

## 12 Connecting Philosophy and Practice

JOHN BRAITHWAITE AND HEATHER STRANG

It was Kurt Lewin who famously said there is nothing as practical as a good theory. This was a statement about the impact of explanatory theories on practice in the world. Philip Pettit and John Braithwaite in their contribution to this volume take Lewin a step further. They argue that normative theory is improved by being responsive to good explanatory theory and vice versa. There is nothing as practical as a good philosophy and the best philosophy is informed by practice.

The history of restorative justice in the 1990s illuminates both claims. Restorative practices preceded their philosophical interpretation as restorative justice. Since Kant, Hegel and Bentham made their seminal contributions, the philosophy of punishment has been one of the dullest, least inspired fields within both philosophy and criminology, even though it has attracted contributions from many of law and philosophy's brightest and best – Rawls, Dworkin, Hart, Habermas, Nozick, among others. Restorative justice practice has inspired some creative new thinking, as evidenced in this volume. Yet the volume also indicates that it is early days; philosophy is still lagging behind practice. This is clear in the way the New Zealand courts struggled with the *Clotworthy* case as discussed by Sir Anthony Mason in his opening contribution, and taken up by Morris and Young and Barton in their essays. At the time of writing even greater judicial ferment surrounds the decision of the Canadian Supreme Court in *Gladue* to recognise restorative justice as a more important principle of criminal sentencing for First Nations defendants than for defendants from the rest of the community.

Equally, the volume demonstrates a crying need for practice to be more informed by philosophy. Consider, for example, Christine Alder's warnings about the dangers restorative justice practices might pose to young women – shame as a threat to self-esteem, family members who have sexually abused them having a say in how their offending will be dealt with, community controls that seek to dominate young women into conventional moulds of femininity, and more.

## Values

The starting point for confronting these dangers of practice may be to be clearer about what restorative justice values are, a challenge Morris and Young seek to address up front in their essay. What sort of space do these values create for traditional liberal rights? Do they weaken or strengthen them? If dominion, or freedom as non-domination, is a restorative value as Walgrave argues, then dominating young women into conventional moulds of femininity clearly becomes an unacceptable practice. But how tight can the fit between restorative process and restorative values be in the context of such a problem? If a bedrock of restorative process is empowerment of all stakeholders (Barton's essay), where do we stand when it so happens that the stakeholders want to shame in a stigmatising way or hold together family relationships where women are victims of sexual abuse?

It is not good enough to say that juvenile courts sometimes do these things as well. The challenge for restorative justice is to involve value commitments and process commitments that are more explicit than those of contemporary courts in respect of such concerns. And then to move on to empirical research that evaluates different approaches to delivering such commitments in practice. For example, do we achieve less stigmatising processing of girls by training conference coordinators to recognise and reframe shaming that attacks the self, training that distinguishes stigmatisation of the violent girl from the communication of community disapproval of violence? Or do we achieve less stigmatisation by sweeping shame under the carpet – seeing shaming as a bad thing that will pop up but that we minimise by keeping criminal process as demoralised as possible? Walgrave has a hybrid position that would see the courts take the latter path, conferences more the former path. Our main point is that the effects of such policies are eminently empirically testable and that such empirical work is an obligation of both those who advocate the new and those who defend the old.

In a future world when we are clearer about restorative values, they might be enshrined in legislation as principles. The hope would then be that programs for which the research showed a failure to deliver on them would be discontinued. Even with “good” programs in terms of these values, when they threw up bad cases courts could invoke the values to strike down the decisions of the conference. Hence, silencing of a young woman by the presence of her sexual abuser, humiliation or degradation as in a conference decision to order the wearing of a T-shirt saying “I am a thief”, could and should be grounds for courts to strike down a conference decision.

Much more debate of the kind in this book and more empirical experience with restorative justice innovation and its risks is needed before we are ready to settle any such list of restorative values. As important as it is to settle on cultural and legal commitments to restorative values, more important still is guaranteeing restorative process commitments.

