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META REGULATION OF JUSTICE

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Abstract

Access to justice cannot be secured by more progressive law – legal aid, public interest law. Max Weber explained why: as the quantity of law and the size of bureaucracies grows, law as an institution becomes more useful to those with institutional power (and less accessible to others). In late modernity the more serious the injustice, the more likely large organizations will somewhere be a stakeholder in it. Meta-regulatory strategies, regulated self-regulation, then become more productive paths to justice. Christine Parker has planted the seed of a new debate with the idea of generalizing corporate obligations to prepare EEO plans, environmental and safety plans. Her more general approach would require large organizations to have a plan to continuously improve access to justice. Is meta-regulatory movement toward restorative and responsive justice for the whole of law possible? Large organizations are already on a trajectory of incipient justice meta regulation; NGOs already in many specific ways demand it. Nudging these developments forward more accountably is a social justice agenda worth consideration.

Key Concepts

Meta regulation means the regulation by one actor of a process whereby another engages in regulation. An example is the government regulating a process of corporate self-regulation – regulated self-regulation.

Restorative justice is a process where all the stakeholders in an injustice have an opportunity to discuss in an undominated dialogue what might be done to repair the harm, meet the needs of those affected and prevent recurrence of injustice.

Responsive regulation means that governance should be responsive to the conduct of the regulated in deciding whether a more or less interventionist response is needed. Rule enforcers should be responsive to how effectively citizens or organizations are regulating themselves before deciding whether to escalate intervention. Responsive regulation is about state, corporate and civil society actors each regulating one another. It is about the ideal that they all do best to drive one another down to the deliberative base of pyramids of progressively more coercive interventions.

Meta Regulation of Justice¹

John Braithwaite

Plan of the Essay

While the justice of the courts is an important kind of justice, it is argued that often courts offer inferior justice to restorative justice circles. Access to justice in this essay thus only means access to the justice of the courts when that is a good way of securing justice. Access to justice means here access to effective ways of securing justice in a given context. The next section argues that access to justice is a receding ideal in a capitalism dominated by large corporations that drives law to new layers of complexity. Yet these conditions also create spaces for the growth of responsive regulation, meta regulation and a reinvention of restorative justice. Compared to the past, large organizations today perpetrate a larger proportion of the injustices that occur in the world. They also have the greatest capacities to prevent injustice, not only within their walls, but up and down their supply chains as well - into the lives of small organizations and families.

Philip Selznick's notion of responsive law as integrity is conceived as holding the key to access to justice in such an organizational world. The third section of the essay conceives a marriage of restorative justice and responsive regulation as following from Selznick. Access to justice is best secured by applying the principles of restorative justice and responsive regulation to the delivery of justice itself. The essay then explains that this assertion does not only apply to limited domains of

¹ This research was supported by an Australian Research Council Discovery Grant on Meta-Regulation with Nicola Lacey, Christine Parker and Colin Scott. I thank these three colleagues for their comments on the paper and to participants at seminars at Yale, University of California Berkeley and Chicago-Kent College of Law and to anonymous reviewers and the editors of the *Law and Society Review* and *Law and Social Inquiry*.

law, like criminal law, but that it applies to the whole of law. This is because when people go to law, they are inclined to feel injustice. Contested senses of injustice are intrinsic to the meaning of law as an institution. It is argued that conflicts over who is the victim of injustice rarely or never lack important implications for human relationships. Because relationships in particular is one of the things injustice hurts, justice should heal and justice should be relational. It should be restorative of respectful relationships between people.

This is why restorative justice is more likely to be win-win for the disputants, while litigated justice is more likely to be win-lose or lose-lose (especially relationally). However, because some disputes are less relational and more calculative, it is essential to be able to escalate up a responsive regulatory pyramid from restorative justice to deterrence of injustice to incapacitation of injustice.

A paradoxical feature of the argument is then introduced: because the drivers of injustice in the contemporary world are to be found in a Weberian sociology of organizations, the solutions are about flipping organizations to be agents of justice. Organizations must be regulated to do this by both NGOs and the state. Christine Parker's idea is that organizations above a certain size be required to prepare a Justice Plan. Such a law would require private and public organizations to engage in a process of democratic deliberation with their stakeholders on what are the most important injustices their organization causes. Then it must consider what it is doing to prevent and repair such injustices.

Each year it must consider how it can improve the access to justice it provides next year compared to this year. It must pursue continuous improvement in access to justice and monitor whether citizens affected by the organization are actually getting more just treatment. This might mean women getting more equal

employment opportunities, workers fewer injuries, fishermen fewer dead fish in the river, students fairer assessment. Evidence of continuous improvement would have to be reported to an access to justice accreditation agency. Adverse legal consequences would follow from denial of accreditation as an organization that was continuously improving access to justice.

The essay then considers in a preliminary way how this would work. It argues that it goes with the grain of a lot of developments in internal corporate compliance, corporate integrity and ethics systems that the private sector are being pressured to introduce by NGOs with increasing success. This leads to a discussion of the role of NGOs with justice agendas in preventing the access to justice accreditation agency from being captured by powerful organizations. Strategies for NGOs to secure the resources to sue the state and corporations for failing to enforce the credibility of the Justice Plans regime are considered. While the meta regulation of access to justice is a utopian agenda, it is argued that there is a pragmatic democratic politics of how to move toward it. It can be implemented incrementally, and indeed in important ways NGOs are already making this happen.

The final part of the essay assesses whether such a reform agenda would address certain pathologies of Alternative Dispute Resolution (ADR) that are well documented in the socio-legal literature. It is concluded that the pathologies of ADR and of litigation are not so much achieved by reforming each but by putting restorative justice and litigated justice in fertile interplay. This means covering the pathologies of litigation with the strengths of restorative justice, and the pathologies of restorative justice with the strengths of courts. It is argued that universal access to legal aid to go to court is economically feasible, indeed conducive to economic growth, in a world where there is universal access to

restorative justice. Incremental reformers might therefore struggle for ever-increasing access to legal aid and ever-increasing access to restorative justice as complementary rather than competing agendas. Such a struggle is for an access to justice that also has a more productive economy as an outcome.

