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Restorative Justice and Social Justice

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I. RESTORATIVE VALUES

Restorative justice is now a global social movement advocating transformation of the criminal justice system. There is no criminal justice system that it has yet actually transformed, but there are few it has not touched. Few have played a more important role in the new social movement for a restorative justice system than the Canadian criminal justice system.¹

Part of this movement stems from a greater openness in Canada to learning from the wisdom of Indigenous people about justice, a greater openness than we see in my own country or in the United States, for example. In particular, Canadian senior judges listen more to the wisdom of First Nations Peoples than judges in other countries, and show more judicial leadership toward restorative justice alternatives. In his 1997 Culliton Lecture, Chief Justice Bayda suggested changes in law school curricula to include "extensive classes in restorative justice and in sentencing."² Justice Bayda found it "a rather exciting thought" that there might be "[t]housands of law students across the country thinking and talking about innovative ways to involve the community in the healing of the breaches in relationships caused by an offender's offense".³

Healing relationships, as opposed to balancing hurt with hurt, is one core value of restorative justice.⁴ So is community deliberation: putting the problem in the centre of the circle rather than putting the criminal at the centre of the criminal justice system.⁵ Whatever a retributive system deems

* The Culliton Lecture, College of Law, University of Saskatchewan, September 1999.

1 See Canada, Law Commission of Canada, "From Restorative Justice to Transformative Justice" (Discussion Paper), online: <<http://www.lcc.gc.ca/en/forum/rj/paper.html>> (last modified: 1 October 1999); K. Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999).

2 E.D. Bayda, "The Theory and Practice of Sentencing: Are They on the Same Wavelength?" (1996) 60 Sask. L. Rev. 317 at 331.

3 *Ibid.*

4 See H. Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Waterloo: Herald Press, 1990).

5 A.P. Melton, "Indigenous Justice Systems and Tribal Society" (1995) 79 *Judicature* 126.

as the right punishment for the criminal will usually be the wrong solution to the problem. Non-domination also merits consideration as a core value of restorative justice—ensuring that all voices in the circle are heard and that none are silenced by domination. What Philip Pettit refers to as the republican value of freedom as non-domination leads to the key process requirement of restorative justice.⁶ For justice to be restorative, it must involve a process where all key stakeholders have an opportunity to be heard with respect to their views of the consequences of a crime and what is to be done to restore victims, offenders, and communities in the aftermath of the crime.

If freedom as non-domination is a value of restorative justice, it leads to the existence of a strong connection between restorative justice and social justice. This connection is the topic of my lecture.

II. THREE HYPOTHESES ABOUT THE RELATIONSHIP BETWEEN RESTORATIVE JUSTICE AND SOCIAL JUSTICE

There are reasons for taking seriously three competing hypotheses:

- A. Restorative justice is unimportant to struggles for social justice.
- B. Restorative justice risks the worsening of social injustice.
- C. Restorative justice can be an important strategy for advancing social justice.

We consider these hypotheses in turn.

A. RESTORATIVE JUSTICE IS UNIMPORTANT TO STRUGGLES FOR SOCIAL JUSTICE

This is what I used to think. Social justice requires restructuring the economy, confronting unemployment, land rights for Indigenous peoples, equal employment opportunities for women and other categories of people subject to discrimination, more effective regulation of corporate power, a different kind of tax system, greater equity at the International Monetary Fund and the World Trade Organization, and a fairer education system. Any kind of reform to the criminal justice system does not seem central to achieving any of these social objectives.

⁶ *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997); J. Braithwaite & P. Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Oxford University Press, 1990).

B. RESTORATIVE JUSTICE RISKS THE WORSENING OF SOCIAL JUSTICE

Some critics accuse restorative justice, at least in some of its manifestations, as being “orientalism”.⁷ According to Harry Blagg: “Justice systems have a tendency to generate and reflect mono-culturalist narratives...Orientalist discourses are, primarily, powerful acts of representation that permit Western/European cultures to contain, homogenize and consume ‘other’ cultures”.⁸ In the New Zealand Maori context, for example, to interpret the 1989 reforms to juvenile justice in New Zealand as a shift to “restorative justice” is to frame a local struggle over decolonization and justice of much wider significance into the narrowing discourse of a global, Western-led social movement. The deeper significance of the legal struggles between Maori and Pakeha cultures is whether Maori people are able to do their own justice in ways that connect to their meaning systems, not whether they are enabled to do “restorative justice”.

