments".
 - Indeed, they found that for a total of nine conferences they had observed, the core sequence did not occur in any of them during the formal part of the conference, although it did in three cases, after the formal end of the conference.

Therefore, Retzinger and Scheff propose that if an offender can "shar[e] and communicat[e] shame, instead of hiding or denying it", then it may be possible to repair the damage to "the bond" between an offender and victim (and perhaps others, as well). Retzinger and Scheff's "shame" is similar to Duff's concept of an offender's coming to have a "repentant understanding of what s/he did" and making "some apologetic expression of remorse for the harm caused to the victims" (Duff 1992: 49)⁴⁹. The authors do not assume that shame or repentant understanding will in fact occur in mediated victim-offender encounters. However, and this point is key to the legal philosopher of punishment and the social-psychologists of emotions: it is crucial that an offender show signs of remorse or shame when admitting responsibility for a crime, and that this is a prerequisite for any subsequent reparatively (or restoratively) oriented communications between a victim and offender (and no doubt other participants such as the supporters of victims and offenders).

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- For some time, I have pointed out that however much restorative justice advocates may wish to draw a strong contrast between retributive and restorative justice, this contrast is not borne out empirically in restorative justice practices (Daly and Immarigeon 1998)⁵⁰.
 - Having observed many conferences, I find that elements of censure, paying back the victim, and helping the offender can all feature in a conference discussion.
 - Retributive, restorative, and rehabilitative principles and terms are intermingled, or they may shift in emphasis, depending on the conference phase.
 - When I noted this empirical finding at a session at the 1998 American Society of Criminology meetings, Lode Walgrave responded with, "Yes, this is a problem".
 - But, I wonder, what is the problem?
 - Is there something wrong with the idea of censure or retribution?

⁴⁸ Retzinger, S & Scheff, T (1996) "Strategy for community conferences: emotions and social bonds" in Galaway, B & Hudson, J (eds) *Restorative Justice: International Perspectives*, Criminal Justice Press, Monsey, New York, pp 315-36. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁴⁹ Duff, R A (1992) "Alternatives to punishment -- or alternative punishments?", in Cragg, W (ed) *Retributivism and Its Critics*, Franz Steiner, Stuttgart, pp 44-68. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁵⁰ Daly, K & Immarigeon, R (1998) "The past, present, and future of restorative justice: some critical reflections", *contemporary Justice Review*, vol 1, No 1, pp 21-45. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

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- Or is it that both retributive and restorative ideas are brought into one discussion?
- As Duff, Retzinger, and Scheff point out, censuring activity and subsequent (or simultaneous) signs of remorse may be a precondition for any movement between victims and offenders.
 - In short, one cannot begin a restorative justice process by announcing "let's reconcile", "let's negotiate", or "let's reintegrate".
- I would like to put the case more strongly. At present, most people have a limited range of ideas about the response to crime; among them are punishing wrongdoers, stopping them from doing it again, keeping them away from the community, teaching them a lesson, and helping them to help themselves.
 - These are commonsense understandings of a just response to crime (or to individual offenders), and restorative justice scholars would be wise to work with them (or perhaps to re-work them) in building interest in the idea.
 - Any putatively new justice idea – however radical -- will contain residual bits of the old.
 - For many critics, restorative justice already sounds like a repackaging of rehabilitation in that it seems to give wrongdoers a second chance or appears to be a soft option.
 - When we talk about a just or an appropriate response to crime (whether toward one person or in the aggregate), we are not talking about a singular thing.
 - As a political and policy matter, it may be mistaken to excise the idea of punishment from a restorative justice process.
 - It may not be strategic politically nor comprehensible culturally.
 - People's ideas and feelings about punishment cannot be censored or willed away even if restorative justice advocates may wish otherwise.
- One feature of conferences is that they permit time to discuss things that matter to people: time for anger and forgiveness, and time for several justice principles -- not just one -- to be expressed.
 - As reported by Strang et al (1999: 62-65)⁵¹ from the RISE project, punishment is aired as a principle in deciding 19 outcomes in youth justice conference cases as often or more often than in court cases (see also Sherman et al. 1998: 87-99).⁵²
- Although principles of repaying the victim and community were expressed more often in conferences than in court, the most frequently aired principle in both settings was preventing future offences, not restoration or punishment. What explains these findings? In part, they suggest that conference participants want to talk about multiple justice principles, not just one, and in part, there is time to do so.