So it is concluded that a struggle is already underway for a macro restructuring of justice from being something provided by a market for lawyering to becoming something the self-regulation of large organizations is regulated to provide. This essay seeks only to render plausible the theory that justice is best secured by applying restorative justice and responsive regulation to the provision of justice itself, and to discuss some major worries about its implausibility. It does not seek to marshal systematically evidence concerning its claims. Rather it aspires to motivate empirical research to evaluate responsive, restorative and meta regulatory experiments to enable such a future assessment. And it seeks to sketch some of the features of such a program of future empirical research.

The Widening Impossibility of Access to Justice

Developed democracies have seen enormous growth in the quantity of law. Australia, for example, has not only seen steep growth in the number of Acts in recent decades, the number of rules per Act, the complexity and length of Acts is also increasing. For the 1990s, the number of pages of law per Commonwealth government Act was twice the number for the 1980s and three times the quantity for the 1970s (Argy, 2003). As in many nations, tax law is probably the most extreme example, which has grown 27-fold in pages of law since 1970 (Inglis,

2003). It is post-1970s rules in commercial areas such as tax and corporations law that account for the largest part of the growth in litigation.²

The regulatory state literature also documents the rise in the number of state agencies that enforce laws and in the enforcement personnel available to them (Ayres and Braithwaite, 1992: Chapter 1; Jordana and Levi-Faur, 2003; Moran, 2003; Parker et al, 2004). Meta regulatory theory asserts that the existence of more law and more public enforcement of it is one factor driving more private enforcement of law. As the quantity of law to be enforced grows, delegation to private regulation that is then publicly monitored becomes a coping strategy. Growth in private enforcement has not all been growth in litigation, or even mainly growth in litigation. Legal systems have also coped with the growth of both law and the capability to contest law with massive expansion of Alternative Dispute Resolution (ADR) in the twentieth century.

ADR has been an important part of the growing truth of Galanter's (1981) insight that justice occurs in many rooms. It has been said that the nightwatchman liberal state that from FDR's Presidency was succeeded by a Keynesian welfare state, in turn ended in the 1970s to be succeeded by a regulatory state (Jordana and Levi-Faur, 2003). The regulatory state is said to govern more through steering than rowing (Osborne and Gaebler, 1992). The growth of non-state regulation since the 1980s makes it more accurate to describe the latter development as the growth of a regulatory society or "regulatory capitalism" (Levi-Faur, 2005). Business firms also

² The most dramatic growth in a single locus of litigation has been the use by business litigants of the 1974 *Trade Practices Act*, Australia's competition and consumer protection law. Globally, growth in the quantity of the latter kind of law has also been from a zero base in most countries, substantial and even more recent than in Australia. Most of the world's nations now have competition laws and competition enforcement agencies. Most have acquired them since 1990 (CUTS, 2003; Jordana and Levi-Faur, 2003).

do less of their own rowing; they get more things done by contracting out and regulating the performance of contractors. Professions, non-governmental organizations (NGOs), intergovernmental organizations, industry associations and a plethora of hybrid business-NGO organizations (like the Forest Stewardship Council collaboration between retailers and environmental NGOs to certify and eco-label wood products) also do a lot of regulating.

In a world where there is continuous growth in the quantity of law and private regulation and their private and public enforcement, access to justice retreats further beyond the reach of those with limited resources. Of course where access to justice matters is with those with insufficient resources to fight their own legal battles. Max Weber (1954) revealed to us the most profound reason why as the formality and complexity of law grows, access to justice becomes more impossible for little people (see Sutton and Wild, 1978). The more formal and complex the law becomes, the more it favours formally rational organizations such as business corporations that have evolved to govern complexity. Increasingly, little people and little businesses cannot cope with things like doing their own tax returns; they contract the services of a tax preparer expert in managing this particular kind of complexity. But in most spheres of life, small players cannot afford to contract the services of an organization that is expert in managing formal legal complexity that ordinary people cannot comprehend. Mostly they lump it.

So regulatory capitalism structurally induces expanding spheres of injustice. This is a result of the fact that more of the important things that get done through the private and public enforcement of private and public rules and standards. A paradox of regulatory capitalism is that even specific laws designed to fix injustice contribute to this wider structural fact of injustice. We see it with tax law: new rules designed to plug a loophole that is available to the rich but not the poor are

later used to open up newly conceived loopholes for the rich. Moreover, by increasing the quantity of law, the new rules may make the law more incomprehensible to ordinary folk and more exploitable by formally rational managers of complexity.

A new paradigm seems required. More of the same – writing more laws to favour the poor, more legal aid from experts in managing legal complexity – cannot solve the dilemmas of regulatory capitalism. Social justice advocates might do better to pull their fingers out of a dyke riddled with cracks that constantly open under its own growing weight. Better to pull back from the dyke to build some new protective structures. These will not be structures that give up on a dyke that might collapse under its own weight any day; they will be structures that regulate dyke maintenance. The access to justice project that counts most, this essay argues, is a meta-regulatory project (Grabosky, 1995; Gunningham and Grabosky, 1998; Parker, 2002; Morgan, 2002). It is about the regulation of extant regulatory structures.

The meta-regulatory project I consider is restorative and responsive justice for the whole of law. This essay will summarize the argument of my book *Restorative Justice and Responsive Regulation* in its application to all areas of law and will reconceptualize from that work a meta-regulatory strategy for access to justice. It will be argued that a restorative and responsive strategy for the whole of law is more than a utopian project to build a better dyke than the one public interest lawyers seek to plug. There is a theory of transition to restorative and responsive justice. In the process of working to build the alternative structures, the meta-regulation of the injustices of the existing structures is got underway. Parker et al. (2004) have argued that faced with the realities of regulatory capitalism, actors naturally turn to meta-regulation when they are concerned to shape the world.

Homage to Selznick

It would be nice to go further and conclude that there is some sort of sociological imperative for an evolution toward responsive law, as Nonet and Selznick (1978) have done. But I am not persuaded that it is descriptively accurate to see an evolution from repressive to autonomous to responsive law; nor am I persuaded that a plausible mechanism exists to drive forward such an evolution. Mine is a more mundane claim that while access to justice through more law of the right kind is sociologically implausible, access to justice through responsive meta regulation might at least be sociologically and economically feasible. Whether restorative and responsive justice happens or not is about how effectively reform movements struggle for it.