## Process

Some of the crucial restorative process commitments have become fairly clear from the chapters in this book: ensuring all stakeholders have an opportunity to attend and have their say; cultural responsiveness to those stakeholders in a particular conference or circle (participant control of process); shouting, violent threats or other forms of domination of speech as out of order; violation of fundamental human rights as out of order; ensuring that the full plurality of relevant voices is heard in the room.

The last of these process commitments is an example of one that may be more important to dealing with the concerns Alder raises than the value commitments. Courts are unlikely to give voice to a homeless young woman's street community. But restorative justice conferences can and should do this. The best assurance against dominating voices in a conference (for example, those who wish to coerce a girl into some hegemonic femininity) is not enforcement of the value of non-domination, because domination inevitably happens. The best assurance is for the process to be so structured that other voices will be raised against the voices of domination. The voice that says there is no harm in the kind of identity the young woman presents, that there is good in it, that the harm is in threatening her freedom to go with it. If there is one thing our empirical experience of conferences and circles has taught us it is that allowing a large number of people into the circle does not produce chaos. Practitioners say they prefer to facilitate conferences with many participants because the process unfolds more easily and naturally. Welcoming plurality is the best way of guaranteeing that there will be someone who will speak up when domination occurs. This is a more practically achievable process objective in a restorative justice conference than in a court where a judge or magistrate, who is the source of the domination, can rely on the law to defend his/her right to call the shots. Such process controls that are available in court – mainly appeal – can be fully available in restorative justice processes where the defendant is advised of a right to walk out of a conference at any time to have the matter settled in a court decision that can then be appealed to a higher court.

## Punishment

One of the divides in this collection is over the place of punishment in restorative justice, over values like equal punishment for equal wrongs. The debate around *Clotworthy* (Mason, Morris and Young, Barton) illustrates what a philosophical divide this is among scholars who consider themselves sympathetic to restorative justice. Kathleen Daly and Charles Barton are undoubtedly right that as an empirical matter if you set up processes which comply with any process definition of restorative justice, at times the outcomes will be quite punitive. Certainly punitive values will get a good bit of play during the restorative justice dialogue.

This is one reason why many want restorative justice to qualify as such only if it passes a values test as well as a stakeholder empowerment test. In those cases where the stakeholders turn punitive, stigmatising, disrespectful of difference, dominating the vulnerable, you simply cannot call what happened restorative justice. Valerie Braithwaite's research in this volume shows that support for restorative justice has deep roots in harmony values, as does support for punitive justice have deep roots in security values. Since both harmony and security values have a near universal hold on human beings, at any gathering of mortals, both are likely to be manifest.

The point we wish to make in this conclusion is that while this is a major divide, it has rather less bite at the level of practice than it does at the level of philosophy. This is because most of the protagonists in this debate can agree on two things:

1. Restorative justice processes should be constrained from breaching upper limits on the amount of punishment permissible for a given crime.
2. If we are serious about empowering stakeholders, we cannot rule out of order arguments or outcomes that involve punishing offenders.

On the first point, Lode Walgrave can have a serious philosophical difference with Kathleen Daly on the meaning of punishment when he argues that a community service order may not be punishment. When a community service order is ordered not for the purpose of intentionally inflicting pain but for the purpose of aiding the restoration of community, victim, offender, or all three, then Walgrave wants not to conceive it as retributive. However, we expect Walgrave to yield to Daly when the upper constraint on the amount of punishment that is permissible for a given crime is determined. It would be unthinkable to contend that an onerous community service order should not count here just because it was imposed without

punitive intent. Equally, we think Daly would yield to Walgrave when it comes to the practical question of whether to design restorative process so as to put the problem in the centre of the circle (encouraging deliberation around what should be done about the problem) or whether to put the person in the centre of the circle (encouraging deliberation around what is the right punishment of that person). They can agree that what we want to encourage is restorative problem-solving rather than intentions to punish. Parsimony in resort to punishment is a value which, as Walgrave suggests, a social movement for restorative justice might promote. What this means in practice is creativity and active search for non-coercive ways of solving a problem and preventing recurrence. Valerie Braithwaite's data also show that support for restorative justice is predicted by trust. Yamagishi and Yamagishi's (2000) wonderful Japanese research program further shows that trust builds social intelligence. Those who opt not to take the risk to trust never learn how to make correct contextual judgments of trustworthiness, never learn how to forge creative win-win solutions. In the context of schools, we therefore might conceive of restorative problem-solving as education for a socially intelligent democracy.