Compared to courtroom interactions, there is greater potential for an offender at a conference to explain what happened, for an offender's parent or supporter to say how the offence affected them, and for a victim to speak directly to an offender about the impact of the offence and any lingering fears. Some critics may be concerned that this wide latitude of discussion is too open-ended, and they would want to curtail it. For example, they would argue that a legal authority should not be permitted to coerce an offender into accepting an outcome, and participants should not engage in "stigmatising shaming" that puts down any person. Such problems are easily addressed. But what if it is an offender's parent who puts down their child? And what if, in witnessing this, the victim begins to feel more sympathetic to the young person's situation? These interactions occur in conferences, not infrequently, and they set up the possibility for alliances to form between victims (or their supporters) and young people.

⁵¹ Strang, H, Barnes, G C, Braithwaite, J, & Sherman L (1999) Experiments in Restorative Policing: A Progress Report to the National Police Research Unit on the Canberra Reintegrative Shaming Experiments (RISE). Canberra: Australian National University. at <http://www.aic.gov.au> cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in Restorative Justice: From Philosophy to Practice (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁵² Sherman, L W, Strang, H, Barnes, G C, Braithwaite, J, Inkpen N, & Teh, M-M (1998) Experiments in Restorative Policing: A Progress Report to the National Police Research Unit on the Canberra Reintegrative Shaming Experiments (RISE). Canberra: Australian National University. at <http://www.aic.gov.au> cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in Restorative Justice: From Philosophy to Practice (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

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- The restorative justice process, involving as it does mediation, direct exchanges between victims, offenders, and their supporters, permits the potential for honesty and humanity to emerge in ways foreclosed in a courtroom process (or one dominated by formal legality).
 - It is the process, not the sanctions per se that most distinguishes informal (and restorative justice) from formal (and retributive or rehabilitative) justice.
 - It is within this process where the meaning and purpose of a restorative sanction can be forged, agreed upon, and taken on by an offender for a victim (or, where relevant, others).
 - It is the understanding between an offender and victim (and often others present) of how a sanction connects meaningfully with a harm that can make a process and outcome in part "restorative", at least ideally.

Point 5: Ethical problems in the practice of restorative justice.

Duff terms his "communicative account of punishment" an "ambitious" one, which is a good way to distinguish it from that of von Hirsch (1993)⁵³. (For an exchange of views, see von Hirsch 1993⁵⁴, chapter 8; Duff 1996: 53-67)⁵⁵

While working with a desert-based notion of censure, von Hirsch wants to limit the "censure conveyed through punishment ... [to the] person externally" (von Hirsch 1993: 72)⁵⁶, and not attempt to "elicit certain internal states" from the actor, "whether those be shame, repentance or whatever". Should these behaviours occur spontaneously, that is all right in von Hirsch's view; his concern is that state censure should not attempt to elicit them. Rather, state censure should adopt the role of "judges" not "abbots".

Although it may be appropriate for a monk's superior to impose a penance and not simply to censure a monk's wrongdoing, von Hirsch asks, "why should the state be entitled to use its coercive powers to seek to induce moral sentiments of repentance?" Not surprisingly, von Hirsch is also concerned with the effect that "personalised penances" would have on proportionality; ultimately, though, his concern is that "it should not be the business of the state to try to engineer [an appropriate moral response]" (von Hirsch 1993: 77).⁵⁷

Several points can be offered. In defence of von Hirsch's position, we should be concerned that conference participants will look for signs or clues that an offender is genuinely²¹ remorseful for their actions. If the