While my theoretical ambitions are not as great as Philip Selznick's, the debt to his bigger ambition is profound, especially on the question of what responsiveness might mean, a matter on which Selznick's 1992 book *The Moral Commonwealth: Social Theory and the Promise of Community*, has a more sophisticated account than Ayres and Braithwaite's (1992) *Responsive Regulation*. For Selznick (1992:336), the challenge of responsiveness is the challenge "to maintain institutional integrity while taking into account new problems, new forces in the environment, new demands and expectations". Integrity requires authentic communication that connects reason to emotion, not political or commercial spin that dissociates emotional appeal from reason. Reason connected to emotion through practical experience forges integrity as holistic purposiveness.

For Selznick, one of the things that enables such integrity is connecting the private to the public sphere. In this part of Selznick's responsiveness story, I find a rationale for privileging restorative justice at the foundations of responsive

regulation. An opportunity for the justice of the people to bubble up into the justice of the law can be institutionalised through direct emotional engagement of stakeholders with particular instances of injustice. This fits with Selznick's (1992: 465, 465) notion that "responsiveness begins with *outreach* and *empowerment*...The vitality of a social order comes from below, that is, from the necessities of cooperation in everyday life." Responsiveness means having respect for the integrity of practices and the autonomy of groups; response to "the complex texture of social life" (Selznick, 1992: 470). The project of both Tom Paine (Selznick, 1992: 505) in the *Rights of Man* and James Madison is that empowered civic virtue is at least as important to democracy as constitutional checks and balances: "power should check power, not only in government but in society as a whole" (Selznick, 1992: 535). So, for example, business custom shapes responsive business regulatory law and state regulators check abuse of power in business self-regulatory arrangements, and both should have their power checked by the vigilant oversight of NGOs and social movements.

Marrying Restorative Justice and Responsive Regulation

Restorative justice is a process to involve, to the extent possible, those who have a stake in an injustice and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible (adapted from Zehr, 2002: 37). It is a tradition that has mainly developed in criminal law and transitional justice, as with the South African Truth and Reconciliation Commission. Responsive regulation (Ayres and Braithwaite, 1992) is mainly discussed as a business regulatory tradition.

A core idea of restorative justice is that because injustice hurts, justice should heal. Healing, it contends, is most likely when there is undominated deliberation among stakeholders about the consequences of the injustice and what should be done to

right the wrong. The core idea of responsive regulation is that regulation (whether by governments or other actors who regulate) should be responsive to the motivational postures of the regulated (V. Braithwaite, 1995), to their customs, their actual conduct and to structural facts about regulated markets.

Like restorative justice, responsive regulation makes the explanatory claim that legally pluralist deliberative institutions that engage multiple stakeholders are most likely to secure the regulatory purposes of such institutions. Like restorative justice, responsive regulation values flexibility, citizen participation in crafting contextually attuned solutions to problems and parsimony in recourse to coercion. Yet deterrence and incapacitation have vital roles in responsive regulation. It advances the paradox that by signalling a willingness to escalate to the levels of deterrence or incapacitation needed to secure a just outcome, we actually reduce the punitiveness of regulation. By signalling (without making threats) a resolve to escalate up an enforcement pyramid until a just outcome is secured, we can actually drive most of the regulatory action down to the base of the enforcement pyramid. In the integration between restorative justice and responsive regulation in Figure 1, this regulatory action at the base of the pyramid is restorative justice.

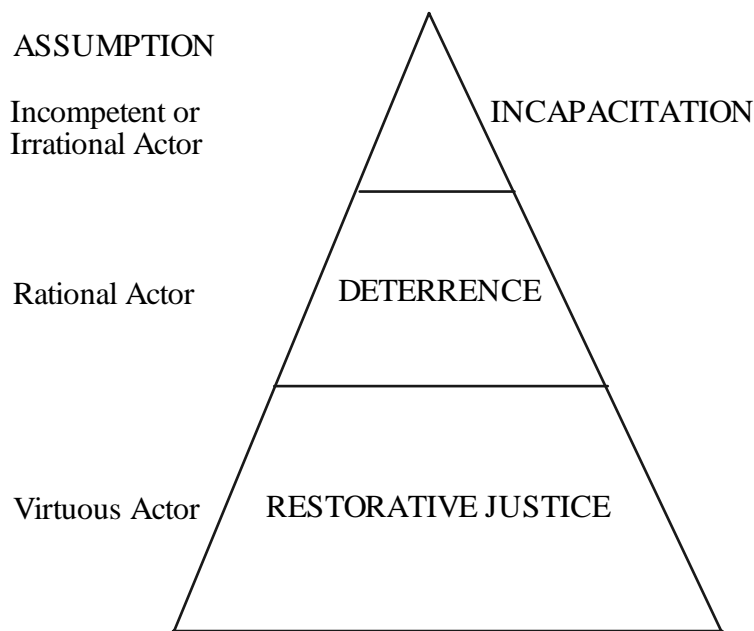


Figure 1: *Toward an Integration of Restorative and Responsive Justice*

In the worst case, we do need to incapacitate criminals by capturing and incarcerating them, armies by capturing and disarming them, criminal corporations by revoking their licences to operate (or replacing their directors and top management). Signalling the inexorability of this resolve actually empowers more deliberative forms of restorative and deterrent justice. The pyramid connotes a presumption that it will mostly be fairer, cheaper and more effective to try restorative justice before deterrence. But there will be exceptions where this presumption is rebutted after considering restorative justice first and then deciding to escalate immediately to deterrence or incapacitation.

The explanatory theory of the pyramid that accounts for the parsimonious resort to punishment should be complemented by a normative theory of justice. In my

writing on both restorative justice and responsive regulation, that normative defence of parsimonious punishment with firm upper limits on punishments is a civic republican theory (Braithwaite and Pettit, 1990). According to these republican lights, both restorative justice and responsive regulatory institutions should be crafted to maximize freedom as non-domination. Values like forgiveness, that are common ground between the restorative and responsive traditions, are justified in terms of maximizing freedom as non-domination.