We also suspect that none of the scholars writing in this volume would be so determinedly anti-punishment as to advocate the prohibition of punitive speech or punitive outcomes in conferences. That is, they all take empowerment of stakeholders as a more fundamental restorative value than movement from punitive to restorative outcomes.

A good analogy is the way we think morally about democracy. Republicans believe in electoral democracy because they think it is more likely to produce freedom as non-domination than despotism by a king. But what do they do when the people elect a worse despot than the king? They do not turn around and argue for displacing democracy with a return to the divine right of kings. They start campaigning for the election of a genuine democrat at the next vote. All process values will at times produce self-defeating outcomes in terms of the outcome values that motivate support for those processes. The democratic election delivers anti-democratic government; the restorative justice conference delivers anti-restoration. So long as this is not consistently so, we must show our sincerity of commitment to processes that empower by honouring their outcomes. But this does not preclude constitutional prohibition of certain outcomes in advance of the empowerment. The elected president is empowered to govern as she sees fit, but that does not extend to dissolving the parliament and dismissing the judiciary. The conference is empowered to solve the problem however it sees fit, including by punishment, but that does not

mean it is allowed to punish with a severity that exceeds the legal limit or in a way that breaches fundamental human rights.

### Mixing Philosophies

Miller and Blackler argue that retributive, consequentialist and restorative theories are not mutually exclusive. They seek to define rather limited contexts where restorative justice seems the way to go. They would exclude restorative justice from realms such as tort or non-violent school bullying. But why would one not want to deploy all the defining features of restorative process and restorative values in such arenas? Daly seems to suggest a fruitful perspective on the mixing of philosophies question when she says: 'one cannot begin a restorative justice process by announcing "let's reconcile", "let's negotiate", or "let's reintegrate"'. In other words, our intuition about getting the mixing of philosophies right is that it is more a trick of timing than of defining characteristics of the problem to specify what is a restorative justice problem and what is not.

There is no problem so serious that restorative processes and values might not be morally superior to formally retributive processes and values. Nuclear safety, as one of us has argued elsewhere, is most effective when its regulation is restorative (Braithwaite, 1999). Apartheid, mass murder in Timor or genocide in Rwanda are not too serious for restorative justice. In such traumatic cases, however, restorative justice is a disaster if victims and their families are not ready for it, have not been persuaded that it is worth a try, reject the proposition that it could be the most practical way to move forward. Indeed, in cases of mass killing, as Prunier (1995) has shown using the Rwanda case, any kind of legal justice is a disaster if it is attempted before the prevention of further killing is fully effected. Why? Because justice can prevent peace when its selective commencement gives reason to some to keep killing.

A paradox of justice is that the more traumatic the victimisation of a crime, the less is speedy justice the ideal. Angry people must be disarmed, tempers cooled lest hot justice be injustice. But most importantly, we must be patient with victims. They need time for grief. Peace first, grieving second, justice only third. It is in the interests of offenders to give victims all the time they need to grieve, to seek counsel from those who care for their healing and then decide whether they want to opt for a restorative justice process.

### Equal Justice?

In the *Clotworthy* case, it can be argued that Mr Clotworthy was lucky that he stuck his knife into a man who wanted the healing available to him in a restorative justice conference. Sir Anthony Mason points out that inequality of sentencing arises when other serious offenders are not so lucky as to have a victim who wants the grace of waiving the repayment of hurt with hurt. But why should equal sentences for offenders be a higher value than equal concern for victims? Where is the justice in denying that grace to Clotworthy's victim and denying him the plastic surgery the offender could no longer pay for in prison? The theory of proportionality ducks the question of why equal justice for offenders is a higher value than equal justice for victims. While these two objectives are incompatible, one possible compromise is to constrain unequal treatment of offenders only by a guarantee that none will be punished above a maximum specified for each offence and to guarantee victims a hearing where their needs are considered, where the state and state-supported victims' assistance associations take responsibility for helping them back to emotional and physical health.<sup>1</sup> Thus we might ensure minimum guarantees of justice for both victims and offenders instead of the impossible reconciliation of equal justice for victims and equal justice for offenders.