⁵³ von Hirsch, A (1993) *Censure and Sanctions*, Oxford University Press, New York. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁵⁴ von Hirsch, A (1993) *Censure and Sanctions*, Oxford University Press, New York. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁵⁵ Duff, R A (1992) "Alternatives to punishment -- or alternative punishments?", in Cragg, W (ed) *Retributivism and Its Critics*, Franz Steiner, Stuttgart, pp 44-68. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁵⁶ von Hirsch, A (1993) *Censure and Sanctions*, Oxford University Press, New York. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁵⁷ von Hirsch, A (1993) *Censure and Sanctions*, Oxford University Press, New York. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

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desired signs are not seen, then for how long will conference participants continue to try to elicit them? Or if the desired signs are not seen, does the sanction become more severe? Of greater concern is a misreading of the signs themselves. Some offenders may show external states of "hardness", but are deeply distressed internally.

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Others may withdraw from the conference process because it is a "shame job" that they, as a minority group person, cannot accept. Upon reflection, we can see that signs of an offender's guilt and remorse have been a longstanding element in the ways in which legal officials and lay actors respond to wrongdoing. When police officers say an adolescent has an "attitude problem", they are referring, in part, to an "unrepentant" attitude. When judges discuss the role of a defendant's demeanour in court, they are referring, in part, to the degree of "respect for the law" that the defendant appears to display. A good deal of a formal-legal reaction to crime is bound up, then, in eliciting internal states of remorse.

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If we apply von Hirsch's critique to the conference context, there are other things to consider. Because the sanction in a conference is decided by (ideally) the victim, offender, and their supporters, there is no clear judicial role as such. Apart from a conference coordinator and police officer, the conference participants are not members of particular legal or religious communities. They have other kinds of affiliations with offenders and victims, most frequently via familial, marital, household, friendship, or community ties. These personal relationships may convey a moralising influence that is closer to the role of an abbot than a judge; but the better relational metaphor may be parent or teacher or respected community authority.

Whereas for von Hirsch the idea of eliciting particular emotion states (like remorse or contrition) should not be the aim of a sanctioning process, for others, this is the *raison d'être* of reparative or restorative justice. Davis (1992: 205)⁵⁸ encapsulates the idea well when he says that the harm from crime is "not just material [but involves] damage to a social and moral relationship". Thus, if reparation "is to be complete, [it] must make some to make amends for the victim's loss of the presumptions of security ... [for example] by some effort to reassure the victim that his or her rights are now respected". Davis suggests that while it is straightforward to see the retributive (desert-based) logic to material reparation, "one component in reparation cannot be coerced" by a court order, and that is the victim's "trust that the appropriate moral standards are shared by the offender". For a victim to be reassured, "s/he must believe that the attitude in question is freely expressed ... [which] can only be achieved by the victim and offender themselves" (Davis 1992: 205⁵⁹, emphasis added). Again we see that commentators are concerned that offenders come to recognise the moral wrong of crime, not just its material harm.

Here then is problem of process, which is also an ethical problem, for restorative justice. Commentators suggest that for a restorative/reparative process to work effectively, there needs to be a genuine admission of responsibility, remorse, or guilt for a wrong. Unless that symbolic reparation occurs, the rest will not follow easily, and as Retzinger and Scheff suggest, there will be many impediments to settlement. To date, restorative justice processes have been used mainly in cases where an offender admits or has "not denied" the offence to a police officer (and at times, to a magistrate). But that does not tell us what an offender (and their supporters) may say in a conference when they meet "their" victim and others associated with an offence. An interrelated set of ethical questions arises. Should an apology (or other reparative-like gesture or movement) be coerced, if only gently from an offender? What if a victim cannot "hear" or "see" an offender's remorse and offer of

⁵⁸ Davis, G (1992) *Making Amends: Mediation and Reparation in Criminal Justice*, Routledge, London. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁵⁹ Davis, G (1992) *Making Amends: Mediation and Reparation in Criminal Justice*, Routledge, London. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

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apology, but other participants can? What should be the role of laypersons and legal officials in coaxing or persuading the symbolic reparation elements of the restorative justice process?