Fundamentals of procedural justice are also justified in terms of maximizing freedom as non-domination (Pettit, 1997). Again the normative-explanatory theoretical package is that observance of procedural justice constraints is not only normatively required, it increases the effectiveness of restorative and responsive justice in achieving its purposes (see Tyler, 1990; Tyler and Dawes, 1993; Tyler and Blader, 2000; Tyler and Huo, 2001). Wars fought in compliance with the Geneva convention are hypothesised as more likely to secure a just peace; criminal laws enforced without racial discrimination more likely to prevent crime; environmental tort litigation that treats corporate polluters with respect rather than humiliation more likely to restore the environment. In this essay I do not seek to defend any of these claims. I simply point out that they follow from the theory of restorative and responsive justice, that they are testable empirical claims and they show the theory is fertile in making a wide sweep of empirical predictions.

Nor do I make the empirical case that developed western legal systems are injustice systems that require us to take access to justice seriously as an issue. I assume some readers might accept that when legal rights are created, these are systematically and increasingly used by large corporations to avoid basic obligations like the payment of tax, while poor and middle class people almost never have the resources to enforce such rights in the courts (Johnston, 2003). Nor

do I defend the premise that while it is where law is most coercive that we invest most in legal aid for the poor – the criminal injustice system – it is here we find that multi-million dollar corporate tax offenders, insider traders, price fixers or environmental criminals almost never go to prison. This while most of those who do end up in prison are poor, not employed at the time of their arrest, and most of the women in prison have a history of physical and/or sexual abuse (Braithwaite and Pettit, 1990: Chapter 9).

The Whole of Law Hypothesis

Is there any plausibility to Braithwaite's (2002) claim that restorative and responsive justice is relevant across international treaties, tax, trusts and tort? The general claim made about law is that when people go to law, they are likely to feel some sense of injustice. This is because defining what is just is intrinsic to the social meaning of law as an institution. Moreover, if the dispute gets as far as litigation, the litigation process is likely to further sharpen this sense of injustice. Why? Because lawyers are trained to sharpen the story of injustice in their client's claim and to imbue their client with that sharpened story should they end up in the witness box. Because judges and juries like to believe that law is about justice, this sharpening helps win trials.

There is unfortunate fallout, however, when two parties sharpen their competing stories of injustice to stories designed to lead to exactly opposite conclusions in court. The juxtaposition of the claims "X is unjust" and "not-X is unjust", the very talking past each other on what are the kinds of injustices most relevant to the legal decision, engenders resentment between litigants. The structured legal failure to acknowledge the injustices suffered by the other causes this resentment to take the form of anger that the other side cannot see a whole range of injustices that lurk in the relationship between the parties. We see this routinely with divorcees who

begin the dissolution of their marriage both resolved to be fair. Resolve wilts when the tabling of the first affidavit triggers, through its narrowing of the account of the injustice in dispute, a whole host of resentments about the marriage.

Most of these other injustices are legally irrelevant; the lawyers keep the lid on them during the trial. This strategic suppression of anger often makes anger worse. If we think of a relationship between parties as a bottle with a mix of respectful and resentful emotions in it, litigation pumps some new resentments into the bottle and puts a lid both on articulation of one's own resentments and acknowledgement of the justice claims in the resentments of the other. Restorative justice, in contrast, is a theory about how to open up the bottle so that the reservoir of respect within it is enticed to find expression, acknowledgement of the injustices of the other is encouraged to find expression and acknowledgement of one's own hurts is enticed to articulation in a way that creates an opening for the other to respond to the hurt with a gesture of healing.

Even before cases go to law, it is argued that "our deepest disputes have disturbing relational meanings to litigants and are markers of identity" (Braithwaite, 2002: 244). This may seem an implausible claim in an ostensibly cold and calculative dispute, for example with a revenue authority over tax law. On the contrary, the empirical evidence shows that compliance with tax laws is greatly affected by perceptions of being treated with respect and procedural fairness by officers of the tax authority, believing that the government is distributively fair in the way it defines tax laws, and having an identity as an "Australian" citizen who thus owes a fair share of tax to the Australian community (Wenzel, 2002, 2003, 2004).

Part of the restorative theoretical perspective is that disputes will rarely or never be lacking in important implications for human relationships and will often have their

source in problems with human relationships. There is an essentialist claim here that human beings are relational animals. It is therefore hard to understand or resolve their disputes if relationships are excluded as legally irrelevant. A second essentialist assumption is that human beings are storytelling animals. So if disputants are prevented from telling their own story in their own way about the dispute, they will be frustrated in any ambitions they have to heal the relationship problems.

It follows that restorative justice with tort, contract, labor or competition law may not be as conceptually different from restorative justice with criminal law as we might initially assume. Restorative justice is a whole of law issue³ which is about widening the agenda of legal disputes to relational rifts that might be healed. In a matter like personal injury tort cases, the relationship issues may be more profound with a family doctor who prescribed a dangerous drug recklessly, a supervisor at work who failed to show due care, than with criminal injury by a stranger. The tensions between winning in court and getting on with restoration may also be more profound:

In civil practice in the US it is common for the motor vehicle accident traumatic brain injury plaintiff to have any rehabilitation efforts postponed until after the case has been tried/settled. This translates to a patient waiting 4+ years before participating in any programs that look to restoring lost functional/cognitive abilities, “reprogramming” attitudes and goals into realistic ones, and coordinating such processes with family members, co-workers, and friends.⁴

³ I am thankful to Angus Corbett via Christine Parker for this characterization.

⁴ Personal communication with US plaintiff lawyer L. Virginia McCorkle.

In cases like traumatic brain injury, the need to involve caregivers and children of the victim in a restorative justice process when their lives are also permanently and devastatingly transformed is generally more profound than in a criminal shooting case for example. And the need is greater for priority to be given to professional and family consensus on a restorative health and caregiving plan. The anger a woman directs at a large corporation when she believes it has destroyed her body through leakage of silicone from a breast implant can be greater and more self-destructive for the victim even than the anger a rape victim experiences toward the individual who has defiled her body. This is especially so because of the number of years that pass before a mass tort case may fizzle to an unsatisfactory conclusion such as the corporation disappearing into bankruptcy.