On the other hand, the meaning of restorative justice might be culturally plural—creating spaces where Indigenous peoples (and other minority cultures) can do their own justice in ways that make sense to them. This would be a shift from the univocal “consistent” justice of extant Western systems. Sounds simple. But, of course, this is a complex and difficult prescription in contexts where there is an offender from one culture and a victim from another.

Even when restorative justice is read in a way that maximizes cultural plurality, tensions remain between restorative justice and social justice for Indigenous people. Imagine, for example, that research on restorative justice processes reveals the procedures that best ensure that non-Western cultures—be they Vietnamese, African, or Cree—are given space to transact justice in ways that have the most meaning to them. In response, we require restorative justice facilitators to undertake training courses in how to assure this plurality. But do we then forbid Indigenous elders, who have not been so certified as trained restorative justice facilitators, from presiding over Indigenous justice processes? I think we should not. To do so would be to privilege our restorative justice aspirations over more important social justice aspirations of Indigenous peoples seeking empowerment (Blagg’s caution). To some degree, however, these tensions are unavoidable. Most readers who would agree with this position would not want to persist with it in the context of the rape of an Asian or African woman by a First Nations man, or even perhaps the

⁷ E.W. Said, *Orientalism: Western Conceptions of the Orient* (London: Penguin, 1995).

⁸ “A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia” (1997) 37 *Brit. J. Criminology* 481 at 482-83.

rape of a First Nations woman by a man from another culture who does not wish to submit to the justice of the elders. Once colonialism, slavery, and immigration has ruptured the lives of Indigenous peoples, all forms of justice, including the most plural forms of restorative justice, serve as a threat to social justice for First Nations.

There is no inevitability in the proposition that disempowering state courts in favour of empowering the people will advance social justice. Peoples' Courts and Bang Jiao programs in China have quite often empowered officials of a totalitarian political party rather than the people. Even when the people have been empowered, we have seen tyrannies of the majority oppress homosexual minorities in Cuban Peoples' Courts. Indeed, there have been cases where Indigenous elders empowered by restorative justice programs have used that power as males to protect male friends who have abused Indigenous women. In the far north of Australia, I once confronted the dilemma of Aboriginal elders who wanted to deploy restorative justice conferences in order to compel young girls to marry the men the elders told them to marry. Their prescription was not without the good intent of restoring civility to communities where traditional responsibilities to control young men rested not with their parents but with the father of the girl promised to marry them.

In Rwanda, genocide appeared as an upshot of unaccountable power over on-the-spot justice being returned to leaders of a disenfranchised group suffering a terrible colonial legacy.

While there can be no social justice without empowerment for peoples who have suffered dreadful colonial histories, that empowerment can itself worsen social injustices for others. Hence, both restorative justice that crushes Indigenous empowerment (as in Bragg's analysis) and Indigenous empowerment that crushes social justice are complex post-colonial possibilities.

The most forceful critique of restorative justice has been a feminist one. Whatever the limitations of adversarial legalism, a battered woman with a lawyer standing beside her against a batterer and his lawyer is a more equal contest than one-on-one mediation between victim and offender. The question is whether a meeting of two communities of care where both victim and offender are surrounded by supporters involves more or less an imbalance of power. A feminist perspective asserts that one of the accomplishments of the women's movement since the 1970s was to have violence against women and children treated as a crime.⁹ The worry about restorative justice is that

⁹ See e.g. R.E. Dobash & R.P. Dobash, *Violence Against Wives: A Case Against the Patriarchy* (New York: Free Press, 1979).

by not taking such crimes to court, restorative justice might fail to treat these crimes seriously.¹⁰ Worse, restorative justice might return family violence to being a private matter rather than a social problem whose dimensions are profoundly public.

Restorative justice advocates reply that court processing of family violence cases actually tends to foster a culture of denial, while restorative justice fosters a culture of apology. Apology, when communicated with ritual seriousness, is actually the most powerful cultural device for taking a problem seriously, while denial is a cultural device for dismissing it. Gale Burford and Joan Pennell's sophisticated research on family group conferences for domestic violence in Newfoundland is persuasive that family violence was reduced by their interventions.¹¹ This is the best piece of research done on the topic and it is of significance that one of its authors, Joan Pennell, came out of a background of distinguished contributions to the women's shelter movement in Canada.