The symbolic reparation sequence is at the heart of a restorative justice process. It may be induced by (or occur simultaneously with) retributive-based censure or denunciation of the act. Signs of remorse, contrition, or shame may be difficult to read, and that may pose a problem for the ethical practice of restorative justice. Although it may seem paradoxical to some restorative justice advocates, the conclusion I draw is that punishment, defined broadly to include retributive censure, should not be excised from a restorative justice process. Rather, punishment can be seen to make restorative justice possible.

I am grateful John Braithwaite, Antony Duff, and Lode Walgrave for their comments on an early version of this paper in February 1999. They raised many key questions about the meaning of punishment and its relationship to restorative justice, which I only partly address here.

In revising the paper since the February 1999 conference, I have become aware of a similar argument made by Stephen Garvey (1999)⁶⁰. He too proposes that punishment (as "penance" and as "atonement") is required for restorativeness, and I shall note the similarities in our positions, together with clarifications he offers. While his argument draws from a wider reading of the legal and philosophical literature than mine does, I draw selectively from this literature and from empirical research. ³ I have observed over 50 such conferences since coming to Australia in 1995; and as part of my research project on conferencing in South Australia, members of my research team and I have observed 89 youth justice conferences and interviewed over 170 young people and victims associated with those conferences, both in 1998 and in 1999. See Daly et al. (1998)⁶¹ for the project design and rationale.

There is great variety in conference practices and their organisational placement in Australia and New Zealand. In Australia, conferencing is now routinely used in statutory-based schemes in four jurisdictions (South Australia, Western Australia, Queensland, and New South Wales). Statutory-based schemes were legislated in Tasmania in 1997 (although not resourced and thus not implemented as of 1999), and in the Northern Territory in 1999 (although used only in selected cases). Australian conferencing began in the early 1990s with non-statutory schemes trialed by police departments and with police officers running the conferences; today there are two jurisdictions (the ACT and Victoria) without a statutory basis for conferencing. ACT conferencing is police-facilitated and based in police departments; Victorian conferencing is used only as a pre-sentencing option and for a relatively small number of cases. Throughout Australia, conferencing is used mainly for admitted offenders in youth justice cases (it is also legislatively established and used in care and protection matters in South Australia). In New Zealand, conferencing is legislatively established for the entire country, and it is used in both juvenile cases and care and protection matters. In the ACT, conferences were used in handling adult drink driving cases from 1995-97, and conferences continue to be used, in selected instances, in disposing adults.

While there is jurisdictional variation in the expected composition of conference participants and their conference roles, the general idea is that an offender, their supporters, the victim, and their supporters meet to discuss the offence and its impact; they jointly discuss the sanction, with at least one legal actor (a police officer) present. In most jurisdictions, conferences are a diversion from a juvenile court disposition (and potential court conviction), although they are also used as a pre-sentencing option in New South Wales,

⁶⁰ Garvey, S (1999) "Punishment as atonement", *UCLA Law Review*, vol 46, pp 1801-1858.

⁶¹ Daly, K & Immarigeon, R (1998) "The past, present, and future of restorative justice: some critical reflections", *Contemporary Justice Review*, vol 1, No 1, pp 21-45. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999.
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Queensland, and Victoria. Conferences normally last from one to two hours. For overviews of jurisdictional variation, see Bargen (1996, 2000)⁶², Daly (2000)⁶³, Daly and Kitcher (1999)⁶⁴, and Hudson et al. (1996)⁶⁵. In Australia, restorative justice practices, using the conference model, have also been applied to disputes in schools and workplace organisations..28

I use the term community here and elsewhere with great reservation; it is deployed by so many to mean so many things (Crawford 1997⁶⁶; Lacey 1996⁶⁷; Pavlich 1999⁶⁸); it is more likely to be discursively present when it is empirically absent (Lacey and Zedner 1995).⁶⁹

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Some advocates like to chronicle a 2000-year history of restorative justice, but such presentist and ethnocentric histories gloss over an extraordinarily diverse and complex story of justice practices around the world; and worse, such histories wrongly attempt to authenticate a modern western justice practice by citing its origins in pre-modern indigenous societies (for elaboration, see Blagg 1997). I use the term to refer to a modern, post World War II conception of justice, largely emerging in first-world industrialised societies, but also having resonance for nation-building in some countries (such as South Africa).