Braithwaite (2002: 240-242) seeks to show how business-business disputes over matters like contracts tend to become individual-individual disputes because there are issues of trust among the individuals who negotiated the contract. Indeed, very often a contract dispute is just a symptom of a deeper dispute over human relationships. If this is true and if it is also true that litigation or even litigotiation (negotiation in the shadow of a litigation strategy (Genn, 1987; Roberts, 1995)) puts the lid on legally irrelevant relationship issues, then privileging restorative justice at the base of a regulatory pyramid opens up the option of having a crack at the underlying resentments as a dispute resolution strategy.

Note that this involves a radically different dispute resolution strategy than we normally find with mediation or arbitration positioned as a pre-trial settlement process. In the latter context, mediators and arbitrators tend to want to keep personal resentments out of the process, eschew the strategy of inviting gestures of healing by articulating hurts, keep the lid on emotions, and narrow the issues on

the table to those that are legally relevant. This is even true of family court mediation, terrain one might have thought where the disputes were maximally relational.

Braithwaite (2002) identified three characteristics of our deepest disputes that prove of strategic importance to the policy analysis: (1) They are complex in a way that means they would cascade across many areas of law were it not for the fact that lawyers tend to simplify them to the one category of law that courts can most productively (for their clients) digest; (2) Our deepest disputes have disturbing relational meanings to litigants and are markers of identity; (3) Legal disputes between two individuals that reach litigation are uncommon and when they do occur they are usually disputes between individuals that are embedded in organizational action.

When disputes get legally or economically serious, organizational actors of wider sway get involved – corporate complainants with the same grievance as the individual, government regulators, or industry associations. Private law cases become public law cases when governments cannot politically afford to sit on the sideline. The main exceptions to point (3) are very important ones – family law disputes, disputes between neighbours and crimes perpetrated by individual strangers.

From a Zero-Sum to a More Win-Win Institution

The evidence is that participants are less angry following restorative justice conferences than they are following court cases (Strang, 2003; Poulson, 2003). But on anger, as on a lot of the other destructive effects disputants suffer, the theoretical claim of restorative justice is more than just that there will be less of it.

Heather Strang (2003) finds that win-win for victims and offenders⁵ is more common in criminal restorative justice conferences than in court, several times more common.

Win-win on emotional healing means that victims get more emotional healing after the hearing and offenders get more emotional healing. Lose-lose, which Strang finds to be more common in cases randomly assigned to court, means that victims suffer increased emotional hurts and offenders also suffer greater hurt. Strang thinks this result may occur because justice is relational. Healing for offenders begets healing for victims and vice versa. And hurt begets hurt. Whereas courtroom justice has a reciprocal negative dynamic of hurt begetting hurt, restorative justice is characterized by healing begetting healing (Zehr 1995). Strang's data are on too small a sample to be definitive in testing this relational hypothesis (n=240), but they are suggestive that these empirical claims may be correct, especially in relation to emotional healing and hurting.

What is clear in Strang's data is that win-win is more common in restorative justice, and not just on emotional outcomes. What is not so clear is whether this is a relational effect of healing for the victim begetting healing for the offender. It does look like some of this is going on. Or is it more an effect of expanding the agenda of issues in dispute creating a bigger contract zone where win-win is a formal possibility? The idea is that if X wants A, Y wants not-A but B, win-lose is the only option. But if it is also true that X wants P, and Y wants Q, then A and Q may be win-win if A is more important to X than P and Q is more important to Y than B. By widening the agenda of the dispute from A,B to A,B,P,Q settlement is more

⁵ Win-win here means that both victims and offenders feel that they were better off after than they were before the adjudication. Obviously in an adjudicated criminal case, it is likely that both sides will feel they are losers compared with the situation where the crime never occurred.

possible because creativity can be used to open up a larger contract zone. Widening the agenda, especially onto an agenda about relationships, is precisely what restorative justice does. The relational hypothesis and the contract zone hypothesis as to why win-win is more common in restorative justice may therefore be related rather than separate hypotheses. Finding either plausible depends on being persuaded by stories of how disputes actually play out (see, for example, Braithwaite, 2002: 240-242) that it is routinely true that there are cross-cutting non-legal conflicts entangled with legal ones.

A third explanation of higher rates of win-win in restorative justice may be to do with the politics of identity. Adversarialism locks disputants into identities like victim versus gang member, business versus complaining consumer. What restorative justice encourages is the pursuit of shared superordinate identities which are a basis for cooperation – such as school member rather than school bully or victim (Eggins 1999; Morrison 2001). It may be that even restorative justice participants who share no pre-existing superordinate identity can discover a kind of shared identity as a group of people who work together to solve the problem that has been placed in the centre of the circle. In these senses, restorative justice tends to be different from settlement mediations ordered by courts when they shy away from widening the agenda of disputes into the (legally irrelevant) arena of human relationships between the disputants, or the arena of shared identities.

The rebuttable empirical claim is that if legally narrowed mediation/arbitration were replaced by restorative justice, we would see more settlement and less litigation. From a longer-term perspective, this may be even more true. We have seen that it is in the nature of disputes between human beings that they are connected to other disputes of a seemingly unrelated kind. Hence, a settlement to a legally narrowed dispute that sweeps deeper underlying disputes off the agenda

may plant seeds of resentment that will burst into a broader dispute later. The claims that restorative justice performs better at preventing ongoing feuds and more often delivers win-win provide an interpretation for the large number of studies that have consistently found higher levels of satisfaction and perceived justice for disputants in restorative justice processes compared to controls (Latimer, Dowden and Muise, 2001; Poulson, 2003). This client satisfaction will later become important to asserting the feasibility of a meta regulatory transformation of access to justice that people will support.