### A Time for Justice

The timing question discussed earlier and the justice question are connected. With traumatic cases we should certainly privilege the needs of victims over the convenience of courts and the wishes of offenders for a speedy trial.

To everything there is a season, and a time to every purpose under the heaven:

A time to be born and a time to die; a time to plant, and a time to pluck up that which is planted;

A time to kill, and a time to heal; a time to break down and a time to build up;

A time to weep, and a time to laugh; a time to mourn, and a time to dance;

A time to cast away stones, and a time to gather stones together; a time to embrace and a time to refrain from embracing;

A time to get, and a time to lose; a time to keep and a time to cast away;

A time to rend, and a time to sew; a time to keep silence, and a time to speak;

A time to love, and a time to hate; a time of war and a time of peace.  
(Ecclesiastes 3, King James version).

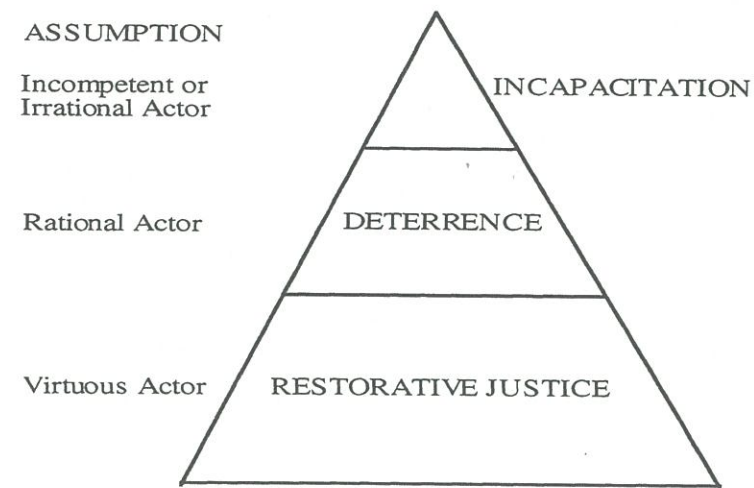
We do not read this text as advocating killing, warmaking or hating. We read it as saying that part of the human condition is that terrible things like East Timor or the Holocaust happen. We find ourselves in situations where we feel we must kill or vote for governments that kill. In these situations, it is a mistake to deny hatred, to deny retributive emotions. To try to heal when we have not dealt with our hate is misguided. We read the text as saying that with wise timing it is not misguided to help others to discover the miracle of the transformation of hate into love. This is Kathleen Daly's wisdom too when she says that we do not expect to commence restorative justice processes with "let's reconcile". This will escalate victim anger because victims will believe we are not taking their suffering seriously.

Within existing restorative justice conference processes we think there is considerable genius of design in the way extended talking through of consequences for victims precedes any discussion of restoration. However, we suspect that more often conferences should adjourn at this point to give victims some grieving time, some healing time, after they have expressed all the hurts that matter to them. This is one reason we suspect why First Nations healing circles in places like Hollow Water in Canada have been able to grapple with rather bigger restorative justice challenges than we have risen to in Australia – such as community-wide patterns of sexual abuse of children. People need time for the enormity of something like this to sink in. Retributiveness is a natural first response to such a threat to our being or to the security of those we love. The time to hate in the wise justice system might involve many months of victim-centred work where if healing of the offender is on the agenda at all, it is not on the victim agenda, but dealt with for example in a circle with other abusers.