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Drawing from Cottingham's (1979)⁷⁰ summary of the many meanings of retribution, it is likely that restorative justice advocates use retributivism to mean "repayment" (to which they add a punitive kick) whereas desert

⁶² Bargen, J (1996) "Kids, cops, courts, conferencing and children's rights: a note on perspectives", Australian Journal of Human Rights, vol 2, No 2, pp 209-28. and Bargen, J (2000) "Kids, cops, courts, conferencing and children's rights: a note on perspectives and update for 1996-98", in Jones, W and Marks, L (eds) Children on the Agenda: The Rights of Australia's Children, Prospect Press, Sydney (in press) cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in Restorative Justice: From Philosophy to Practice (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁶³ Daly, K (2000) "Restorative justice in diverse and unequal societies", Law in Context (in press). cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in Restorative Justice: From Philosophy to Practice (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁶⁴ Daly, K & Kitcher, J (1999) "The (r)evolution of restorative justice through researcher-practitioner partnerships", Ethics and Justice, vol 2, No 1. On line at www.ethics-justice.org/v2n1 cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in Restorative Justice: From Philosophy to Practice (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁶⁵ Hudson, J, Morris, A, Maxwell, G & Galaway, B (eds) (1996) Family Group Conferences: Perspectives on Policy and Practice, Criminal Justice Press, Monsey, New York. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in Restorative Justice: From Philosophy to Practice (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁶⁶ Crawford, A (1997) The Local Governance of Crime: Appeals to Community and Partnerships, Clarendon Press, Oxford. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in Restorative Justice: From Philosophy to Practice (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁶⁷ Lacey, N (1996) "Community in legal theory: idea, ideal or ideology?", Studies in Law, Politics and Society, vol 15, JAI Press, Westport, Connecticut, pp 105-46. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in Restorative Justice: From Philosophy to Practice (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁶⁸ Pavlich, G (1999) "The force of community", Paper presented to Restorative Justice and Civil Society Conference, Australian National University, February. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in Restorative Justice: From Philosophy to Practice (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁶⁹ Lacey, N & Zedner, L (1995) "Discourses of community in criminal justice", Journal of Law and Society, vol 23, No 3, pp 301-25. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in Restorative Justice: From Philosophy to Practice (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

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theorists, such as von Hirsch, use retributivism to mean "deserved" and would argue for decoupling retribution from punitiveness.

8

One can see this development as part of the "civilising" process of modern penal practices, which included new ways for elites to talk about punishment (see Pratt 1998)⁷¹.

9

This may include sanctions that are not fashioned or imposed solely by a state authority, as is the case for conferencing in the Antipodes and circle sentencing in Canada.

10

Garvey (1999)⁷² argues this point in a different and more convincing way than I do. Drawing on Hampton's (1992)⁷³ distinction of crime as both a material harm and a moral wrong, Garvey proposes that the harm (or material loss) may be addressed through reparative measures, but that the wrong ("the morally false message ... of disrespect" to a victim) is addressed by punishment" (p. 1821). He suggests that restorative justice "promise[s] ... atonement without punishment, ... but can't really deliver on that promise" (p. 1830). "Restorativeness -- gentle and inspiring as it may be -- is ultimately self-defeating. [It] cannot achieve the victim's restoration if it refuses to vindicate the victim's worth through punishment ... nor can it restore the offender, who can only atone for his wrong if he willingly submits to punishment" (p. 1844).

11

One would want to add to this history the emergence of the juvenile court in the late 19th and early 20th centuries, with its emphasis on helping and reforming youthful lawbreakers. This²⁹ institutional innovation played importantly into punishment ideologies, which were subsequently applied to adult offenders.

12

Duff and other British commentators tend to use the term reparative justice whereas USA and Australian commentators more often use restorative justice.