Another Canadian contribution that changed the international debate was Hollow Water. Healing circles in this Manitoba First Nation community began to deal with what many first considered an epidemic of alcohol abuse.¹² As citizens sat in these circles discussing the problems of individual cases, they realized that there was a deeper underlying problem: they lived in a community that was sweeping the sexual abuse of children under the carpet. By setting up a complex set of healing circles to help one individual victim and offender after another, it was eventually discovered that a majority of Hollow Water citizens were at some time in their lives victims of sexual abuse. Forty-eight adults out of a community of six hundred formally admitted to criminal responsibility for sexually abusing children, forty-six as a result of participating in healing circles, and only two as a result of being referred to a court of law for failing to do so.¹³ Because there have only been

10 See J. Stubbs, "'Communitarian' Conferencing and Violence Against Women: A Cautionary Note" in M. Valverde, L. MacLeod & K. Johnson, eds., *Wife Assault and the Canadian Criminal Justice System* (Toronto: Centre of Criminology, University of Toronto, 1995) 260.

11 "Family Group Decision Making: Outcome Report Volume I" (St. John's: Memorial University, 1998); J. Pennell & G. Burford, "Attending to Context: Family Group Decision Making in Canada" in J. Hudson et al., eds., *Family Group Conferences: Perspectives on Policy & Practice* (Annandale, N.S.W.: The Federation Press, 1996) 206; J. Pennell & G. Burford, "Family Group Decision Making: Outcome Report Volume II" (St. John's: Memorial University, 1997).

12 B. Bushie, "Community Holistic Circle Healing: A Community Approach" in T. Wachtel, ed., *Building Strong Partnerships for Restorative Practices* (Burlington, Vt.: Vermont Department of Corrections, 1999) 59.

13 R. Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (London: Penguin Books, 1996) at 29-48. See also Aboriginal Peoples Collection, *Community Holistic Circle Healing: Hollow Water First Nation* by T. Lajeunesse (Ottawa: Supply and Services Canada, 1993).

two known cases of reoffending,¹⁴ Rupert Ross claims that the healing circles have been a success. Tragically, however, there has been no genuinely systematic outcome evaluation of Hollow Water.

What is more important than the crime prevention outcome of Hollow Water is its crime detection outcome. When and where has the traditional criminal process succeeded in uncovering anything approaching forty-eight admissions of criminal responsibility for sexual abuse of children in a community of just six hundred? Before reading about Hollow Water, I had always said that the traditional criminal trial process is superior to restorative justice processes for getting to the truth of what happened. Restorative justice processes were only likely to be superior to traditional Western criminal process when there was a clear admission of guilt. The significance of Hollow Water is that it throws that position into doubt.

What we have learned from Pennell and Burford, and from Hollow Water, is that the initial feminist assumption, that restorative justice would be a threat to social justice for women, may sometimes be in error—not always in error, but sometimes in error. This innovative Canadian work shows that restorative justice has potential as a tool for advancing social justice for women and children who suffer at the hands of violent men. Let us now turn to explore this potential more systematically.

C. RESTORATIVE JUSTICE CAN BE AN IMPORTANT STRATEGY FOR ADVANCING SOCIAL JUSTICE

We have already said that restorative justice can and should empower all communities of care for victims and offenders—Indigenous and non-Indigenous. It is possible to design restorative justice so as to not shift power over Indigenous people from the hands of white judges to the hands of the police who are not accountable to judges. It is possible for dialogue to occur between Indigenous elders and experts who have had experience with cross-cultural restorative justice, each learning lessons from the other. I have seen a conference where a trained state restorative justice coordinator handed the facilitation of the conference over to an Indigenous elder, taking a back seat to the process, intervening only when voices were unjustly silenced by the elder. Even when voices are unjustly silenced by an elder (a circumstance I have not seen), the state coordinator can still intervene in a respectful and deferential way: “Uncle Frank, some of the members of the group sound like they want to hear what Mary has to say and I would like to hear her story myself.”

¹⁴ Ross, *supra* note 13 at 36.

Our experience of restorative justice programs in Australia is that they have been quite successful in empowering women's voices in the justice process. Kathy Daly reports that this has been the experience so far in her extensive observations, from a feminist theoretical frame, of conferences in South Australia.¹⁵ Mothers are often the most eloquent communicators at restorative justice conferences. Sometimes they even speak of the violence they suffer at the hands of their sons, a matter on which they never want to testify in court. The empowerment of young people has been accomplished less often: the young are often silenced by "a room full of adults".¹⁶

In Australia, we have been disappointed by the proportion of juvenile conferences where the offender is an Aboriginal young person—only 11 per cent of the young offenders in the Canberra program, which is scarcely better than the percentage of court cases that are Aboriginal (10 per cent).¹⁷ To date, we have failed to use restorative justice to reduce Aboriginal imprisonment rates in Australia. This has been the biggest disappointment for me in the way restorative justice has developed in Australia.