A second sense in which philosophies of criminal justice need to be mixed across time is provided by the responsive theory of regulation (Ayres and Braithwaite, 1992). According to this theory, less interventionist, more cooperative strategies of regulation are generally preferable, even for very serious wrongs perpetrated by maximally ruthless and exploitative offenders. This implies a presumptive preference for restorative justice. Equally a regulatory system that relies solely on restorative justice will be exploited by the most ruthless offenders. Deterrent approaches are needed when restorative justice repeatedly fails and incapacitation is needed when deterrence fails. An enforcement pyramid of the kind in Figure 12.1 is advocated, where the preference is to start at the bottom and only move up the pyramid when there is failure at lower levels of the pyramid. Part of the implicit

explanatory theory of the pyramid is that you don't need consistent deterrence or incapacitation for the law to deliver on its promises. Occasional deterrence in the aftermath of restorative justice failure is quite enough to deliver a minimum level of general deterrence without which, according to the theory of responsive regulation, no system of regulation can succeed.

**Figure 12.1: Toward an Integration of Restorative, Deterrent and Incapacitative Justice**



Valerie Braithwaite shows that this pyramidal model of regulation – dialogic problem-solving first and stricter enforcement if this fails – has intuitive appeal to citizens compared to consistent enforcement or consistent restorative justice. Note that this model also implies rejection of the view that restorative justice under the threat of coercion cannot be genuinely restorative. While it is important that threats of escalated enforcement action never be made in a restorative justice process, it is pointless and counterproductive to deny them as a possibility. Any criminal justice encounter involves an implied threat of coercion in the background (see Daly's chapter). It is best they be kept in the background rather than the foreground of deliberation; but if they are not there at all, we are not dealing with a criminal justice matter, nor with a criminal law enforcement process that is likely to afford prudent protection to citizens.

Very occasionally, however, it will be necessary to go for the maximally incapacitative outcome that the law allows – as when the

convicted murderer of one member of a family vows to do the same to surviving members. Under the responsive strategy this does not preclude a restorative justice conference a few years on when offender and family members are ready for a reconciliation that both sides can persuade each other to be genuine. Release from prison at this point makes no sense under a retributive policy but can make perfect moral sense under a responsive-restorative strategy. The time to hate has passed.

At the other end of the spectrum, it seems wrong to suggest that there are some kinds of matters that are too trivial for a fully-fledged restorative justice process. The principle of parsimony outlined by Walgrave certainly justifies rules of thumb like the following – if it is a first and minor juvenile shop-lift, the police should always issue a caution with the parents rather than send it to a conference. But that is a rule of thumb for the police to follow. It can make perfect sense for private actors who are victims and perpetrators of a particular kind of harm to agree to an elaborate restorative justice process (one that passes all the value and process tests in a definition of restorative justice) on matters that the rest of us might regard as utterly trivial. So if two relatives agree to a conference on “nagging” or if two school children agree to one on “putting each other down”, that can make all the sense in the world to them. Indeed it can make all the sense in the world from the perspective of the community’s wider interest in crime prevention (but only if the principals want to be in it). So there is no domain of law or life where what we call restorative justice processes that satisfy restorative values might not be apposite. As Barton contends, it is for empowered parties to decide whether restorative justice is apposite.

### **Accountability, Privacy, Effectiveness – Who Should be in the Circle?**

Accountability is another issue of concern in most chapters of this volume where we might consider mixing philosophies across time. A key contest of values here is between accountability and privacy. Do we conduct restorative justice conferences in private (by invitation only to members of the community of care)? Miller and Blackler’s essay is one that takes a strong line in favour of this. On the other hand, Alder worries about the accountability question if in these private spaces girls especially are oppressed by their families. While Australian and New Zealand conferencing practice mostly keeps outside members of the public out of the circle, Canadian healing circles tend to be open to any member of the community who wants to attend and have their say in the justice transacted in the circle. But this oversimplifies the

privacy/community-accountability dichotomy. In Hollow Water, circles dealing with sexual abuse of children were held for months or years in private with selected victims and supporters, selected offenders and supporters, before ultimately a circle was open to the whole community at the final stage of the process. Partly, this is about privileging privacy as a value over community accountability until a final resolution has been worked through by the principals in a way that is ready to be put before the whole community (or at least anyone from the community interested to attend). But it is also about giving everyone time so that there is more chance of a general willingness to acknowledge a degree of remorse and healing that enables ratification of a restorative final settlement.