Deterrence, Incapacitation and Relational Disputes

The concern was raised above that disputes like tax litigation may be in the realm of rational calculation so that relational resentments will not be important to their just resolution. Obversely, it can be argued that a rational actor model is irrelevant to, say, a dispute over the custody of a child. Certainly with child custody there is more reason to opt for a justice that is not blind to personal resentments and relationship issues between the contestants than in a tax dispute. But there are actually very often reasons to escalate to deterrent strategies. A parent who believes that the level of access the other party is given to their child is unjust or against the interests of the child can be deterred from compromising an agreement by the threat of a reduction of their own future access. If they abuse a right of access by sexually assaulting a child, prison can incapacitate them from doing so again. Geographical distance can also be used to incapacitate access.

The general claims of the theory here are:

1. Restorative justice is more often useful to securing justice than deterrence and so our presumption should be to opt for restorative justice as a strategy of first resort.

2. Deterrence is more often useful to securing justice than incapacitation and so our presumption should be to opt for deterrence before the last resort of incapacitation.
3. Some injustices are more calculative (e.g. tax cheating) and with them we can be more willing to override the presumption in 1.
4. Other injustices are more relational (e.g. child custody abuses) and with them we should be more reluctant to override the presumption in 1.
5. Therefore denying ourselves the capacity to be responsive up and down the full enforcement pyramid is contrary to the interests of justice in any serious legal dispute.

Restorative Justice and Responsive Regulation argues that it should follow from these propositions that for any serious legal dispute, citizens should be guaranteed a right to both restorative justice and to a justice of the courts that might resort to deterrence or incapacitation. As no society currently funds restorative justice programs at a level to guarantee the first right, and no society funds legal aid at a level to guarantee the second, this seems a wildly utopian prescription.

The Pragmatics of Legal System Transformation

The key empirical claim toward rendering this prescription less utopian was that the legal world changed dramatically in the course of the 20th century from one where most legal disputes were between individuals to one where one or both sides to most disputes are organizational actors (corporations, governments, NGOs) (Braithwaite, 2002: Chapter 8). Moreover, it was argued that even where the dispute is individual versus individual (for example in its legal definition as a private contract dispute), if we allow the definition of the dispute to be widened to a dispute that might also be about industrial relations, anti-discrimination law, the public law of consumer protection and relationships of trust, we recurrently find

that there are organizations as well as individuals implicated in ways that are important to finding a path to a just outcome.

I will not make the case here that organizations are involved in important ways in most of the disputes that go to law in the 21st century (in a way that was not true a century ago). If this claim is right, a strategy suggested by Christine Parker (1999, 2002) shows one way to move in the direction of a right to both restorative justice and the justice of the courts for any serious legal dispute. Parker accepts the hypothesis that organizations are implicated in a large proportion of the injustices of the contemporary world:

People experience domination in the places where they spend their daily lives in the presence of more powerful others – families, schools, workplaces, shops, government departments and community organizations. Because commonplace dominations make up most injustice, it is in these institutional loci that citizens will frequently experience injustice (or be enriched by justice) (Parker 1999, p. 174).

So what is the implication of our story about legal disputes between individuals ceasing to be the majority of disputes?

It opens up the possibility of the state “steering rather than rowing” (Osborne and Gaebler 1992) the justice system. In a variety of other arenas the regulatory state has moved away from the direct provision of services (like health or justice) to the public regulation of the private provision of such services (Majone 1994; Loughlin and Scott 1997; Parker 1999; Braithwaite 2000). A core idea of regulatory capitalism is regulated self-regulation (meta-regulation), an idea it shares with reflexive law (Teubner 1983) and enforced self-regulation (Ayres and Braithwaite, 1992: Chapter

4). Justice, like health, can never be a perfect fit to the regulatory state paradigm because government itself will always be one of the organizational actors that is a principal site of injustice. In response to this, regulation of one part of the state by another (for example inspectors of prisons – some public, some private) are part of regulatory capitalism scholarship (Hood et al. 1999).

Parker's responsive regulatory idea is that each organization (public or private) above a certain size would be required by law to prepare a Justice Plan in relation to all the kinds of injustices its activities are likely to touch – injustices to prisoners if it is a prison, to consumers if it is a business, to creditors, shareholders, suppliers, and so on. Every large organization can be required to report annually on the internet their performance under this plan. For organizations with only 100-1000 employees reporting might only be required triennially (unless they had experienced special problems with access to justice). The key performance requirement would be continuous improvement in access to justice. The organization would have to demonstrate to independent auditors who examine all disputes touched by its activities that it had improved access to justice compared to the last reporting period.

These access to justice auditors, who would be accredited as independent and competent by an accreditation agency, would examine complaint files, staff, student or customer satisfaction surveys, practical availability of dispute resolution, evidence that disputants were advised of their rights to appeal outcomes to the courts, evidence of disputant satisfaction with the fairness of the dispute resolution they got and evidence of the effectiveness of dispute prevention. The latter is particularly important because it will usually be the case that the most efficient way for an organization to continuously reduce the injustice for which it is responsible will be dispute prevention rather than dispute resolution. The auditors

would look for evidence of internal deliberation about what the organization's gravest justice problems are. Then they would look for studies that measure improved performance indicators for the targeted injustices.

It follows that every large organization's Justice Plan would look different. Universities might prioritise fair assessment and quality of education outcomes for students in their Justice Plans, transparency to students of how assessment and teaching quality is administered and participation of student representatives in that administration. A multinational mining company might emphasize environmental justice, occupational health and safety and land rights of Indigenous people whose traditional lands are mined. They might prioritise participation of environmental groups, mine workers in remote communities and Indigenous elders in their dispute resolution and prevention plans.

An economic efficiency argument for the Justice Plan is that it might shift most of the costs of dispute resolution into the hands of the actors who control dispute prevention. The idea is that the organizational sector of the economy would internalise most of the costs of the disputing externalities they cause. And that the cheapest way for them to internalize the costs of justice would be to prevent injustice. Parker (1999, 2002) and others (Sigler and Murphy, 1988; V. Braithwaite, 1993) have written a great deal about what makes for excellence in intra-organizational access to justice, corporate integrity and compliance systems and on the standards that have been set by industry associations, regulatory agencies and voluntary standards bodies around the world on these matters. I will not traverse this research here. But it is important to note that requiring corporations to develop plans for increasing access to justice sets them a challenge of a kind they have a lot of experience in meeting.