13

Thus, by retaining the concept of punishment and by not equating restorative justice with a non-punitive response, there may in fact be no dilemma in applying a restorative justice response to cases of rape and racial harassment (see Hudson1998).⁷⁴

14

I interpret Duff to define punishment as censure for wrongdoing, which may also include an added sanction (e.g., community service), but need not. 15 Garvey (1999:1806)⁷⁵ terms his (and Duff's) understanding of

⁷⁰ Cottingham, J (1979) "Varieties of retribution", *Philosophical Quarterly*, vol 29, pp 238-46. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁷¹ Pratt, J (1998) "Towards the 'decivilizing' of punishment?", *Social & Legal Studies*, vol 7, No 4, pp 487-515. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁷² Garvey, S (1999) "Punishment as atonement", *UCLA Law Review*, vol 46, pp 1801-1858. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁷³ Hampton, J (1992) "Correcting harms versus righting wrongs: the goal of retribution", *UCLA Law Review*, vol 39, pp 1659-1702. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁷⁴ Hudson, B (1998) "Restorative justice: the challenge of sexual and racial violence", *Journal of Law and Society*, vol 25, No 2, pp 237-56. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁷⁵ Garvey, S (1999) "Punishment as atonement", *UCLA Law Review*, vol 46, pp 1801-1858. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised

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punishment as a "fused" theory, neither purely teleological nor purely deontological, but containing elements of both.

16

When he wrote the article, conferencing has just begun in New Zealand, and it was only being used in one town in New South Wales (Wagga Wagga).

17

I am less inclined to assume that victim-offender reconciliation is possible or desirable unless the offender is doing most of the emotional work. A good deal depends on the precise content and context of an offence, including victim-offender relations. Garvey (1999: 1804)⁷⁶ suggests that "reconciliation lies not with the wrongdoer, ... [but] instead with the victim, since reconciliation requires the victim's forgiveness". Such forgiveness is dependent, however, on the offender's having completed the four steps "leading to expiation ... repentance, apology, reparation, and penance" (p. 1804-5).

18

The remorse versus genuine remorse distinction is made by laypersons and legal authorities alike to refer, respectively, to offenders who were sorry that they were caught and those who really were sorry for what they did. 19

They emphasise different things in the censuring process. Duff seems to be saying that after (or simultaneously with) censuring an act, the offender expresses the "pain of accepted censure". Braithwaite seems to assume that shame will occur after the offender's act is denounced, and he gives more attention to modes of reintegration. Whereas Duff highlights the censuring of an act and the associated "pain" (but is less precise about what happens next), Braithwaite passes over censure, but highlights "shame" and "reintegration". As we shall see in the discussion of Retzinger and Scheff (1996)⁷⁷, their emphasis is closer to Braithwaite's in that they pass over censure and move directly to the "core sequence"⁷⁸

Retzinger and Scheff's identification of material and symbolic reparation is analogous to Garvey's identification of the methods of addressing the harm and wrong of crime (see note 17), although Garvey would argue that victim movement toward forgiveness can only be expected to occur after the offender has completed the steps toward expiation, among them secular penance (or punishment).⁷⁹

21

This is a major claim, which they do not support with empirical evidence. Recent work by Maxwell (1999: xx)⁸⁰ suggests that the following conference-based measures were "significant predictors of persistent reconviction"

paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁷⁶ Garvey, S (1999) "Punishment as atonement", *UCLA Law Review*, vol 46, pp 1801-1858. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁷⁷ Retzinger, S & Scheff, T (1996) "Strategy for community conferences: emotions and social bonds" in Galaway, B & Hudson, J (eds) *Restorative Justice: International Perspectives*, Criminal Justice Press, Monsey, New York, pp 315-36. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

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⁷⁹ This is a major claim, which they do not support with empirical evidence. Recent work by Maxwell (1999: xx) suggests that the following conference-based measures were "significant predictors of persistent reconviction" for young people in New Zealand: "not agreeing with the conference outcome; not remembering the conference, not completing tasks, not feeling sorry and showing it, and not feeling they had repaired the damage; and shame [which was defined as] being made to feel a bad person". Thus, there appears to be a variety of indicators of "persistent reconviction" of which stigmatising shame and unacknowledged shame are a part (Braithwaite 1989).