The contributors to this volume tend to favour a circle or conference process over one-on-one victim-offender mediation. An expanded circle of community accountability is one reason. But the more important reason was mentioned earlier. The more people there are in the circle who deeply care about the principals to the conflict, the more likely it will be that if one of those principals is dominated by the speech of another, someone will speak up to defend against that domination. Often that takes courage; but as soon as one person has the courage to speak against someone who seeks to dominate another, their words will often resonate around the circle if the circle is wide enough. From a democratic theory perspective, the wider circle also assures a more complex plurality of voices so that any specious univocal community morality will come under contest. In a complexly plural circle, imbalances of power are more cross-cutting than they are with the crude imbalances of dyadic mediation between a boss accused of sexually harassing a secretary and his victim, or between a child offender and an adult victim. By this we mean that in the circle there are likely to be adults and children, men and women on both sides of the conflict.

Iris Young (1995) is a feminist critic of theories of deliberative democracy about undominated rational argument leading to moral consensus. Such a conception, that we find preeminently in Habermas’s theory of communicative action, does not take emotion and storytelling seriously enough, nor other devices that are alternatives to rational argument. Young is advancing a feminist critique, but one can critique conferencing from an Australian Aboriginal perspective in a similar way. Many aboriginal peoples (not just in Australia) find direct questioning a rude Western practice. Yet conventional conferencing is substantially based on asking questions. At the same time, the deformed procedure of conferences makes it an easy matter to break out of question-asking scripts. For example, instead of starting by asking a young offender to tell us in their own words what

happened, an elder might start with a story about a similar misdeed he did when young. Others in the circle can then be moved to tell similar confessionals about themselves until the contemporary offender is hence moved to self-disclosure.

This is one of many reasons why indigenous peoples often view it as important for the most respected elders to be in the circle even if those elders are not intimates of either the offender or the victim. Justice rituals are important occasions where those with most "mana" (to use the Maori term) can teach others about how to lead with firmness, kindness and grace. Spirituality in both Western and non-Western conferences seems of great importance to many of us who have observed a large number of conferences. Yet we but dimly understand how and why it is important. We simply suspect that when a Mandela appoints a Tutu to head the Truth and Reconciliation Commission, this is wise. The reason has something to do with the spirituality of indigenous elders such as Tutu (or Mandela himself) being infectious. Their grace rubs off on the rest of us. We suspect that every school, every workplace, every local community has people with special gifts of grace. Difficult matters always seem to go better when they are in the room. Contagion of the spirit is a research agenda we do not yet understand how to tackle.

That said, we also know from Nathan Harris's (1999) research that shame or remorse over a wrong we have done is not something normally induced by strangers. Harris measured perceptions by offenders of how much conference participants disapproved of their offence. The perceived disapproval of most people in the room had no power in predicting how ashamed offenders felt of what they had done. The only perceived disapproval that mattered was of those the offenders had an unusually high respect for. This reinforces Miller and Blackler's attack on the potentially counterproductive role of outsiders – community representatives – in Canberra conferences. On the other hand, we might be open to non-intimates if they are elders with "mana", particularly in the case of indigenous offenders or victims who see them that way. And we must bear in mind the work of Inkpen (1999; Mugford and Inkpen, 1995) on another kind of rationale for community representatives for those common kinds of reckless endangerment offences (e.g. drink driving) where there is no victim and where communities of care may see nothing wrong with the behaviour. The problem that must be solved somehow is insufficient plurality of voices in the circle. And there is also as a consequence a community accountability and legitimacy problem when you have a community of care that simply closes ranks around the offender and covers up. Miller and Blackler may be right that this means that restorative justice is not appropriate for offences without direct victims.

But we think this conclusion is premature in light of the research evidence we have at this stage. One reason for pause is the evidence we have found for the remarkable effectiveness of what we would call restorative justice processes without victims in increasing nuclear power plant safety.

A final advantage of a plural circle over dyadic victim-offender mediation is about remorse-induction, which Maxwell and Morris's contribution to this volume shows to be a significant predictor of reduced reoffending. Many offenders are offenders precisely because they have cut themselves off from a capacity to experience remorse over suffering they cause others. One learns how to acquire that capacity (and how to deal with the shame that is induced) through social interaction with others, especially interactions with others who we love or deeply respect – the lesson from Harris's (1999) research.