In Canada, I think you have done better. Programs like the John Howard initiative in Manitoba show the way. In that program, First Nations offenders are a priority and the program is targeted at the deep end—cases where the prosecutor is already recommending at least six months of prison time. This is the kind of program that, if big enough, could put a dent in imprisonment rates for Indigenous people.

The best restorative justice conferences help young offenders who have dropped out of, or have been excluded from school, to return to their education. They also help unemployed offenders find jobs. But these accomplishments are rare. Even if they became common, it is hard to imagine that restorative justice could make a major positive contribution to reducing the injustice of joblessness.

It may be important to think of restorative justice in terms of avoiding harm rather than in terms of doing good. The evidence is persuasive that a criminal record is a significant cause of unemployment.¹⁸ It is even more

15 "Diversionary Conferences in Australia: A Reply to the Optimists and Skeptics" (Paper presented at American Society of Criminology Annual Meeting, 20-23 November 1996).

16 K. Haines, "Some Principled Objections to a Restorative Justice Approach to Working with Juvenile Offenders" in L. Walgrave, ed., *Restorative Justice for Juveniles: Potentialities, Risks and Problems for Research* (Leuven: Leuven University Press, 1998) 93 at 99.

17 This 10% figure is from 1995 Children's Court appearances in Canberra. This is the most recent data Heather Strang has been able to extract. My appreciation to Heather Strang for providing this information.

18 J. Hagan, "Destiny and Drift: Subcultural Preferences, Status Attainments, and the Risks and Rewards of Youth" (1991) 56 *Am. Soc. Rev.* 567.

evident that the criminal justice system is a major part of the social injustice that black peoples suffer in nations such as Australia and the United States. In the United States, the prison system is the most important labour market program for young Black men. For example, there are more young Black men in the prison system than in the higher education system. In Australia, the prison system is a major cause of suicide in the Aboriginal community. It is also a major cause of rape and drug addiction, both of which disproportionately afflict the poor. The spread of AIDS is another concern. We also have an epidemic of Hepatitis C in Australian prisons.¹⁹ In Russia, up to 50 per cent of the prison population are infected with tuberculosis bacillus—a legacy of overcrowding.²⁰

A pathbreaking report produced this year by Anne Stringer shows that imprisonment is also a major cause and effect of debt among poor people irrespective of their race.²¹ Among one hundred and twenty-one Queensland prisoners, 80 per cent had some debt when they went into prison. Drug use, rather than investment in housing, was the most prevalent cause of that debt. Forty-nine per cent said that they had committed a crime to repay a debt. Imprisonment cut them off from a variety of means of sorting out these debts, leaving their families vulnerable to repossession and other assaults on their circumstances. Inequalities grounded in the indebtedness of poor families to finance companies are greatly worsened by imprisonment.

The most important way restorative justice may be able to reduce social injustice involves reducing the impact of imprisonment as a cause of the unequal burdens of unemployment, debt with extortionate interest burdens, suicide, rape, AIDS, Hepatitis C, and potentially most important, the epidemic of multiple-drug-resistant tuberculosis. Although presently worst in Asia and Eastern Europe, the threat of tuberculosis in Canada is real, thanks in part to overcrowded American prisons. There is not much evidence yet that restorative justice realizes this potential. Early results from the Re-Integrative Shaming Experiments (RISE) in Canberra are not consistent on this, but there is some encouragement:

Juvenile Property (Security) offenders who were treated in court significantly more often reported that they had experienced

¹⁹ Parliament of N.S.W., Standing Committee on Social Issues, "Hepatitis C: The Neglected Epidemic" (1998). Survey estimates range from 33-60 per cent for males and 66-80 per cent for female prisoners with Hepatitis C in New South Wales prisons. *Ibid.* at 69-70.

²⁰ K. Lee, "Globalization, Communicable Disease and Equity: A look back and forth" (International Roundtable on 'Responses to Globalization: Rethinking equity in health', Geneva, 12-14 July 1999).