⁸⁰ Maxwell, G (1999) 'Researching Re-Offending', in Morris, A & Maxwell G (eds) *Youth Justice in Focus: Proceedings of an Australasian Conference held 27-30 October 1998 at the Michael Fowler Centre, Wellington*. Wellington: Institute of Criminology, Victoria University of Wellington. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University Revisiting the Relationship between Retributive and Restorative Justice, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

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There are, of course, many ways to achieve movement between a victim and offender; many sequences are possible not one. Moreover, a conference process may engage the potential for movement, which may only come after an offender completes an undertaking (such as community service). Thus, a restorative justice process (or outcome) is not limited to what occurs in a conference alone, but could take some time.²³

If later in time, an offender fails to fulfil the agreed upon outcome, then for the victim, there is little or no restorative justice.²⁴

I cannot do justice to the many important points raised in Duff (1996)⁸². Among the most relevant to the comparison of his ambitious account and von Hirsch's more restricted one is whether one has a communitarian or liberal theory of society (p. 88).²⁵

This may be a good example of what Retzinger and Scheff (1996: 318)⁸³, refer to as "being ashamed of being ashamed". Emotions are kept in check and offenders appear "not to be sorry", but after they leave the conference, they "uncheck" the emotions.²⁶

Whether legal authorities should be eliciting such internal states is, of course, another matter. It would be difficult to imagine enforcing proscriptions against the behaviour, although it is possible to announce what is legal and illegal in questioning witnesses, suspects, defendants, or those under state supervision or custody.

7.3. Putting Aboriginal Justice Devolution Into Practice -1995 ⁸⁴

- Initiatives, such as Hollow Water in Manitoba and the lay assessors courts in Greenland have been subjected to criticism of leniency in cases involving violence.
 - The limited discussions over the course of the three days of the Workshop did not permit a full airing of the leniency issue, but participants pointed to its relationship to larger contexts.
 - These include accountability of those responsible for the initiative to the community, accessibility of victims or those who represent their interests to the decision-making of the initiative,

⁸¹ Braithwaite, J (1989) *Crime, Shame and Reintegration*, Cambridge University Press, Cambridge. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁸² Duff, R A (1996) "Penal communications: recent work in the philosophy of punishment", in Tonry, M (ed) *Crime and Justice: A Review of Research*, University of Chicago Press, Chicago, pp. 1- 97. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁸³ Retzinger, S & Scheff, T (1996) "Strategy for community conferences: emotions and social bonds" in Galaway, B & Hudson, J (eds) *Restorative Justice: International Perspectives*, Criminal Justice Press, Monsey, New York, pp 315-36. cited in Kathleen Daly School of Criminology and Criminal Justice Griffith University *Revisiting the Relationship between Retributive and Restorative Justice*, To appear in *Restorative Justice: From Philosophy to Practice* (forthcoming, 2000), edited by Heather Strang and John Braithwaite. Aldershot: Dartmouth. Revised paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999. December 1999. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper6.pdf

⁸⁴ cited in The International Centre for Criminal Law Reform and Criminal Justice Policy and The School of Criminology, Simon Fraser University and with the support of The Department of Justice Canada and The Ministry of the Attorney General of British Columbia, *Putting Aboriginal Justice Devolution Into Practice: The Canadian And International Experience Workshop Report*, July 5-7, 1995 <http://137.82.153.100/Reports/Aboriginal.txt>

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- community consensus regarding the objectives of programs, and the overall state of support of mainstream society and the public for experimentation and Aboriginal aspiration.
- The perception of leniency may be a reaction to the emphasis on healing and rehabilitation.
 - This complaint may have merit if the emphasis is only on the healing of the offender rather than of the community.
 - The case studies repeatedly show that part of their success is in the partnership between the official justice system which retains its punitive powers over the offender (or victimizer) and the healing processes which is community driven.
 - Notable examples of this partnership are found in the case studies in Kwanlin Dun, Hollow Water and Canim Lake.
 - As illustrated by the case studies, a workable partnership cannot be taken for granted and is often a result of long periods of give-and-take.