In Kathleen Daly's contribution to this volume she quotes Braithwaite and Mugford's (1994) unfortunate metaphor of a shaft of shame crossing the floor of a conference as a victim explains the consequences she has suffered. The offender has learnt a callousness that protects him from experiencing any shame in the face of hearing these consequences. This shield deflects the 'shaft of shame' which then pierces like a spear the heart of the offender's mother, who sobs in consequence. It is the mother's tears which then get behind the offender's emotional defences. Through this indirect emotional dynamic the offender experiences remorse – a remorse mediated by letting down a mother he loves, indeed by hurting her. This complex social emotional possibility is not present in a one-on-one victim-offender mediation. Daly's reading of this may not be a productive one: 'offenders should feel a vicarious sense of punishment via seeing the anguish of their mothers receiving a "shaft of shame"'. Doubtless the emotional pain is punishing at that moment for both mother and child. That is clearly a bad thing. Certainly from the perspective of the retributive theory Daly addresses this is a bad thing because mothers do not deserve to be punished. At the same time, from the perspective of a restorative theory, we hypothesise that the emotional connection that induces remorse in this group dynamic tends to redound to the benefit of both mother and child. The benefit has nothing to do with the moral bad of the punishment that occurs in this context, but to do with restoration of connection between parent and child, in turn enabling connection between offender and victim. Until young offenders come to terms with the way they are hurting their loved ones and extend their hand to them in remorse for that hurt, the suffering of those loved ones will not heal. Nor will the full possibilities for the healing of the offender be realised. We read the evaluation research to date as suggesting that those who find restorative justice processes most

satisfying, who secure the greatest emotional benefits from them may be the families of offenders (compared with victims for example). It is the kind of group healing dynamic that we are describing here, perhaps one that happens more backstage than on the frontstage of conferences and circles, that we suspect underpins this accomplishment.

### Some Research Questions

The Maxwell and Morris results reported in this book will be an influential contribution to the empirical literature. They are results that lend support to a number of influential restorative justice theories. When offenders feel remorse after the family group conference, reoffending is reduced; however, when they feel shame in the sense of being made to feel that they are a bad person, reoffending is increased. Apology and a feeling on the offender's part that they have repaired the damage predicts reduced reoffending, while a feeling that they were not involved in the family group conference decision-making predicted increased reoffending. Note that this last finding supports the key hypothesis of Barton's chapter: *'Restorative justice fails in cases where one or more of the primary stakeholders is silenced, marginalised and disempowered in processes that are intended to be restorative. Conversely restorative justice succeeds in cases where the primary stakeholders can speak their minds without intimidation or fear, and are empowered to take an active role in negotiating a resolution that is acceptable and is right for them'*. Maxwell and Morris's findings about lack of education and employment post-conference predicting reoffending supports Alder's comments on the importance and widespread neglect of developmental issues in restorative justice processes. There is also some support in the Maxwell and Morris findings of the importance of perceived fairness of conferences to the prediction of reoffending.

These papers raise more questions than they answer, however. Morris and Young express concern about victims being used to benefit offenders – victims as props in a production to meet the needs of others. It is surprising that in the conferencing evaluation research of recent years, no one has explicitly asked victims whether they felt this happened to them. What we do know is that victims are more likely to feel better off than worse off as a result of conferences (Strang and Sherman, 1997; Daly, 1996). However, there is a significant minority who feel worse off. Might it be that these are victims who do feel they have been used as props?

Daly asks questions about the value of coerced symbolic reparation in conferences. It would be easy to explore the predictive

power of symbolic reparation in conferences under conditions where this is perceived as coerced versus voluntary.

Findlay plays with the idea of graduated corporate banishment to regulate corporate crime restoratively. Bankruptcy and banishment from all commercial activity might be complemented with a schedule for reintegration which could ultimately allow full access to share trading and company directorships. In the case of a struck-off lawyer, graduated reintegration might involve first *pro bono* work only, followed by limited commercial practice of law and ultimately return to a partnership after several years being reintegrated into the profession. R and D on such ideas could first be done experimentally as an innovative order of a pioneering judge.

