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CONFERENCING AND PLURALITY

Reply to Blagg

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The most valuable contributions of Harry Blagg's 'A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia' (1997) are: (a) an analysis of the importance of gatekeeping; and (b) an exploration of cultural difference in the way informal justice can (and cannot) work.

Gatekeeping and Mainstreaming Restorative Justice

Blagg observes that a most undervalued fact about the New Zealand juvenile justice reforms of 1989 was the creation of new gatekeepers, the youth justice co-ordinators: 'All youth justice matters had, by law, to be referred to the youth justice co-ordinator, the police were unable to by-pass the processes in the old way' (p. 7). A problem with most restorative justice programmes, for example victim-offender mediation programmes in Britain and the US, is that they have not been mainstreamed as well as the New Zealand family group conferencing reforms. A diversion programme thrust at the police or the courts will tend only to get a trickle of business, often only those cases the mainstream gatekeepers don't consider worth the bother. One consequence is that citizens from oppressed minorities benefit less from the restorative justice programme, remaining in the retributive mainstream.

One limitation of the New Zealand youth justice co-ordinator solution is that a new gatekeeper is created for youth only. Hence, adult restorative justice programmes remain marginal in New Zealand and are denied to most Maori adult offenders. This is one reason why some of us find the transformation of police gatekeeping a worthwhile challenge, so that police do more informal cautioning (and in a decent and just way)[1] and facilitate more restorative justice conferences. Just as an understudied virtue of the New Zealand model is the legally mandated gatekeeping of the youth justice co-ordinators, an understudied feature of the Wagga model was the committee of sergeants which reviewed cases headed for court, sending many back to the informant to reconsider a conference. The sergeants' meetings were open to interested parties, such as the Wagga Wagga Police-Community Consultative Committee. In Canberra we are only running around 500 conferences a year in a city of 300,000. Per capita Wagga was running many more conferences than this at its peak. My hypothesis is that the main reason the Wagga programme was more mainstreamed than the Canberra one was the transformation of gatekeeping by the committee of sergeants (the middle managers with real power) that was open to influence by the community and the rest

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[1] Indeed, in post-1989 New Zealand police still divert many more cases from court to police caution than from court to conference.

of the justice system. In Canberra, I wish we did have a committee of this kind to hold diversion decisions more dialogically accountable. I wish we could build confidence with the Director of Public Prosecutions and the judiciary by inviting them to sit in on such meetings, along with the Victims of Crime Assistance League, Aboriginal community groups and any other interested groups.

Blagg is also right to point out that youth justice co-ordinators in New Zealand used their power as gatekeepers to empower indigenous communities, to facilitate the restoration of Maori systems of social control. Empowerment was a key restorative objective, as it should be in any restorative justice programme, including one based on the transformation of police gatekeeping. We need to reintegrate offenders and victims not so much into some remote national community or neighbourhood community that has limited meaning in the multicultural metropolis, but into communities of care, including indigenous ones. This is what conferences should be designed to discover—the communities (Braithwaite 1993) that matter to specific offenders and victims. Conferencing programmes decidedly should not assume that different cultures 'manifest similar mechanisms for ensuring adherence to accepted standards of behaviour' (Blagg 1997: 10). If the biological parents of Aboriginal children feel no sense of responsibility for their children's breaches of either Aboriginal or whitefella law, but an 'uncle' does with respect to Aboriginal law, then a restorative justice meeting should be possible in which the uncle takes the role normally taken by parents in our culture and argues his concerns in a discourse of Aboriginal law.

Essentializing and Stigmatizing the Police

Blagg seems to assume that it is in the essence of police to be opposed to empowering Aboriginal peoples in the same way that some Aboriginal advocates would charge me and him with being essentially opposed to this because we are white. My own view is that police gatekeeping in New Zealand and everywhere else will always remain the most consequential gatekeeping in the criminal justice system. Hence, it is best that we not give up on the project of transforming the domination of indigenous peoples transacted through the guarding of these gates. Moreover, I see examples of both racist police and police who have had their racist practices transformed. If we think it inevitable that we have police, and inevitable that their power is a temptation to domination of the oppressed, then we might be better served with something more than simply circumventing their gatekeeping when we can. We had better give up on stigmatizing the police as essentially and irretrievably committed to the domination of colonized peoples.