²¹ *The findings of the Prison and Debt Project* (Brisbane: Prisoners' Legal Service, 1999).

financial pressures in the preceding year and that they had had 'serious troubles or problems with people who were close to you'. Youth Violence offenders who had been to court significantly more often said that they had changed jobs during the preceding year, while Drunk Driving offenders who had been to court significantly more often had dropped out of full time study or been fired or laid off from a job in that period.²²

In other words, offenders randomly assigned to a restorative justice conference rather than a court case as a result of their crime were, in some respects, less likely to suffer adverse life events such as being fired in the two years after their apprehension.

Finally, I have argued that the empirical experience of corporate restorative justice in the finance, nuclear, coal mining, and nursing home industries suggests that it offers an approach to attacking the criminal abuses of corporate power that can be so important to understanding the advantaging of the rich over the poor.²³ In some cases, such as the major frauds against Aboriginal consumers by Australian insurance companies in the early 1990s, the restorative process can engage even prime ministers with the need for structural change in the regulation of an industry. My colleagues and I in the Australian National University Centre for Tax System Integrity are hoping to develop restorative strategies for tax compliance that might turn around some of the stupendous advantaging of the rich over the poor in this arena.

III. CONCLUSION

I have rejected our first hypothesis that "restorative justice is unimportant to struggles for social justice". Restorative justice involves both serious risk of worsening social injustice and real potential to reduce it. So far neither possibility has been realized in any major way because restorative justice has made marginal inroads into the criminal justice system. Which possibility will be realized depends considerably on the centrality of non-domination as a restorative justice value: specifically, whether non-domination prevails to ensure the maximum plurality of contesting voices are heard concerning both process and outcome.

Restorative justice has the potential to lift some of the silencing of the voices of dominated groups such as First Nations people, women, and children

²² H. Strang *et al.*, *Experiments in Restorative Policing: A Progress Report* (Canberra: Australian National University, 1999) at 95.

²³ J. Braithwaite, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts" in M. Tonry, ed., *Crime and Justice: A Review of Research*, vol. 25 (Chicago: The University of Chicago, 1999) 1.

suffering abuse. If it succeeds in this, the Canadian work of Pennell and Burford, and Hollow Water, is a basis for optimism that restorative justice can reduce violence and sexual abuse against women and children. Further, our Australian work suggests that there is potential for reducing criminal abuse of corporate power. But we must be careful that it does not subvert some of the protections that courts occasionally afford to such victims of injustice. This is a policy design challenge we can rise to.

Restorative justice has the potential to reduce the prevalence of school expulsion, unemployment, imprisonment, and the effects of imprisonment—suicide, drug addiction, disease, and physical abuse—among the poor.

Criminal offenders and victims who are caught up in the criminal justice system have a lot in common. For example, they are more likely to be poor than non-victims and non-offenders.²⁴ A restorative justice strategy that succeeds in empowering both victims and offenders therefore empowers those, on both sides, who are disproportionately powerless. If both victims and offenders get some restoration out of a restorative justice process, that has progressive rather than regressive implications for social justice. Conversely, a retributive justice system that responds to the hurt of one side by inflicting hurt on the other side is regressive in its distributive impact. It adds to the hurt in the world in a way in which those burdens of hurt fall more heavily on the poor. This is more pointedly true when a vicious spiral is triggered by retributive values—where criminals want to hurt victims again and victims want to hurt criminals back²⁵—as hurt endlessly begets more hurt. Whereas the poor are the greatest losers from our present propensity to institutionalize hurt begetting hurt, it could be that the poor will be the greatest beneficiaries of a world where help begets help and grace begets grace.²⁶

24 M.J. Hindelang, M.R. Gottfredson & J. Garofalo, *Victims of Personal Crime: An Empirical Foundation For a Theory of Personal Victimization* (Cambridge, Mass.: Ballinger, 1978); J. Braithwaite & D. Biles, "Victims and offenders: The Australian experience" in R. Block, ed., *Victimization and Fear of Crime: World Perspectives* (Washington, D.C.: U.S. Department of Justice, 1984) 3.

25 Heather Strang's data from Canberra finds victims randomly assigned to restorative justice conferences are significantly less likely to say they would harm their offender if they have the chance (6%) than victims randomly assigned to court (21%). See H. Strang, forthcoming PhD dissertation.

26 I think I am indebted to Howard Zehr for all this begetting talk from a lecture I heard him give in New Zealand. Or perhaps, I am indebted to the Bible. Or perhaps, we both are!