Findlay's collaborative justice ideas also require an action research frame of the kind that Clifford Shearing (2000) and the Community Peace Foundation in South Africa is pioneering. In part this involves using restorative justice for dealing with specific acts of violence, rape or theft in a community as a catalyst for raising wider agendas of community development, housing and community relationships.

In the aftermath of *Clotworthy* and *Gladue*, new traditions of restorative doctrinal research will open up. The preliminary treatments of the issues in the contributions to this volume by Mason, Morris and Young and Barton show the way.

Perhaps the biggest research question which will keep us busy for many decades involves the tension between restorative justice and transformative justice, to use Ruth Morris's (1995) term. Mark Findlay has a particular concern about the limitations of 'restoration to the status quo'. What if the status quo is unjust? Surely then we want a transformative rather than a restorative agenda? At the other end of this debate we have Miller and Blackler who want restorative justice to work in limited ways in those limited contexts where moral rights have been infringed and there is a need for redress or repair in relation to those specific infringements. Walgrave is on a similar wavelength in contending that the criminal justice system is a sensible vehicle for a restorative agenda, but a dangerous one for a transformative agenda. His Figure 10.1 conceptualises the choice nicely within a republican theoretical frame as a choice between the restoration of dominion or the promotion of dominion.

Our own view is that restorative justice can never be the most important vehicle for social justice. The most important institutional arenas in the modern world to struggle for social justice are the IMF, the World Bank, the World Trade Organisation, the development of international taxation policies in institutions like the OECD, and the like. But what seems equally true is that unless struggles for social

justice infect all levels of institutions, from the most global to the most local, then social injustice will prevail. This is because social injustice is insidiously resilient because of the power and self-interest that drives it. Whenever social justice is victorious in one set of institutions, the forces of social injustice seek to use other institutions as vehicles to reestablish power imbalances.

More social structural kinds of research are needed here to reveal how the largely restorative approach to the regulation of tax cheating, stock market manipulation and trade practices are an important advantage to the rich, while the denial to the poor of restorative justice, in particular of indigenous justice, in favour of incarcerative justice, is a central cause of oppression and injustice. As Alder's contribution shows, the criminal justice system is a significant issue in the oppression of women. Again, while it can never be the primary institutional vehicle for sexual equality, there are local things it can do, from helping delinquent girls get back to their education or into jobs, to confronting cultures of exploitative masculinity in a school following a sexual assault in its playground.

Finally, we must remember that we live in a professionalised, managerialised society where opportunities for small groups of citizens to get together and make decisions of any consequence are rare. One of the nice things about restorative justice is that it opens up a little space where a slice of deliberative democracy can occur, where young citizens and old can learn to be democratic perhaps for the first time. This opportunity is particularly rich for all citizens during their school years over problems like bullying, as Valerie Braithwaite's chapter shows. If participatory democratic opportunities are rare in the modern world and if restorative circles are one of those rare opportunities, then we should want citizens to link the personal troubles they confront there to wider public issues, including issues of social justice – calls to governments to take some concrete initiatives about youth homelessness, to reduce school expulsions, even to transform the regulation of the insurance industry as did happen after the Australian Aboriginal insurance cases of the early 1990s (Fisse and Braithwaite, 1993). Very little research has been directed to community-building through restorative justice and to the education for democracy potential of restorative justice, perhaps because this seems so romantic in these early years of a new social movement that is barely finding its feet.

All these questions bubble up from the Chapters with their diverse commentaries and ideas on connecting philosophy and practice. Restorative justice is old, but new for us. We must learn again the philosophical principles that should guide practice; we must develop practice that informs those principles to maximise the possibilities for justice to be delivered and harm to be healed.

## Note

- 1 This implies that for most kinds of financial losses that could not be recovered from offenders, citizens would be expected to take out insurance rather than rely on the state for compensation. The alternative is a fiscally unmanageable moral hazard problem.

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