When a lot of dissatisfied patients, workers or shareholders were taking an organization to court, this would trigger heavier regulation of the organization by the access to justice accreditation agency. A second auditor might be sent in to directly observe the organization's dispute resolution processes, to work with the organization to prepare a dispute prevention plan. Implementing the agreed dispute prevention plan would be mandatory - heavy legal penalties would apply when there was a failure to implement. Parker (1999: 190) also recommends that courts impose exemplary damages on organizational defendants that had failed to prevent the litigation by making their access to justice policies work.

A regime of Justice Plans would to some degree be self-enforcing. For example, firms in a chain of custody for a hazardous chemical - raw material supplier, manufacturer, reprocessor, distributor, retailer - would refuse to do business with a member of the chain which lacked a credible complaints resolution system lest the complaints from environmentalists or harmed consumers came to them instead.

What Parker is advocating in effect is responsive meta-regulation of access to justice. Access to justice becomes less something the state provides, more something the state regulates others to provide.⁶ Here it is important to note that as in any responsive regulatory strategy, there is a critical residual role for direct state provision (in this case of access to justice). The key economic idea of Parker's approach is that by making the organizational sector of the economy pay for most of those disputes that are currently pricing the justice system beyond the reach of

⁶ In the first instance, justice is not something to provide; it is something to do. But once injustice has been done or alleged, access to justice is something to provide according to Parker.

ordinary people, existing court and legal aid budgets would be freed up for individual-individual disputes.

If we get most commercial litigation out of the courts, resources can be shifted to the family court. The most expensive parts of our present justice system are the tying up of the higher courts with commercial litigation for the rich and the tying up of the prisons system (and the lower, criminal courts) by the poor. A reform program of restorative criminal justice that reduces the latter cost and Justice Plans that reduce the former might therefore be self-funding. This is a speculative claim. Restorative justice programs are not cheap, but they are in comparison to running large prison systems, which in a state like California costs more than the entire state university system. And the salaries of restorative justice facilitators are modest in comparison to the fees of large law firm commercial litigators and judges. When much of the cost of commercial disputes is shifted to large companies and much of the cost of regulating criminals is shifted from prisons to the compassionate regulation and care of relatives and friends, the resources saved would be considerable. These resource savings might fund a quantum increase in legal aid so battered women can be guaranteed quality legal advice when they choose to fight for their rights in the family court. The resource savings of the Justice Plans model could also guarantee the option of restorative justice circles to battered women - rather than just quick and dirty one-on-one mediation in the shadow of an self-represented court appearance. The cost savings at the commercial and criminal ends of the system could also fund more community justice centres that can provide a restorative justice service for neighbourhood disputes and other individual-versus-individual disputes.

The goals of the access to justice accreditation agency under the proposed transformation of the legal system would be to ensure that:

1. Restorative justice becomes available for all genuine (non-vexatious)⁷ grievances of injustice. This would be achieved by (a) regulating for access to justice plans in organizations beyond a specified size; and (b) government funding for restorative justice programs to cover grievances beyond the organizational sector.
2. Legal aid is allocated to ensure that any citizen of modest means is legally represented when they confront a serious legal dispute (including all family law and criminal cases) that they cannot or do not wish to resolve through restorative justice.
3. Justice Plans and state-subsidized restorative justice programs safeguard fundamental human rights; they are responsively regulated to continuously improve the quality of access to justice, including human rights.
4. Annual reports are produced on changes in the patterns of injustice revealed by the accreditation agency's oversight of the private and public provision of access to justice.

Points 3 and 4 are the goals the regulator would have to meet if we are to confront what Braithwaite (2002) concludes the large critical literature on Alternative Dispute Resolution (ADR) has established as the three major pathologies of ADR - the domestication of injustice as conflict, the privatization of the public and imbalance of power. How this might be accomplished is the challenge for the next section.

⁷ Even for vexatious grievances, it is generally best to sort them out so the vexatiousness does not lead to other injustices.

Can Restorative and Responsive Justice Correct the Pathologies of ADR?

Critiques of the pathologies of both the courts and ADR tend to be so pessimistic because they are so micro. They lack a macro-sociological imagination. Certainly, most court cases and ADR cases can be pulled apart to reveal imbalances of power that play out so the transaction of the case helps the powerful more than the powerless disputant. But there is a fallacy of composition in arguing that therefore the sum of all those court and ADR cases increases imbalances of power. Engel and Munger (1996) show that people with disabilities almost never assert their rights in the courts. However, they do ask their workmates, teachers, classmates to respect those rights in the organizations across which they move their wheelchairs. One of the reasons they often get a positive response is that the courts have declared rights of wheelchair access to buildings and like rights. Justice, as Galanter (1981) instructed us, must be seen as occurring in many rooms. While the courtroom is just one of those rooms, the public discourse of rights it articulates has an influence on the private justice systems in the many other rooms where the paraplegic seeks to manoeuvre her wheelchair.

What is the macro-sociological challenge of transforming legal institutions into things that reduce imbalances of power? It is revolutionary change in the way the public justice of the courtroom influences the private justice that occurs in other rooms, and vice versa. The vice versa is critically important because commercial interests - of business, the legal profession and the crime control industry (Christie 1993) - dominate the stage in courtrooms. Indigenous, womens' and disabled persons' groups do not dominate the courts. The macro-legal change suggested is (a) to push out of the courts most of the cases those commercial interests are presently pushing into them; (b) to give voice to the interests of less powerful citizens through restorative justice; and (c) to open a communication channel

between restorative justice and courtroom justice so the justice of the people influences the justice of the law.

We must also keep open the communication channel from the justice of the courtroom downstairs to the private justice that occurs in so many other rooms. Indeed we must improve it. Parker (1999: 64) has theorised the macro challenge as the pursuit of a culture of justice where every potential claimant has a choice of whether to pursue their dispute informally or formally, yet where “less disputing is necessary because justice is less frequently denied”. But this will always be a romantic ideal unless we regulate organizational provision of access to informal justice so that disputants can always get it and its quality becomes so high that disputants actually prefer it to the justice of the courts. Once the courts are uncluttered with the disputes that arise in the organizational sector, an affordable right to the justice of the courts might become real. Yet the right to restorative justice is what most powerless citizens would actually choose because in most, but not all, cases it would be the superior justice for them (see the evidence in Braithwaite, 2002: Chapter 3 and in Parker, 1999; Strang and Sherman, 2003; Poulson, 2003).