Lawrence Sherman, Heather Strang and Geoffrey Barnes (1997) have reported preliminary results from the first 548 cases into the RISE experiment in Canberra which show that citizens randomly assigned to conference (rather than court) believe that the police respect their rights better during the justice process, be they victims or offenders. Moreover, offenders randomly assigned to conference report less often that they feel disadvantaged in the proceedings due to 'age, income, sex, race or some other reason' than offenders randomly assigned to court. Empirically, I have doubts that the conferencing we are seeing in Canberra amounts, as Blagg contends, to 'an extension of already significant police powers over young people' (p. 3). I have seen conferences

where mothers criticize the police for excessive force or victimization of their child in a way they would never be allowed to do in court. That makes the police more accountable, not less, especially in a system where the offender is advised of their right to walk out of the conference at any time and take their chances in court. My suspicion is that the Canberra conferencing programme is putting the police more on guard about the abuse or extension of their powers and the preliminary data from RISE seem consistent with that suspicion.

Shame, Shaming and Social Support as Universals

Blagg is critical of the fact that I and others like David Moore think shame and shaming are cultural universals. He points out that shame has a very different meaning for Aboriginal Australians than for other Australians. My own inclination is to think that diversity among non-Aboriginal Australians (and among Aboriginal Australians) in the way shame is enacted and understood is even more profound than differences between Aboriginal and non-Aboriginal Australians identified by Blagg. While shame is experienced and enacted in very different ways by different people, I continually search during my travels for a culture where some conception of shame is not seen as terribly important. I search during my historical reading for a period when shame was unimportant. At this point, I remain empty handed. Thus, I do assume shame and shaming to be cultural universals. This is not to assume it to be biologically universal, notwithstanding associated biological elements (e.g. blushing). It may be that no community can defend itself against threats to its survival if it cannot mobilize social disapproval in a way that bites.

Similarly, I find social support to be a universal—the reintegrate part of reintegrative shaming. No individual can flourish alone. So it may be that no community can survive without institutionalizing the social support that enables its members to flourish. If we can accept a small number of universals or near-universals, it becomes possible to put in place some minimalist procedures that play to those universals. This is what I see the procedural minimalism of conferences as delivering. Invite those who suffer from the crime, so the shame surrounding the consequences of the crime can be exposed and dealt with. Invite the people who care most about the offender and the victim so that universal needs for social support can be available. Forbid violence, shouting or any dominating speech that prevents any of the concerned voices being heard.

The procedural minimalism of conferences creates the possibility for participants to use procedures that are culturally meaningful to them, be they European, Aboriginal or African. When participants from different cultures meet at a conference, it is surprising how respectful they are of the traditions of the other. They do tend to sit quietly during a prayer or ritual in an unfamiliar language. I do not think that fully 'de-colonized' justice is possible. We cannot reverse the fact that we live in societies where many cultures live together and offend against one another. Even within a comparatively homogenous cultural group, we find many dissenters, particularly among the young, who feel no allegiance to their culture of procreation. We will find young Aboriginals for whom the tyranny of their own elders is worse than the tyranny of European justice, who say in the words of some Maori youth that they don't want 'too much shit about the Maori way' (Maxwell and Morris 1993: 126).

This is simply to say that however procedurally open-textured we manage to make conferences, some citizens will not find a comfortable cultural space within them and would actually prefer the more procedurally unicultural and structured space of the court. For that minority of crimes where both victim and offender identify with an alternative justice system of an indigenous community, they may prefer a unicultural space defined by tribal ritual. A forum with opt-out rights that procedurally empowers, backed up by a forum that is more professionalized and devoid of these opt-out rights, seems a good compromise for a multicultural society that has no practical capacity to undo colonialism. Moreover, the liberal justice of the court has some special virtues for a world where colonialism has wreaked havoc of various kinds on the justice of indigenous ordering. So much havoc that male elders sometimes do dominate indigenous justice in ways that viciously exploit women and children, indeed other males (e.g. LaPrairie 1995). As Jeremy Webber (1992: 147) puts it in a Canadian context: 'the challenge is to reinvent aboriginal institutions so that they draw upon indigenous traditions and insights in a manner appropriate to the new situation. This may mean inventing checks to prevent abuse that were unnecessary two hundred years ago or which existed in a very different form'. Blagg concedes as much in his footnote 13. In another paper (Braithwaite 1997), I have argued therefore that the restorative justice research agenda has two key elements:

(1) Culturally specific investigation of how to save and revive the restorative justice practices that remain in all societies.

(2) Culturally specific investigation of how to transform state criminal justice both by making it more restorative and by rendering its abuses of power more vulnerable to restorative justice.

These two research challenges were then reframed as two normative challenges:

(1) Helping indigenous community justice to learn from the virtues of liberal statism—procedural fairness, rights, protecting the vulnerable from domination.

(2) Helping liberal state justice to learn from indigenous community justice—learning the restorative community alternatives to individualism.

In seeking to meet these challenges, we can learn from Blagg's insights on cultural difference and the viability of different modalities of justice. So long as we do so respectfully, with acknowledgement, with sensitivity to contextual variation, there is no need to be shamed that our learning is 'appropriation'.

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