Put another way, we must reframe the choice between courtroom justice and ADR so it is no longer a debate about where the imbalance of power will be worse. The better ideal to pursue is a macro restructuring of legal process so that the powerless always have a choice of both and always have access to good legal advice so they can choose the venue where the imbalance of power will be less. Moreover, the macro challenge is to change the nature of the power-imbalance dynamic between the two. Instead of a person being dominated in a family law mediation because the alternative is a court in which her partner is legally represented and she is not, that person can be empowered by a transformed

system wherein if she is dominated in the mediation she can walk away from it with assurance that she can fight in court with a lawyer to help her. The ideal is that the most powerless complainants must be able to regulate the other responsively. Restorative justice and responsive regulation are not simply twin capabilities that should be available to the state as dispenser of justice. They should be available to every potential player of the justice game. If our analysis is correct that restorative justice is a powerful tool for securing respect for legal rights, but more powerful if it is backed by the possibility of responsive escalation to litigated justice, then an important way of securing equal protection of rights is to make both restorative justice and responsive regulation as available to the poor as they are to powerful corporations and state regulators.

Braithwaite (2002) perhaps is utopian that in a domain like family law simply improving existing mediation programs by making them more like restorative justice circles would make much difference. After all in many societies mediation already helps divert about 95 percent of divorces to settlement. Simply because most people prefer conferenced outcomes to litigated outcomes after the event, this does not mean that, up front, resentful people will prefer the peace of reconciliation to the vindication of adjudication (if they win). Availability of a restorative justice option may do little to increase a 95 percent settlement outcome already being achieved in a field like family law.

But it may make the settlements more satisfactory than those delivered by traditional family court mediation. If various members of the divorcees' extended families or friendship network are driving demands for vindication, resources or custody in the dispute, then it may be better to have them in the settlement circle. Without their presence, according to restorative justice theory, settlements are more likely to unravel. Moreover, those relatives and friends may be able to offer

the practical help and support, with childcare for example, to make agreements work well. Finally, self-representing disputants in a restorative justice circle may not be able to call on a lawyer to resist the domination of a domineering spouse, but may choose to have cousin Mary sit beside her precisely because cousin Mary is so effectively assertive in speaking up on her behalf. Or she may choose to have publicly funded battered women's advocates present if fear of battering is an issue for her.

This is not to deny that there will be situations where disputants will wisely choose one-on-one mediation over the presence of a phalanx of relatives when they are likely to be more destructive than constructive. In a domain as important as family law, we need a range of different types of mediated, conferenced and trial paths, where there is competition between state-supplied and NGO-supplied ADR options. Evidence on how procedurally fair, on what percentage of disputants got what they wanted, should be collected and fed back to new disputants to inform their choices of which path to take. If there are many evaluated paths to settlement, the competition will improve the quality of both restorative justice and courtroom justice. If there are: (a) many ADR paths, (b) simplified, accessible data on when they produce good outcomes for men and women, and (c) helpful pathfinders to open gates to those ADR programs, then gatekeeping to the court can be less coercive. There should be no need to make pre-trial mediation compulsory when there is both gate-opening to genuine choice and well communicated evidence on the efficacy of the plurality of options.

NGO Regulation of ADR

Equal access to restorative justice and the courts (through legal aid) is not enough however. The organizational sector of the economy will still have organization on their side; regulatory capture will remain an endemic problem. The remedy to this

is organization of citizen groups – a consumer movement to stand behind consumers, an Indigenous rights movement to stand behind Indigenous people, a welfare rights movement to stand with welfare claimants, a tenants’ union to stand behind tenants and so on. An important part of the function of these NGOs is simply to be a countervailing lobby against the power of corporate interests. Corporate interests will attempt to capture, corrupt or politically influence the access to justice accreditation agency when it impacts upon their interests. When that happens, lobbying from a citizen group that exercises a countervailing power, putting the regulator in the middle, is needed if we are to avoid power imbalance (Ayres and Braithwaite, 1992: Chapter 3).

NGOs have a particularly important role in overcoming the pathology of privatized ADR, of depoliticising disputes that should be in the public arena, that should be given a collective as opposed to an individualized quality. If NGOs are resource-poor, they should be eligible for legal aid. They must have standing to sue. With a little resourcing they can then transform private troubles into public issues. They can do this through aggregating individual claims into high profile class actions. They can do it by jumping in to defend a restorative justice settlement that is appealed to the courts by a more powerful actor in the system. They can do it by appealing a restorative justice settlement to the courts to establish a legal guideline that protects against domination. They can do it by monitoring the monitoring of patterns in disputes by the access to justice accreditation agency. Guarding the guardians of access to justice. NGOs need more resources to do this – from tax deductible citizen donations, foundations and government funding. One option is a tax *credit* (as opposed to a deduction or a check-off to pay extra taxes) that would give every citizen a right to issue checks from the taxes they pay to their favoured NGOs up to a value of say \$500 (Braithwaite, 1998: 364).

Depending on how well resourced they are, NGOs can also play a role in responding to invitations from less powerful or articulate citizens for support in restorative justice circles. This is particularly important in an arena like nursing home regulation where on one side of the circle you have a well-resourced business, doctors and other health care professionals and on the other residents who are old and sick, often unable to voice their concerns audibly and unable to sustain their attention on the negotiation.

It is hard for most advocacy NGOs to do a lot of this, however, unless they are given funding specially for this purpose. Volunteer nursing home visitors can nevertheless be effective advocates with a little training. The first line of defence against this kind of imbalance of power is auditors of organizational Justice Plans collecting interview data on whether circle participants felt disadvantaged or dominated because of their age, sex, disability, on whether circle facilitators achieve a plural balance of supporters on both sides of a dispute. For a discussion of how circles might be designed to generate reduced imbalances of power compared to one on one mediation, and how they often fail to do so, see Braithwaite (2002: Chapter 5).

Regulating the Justice of ADR that Already Exists

ADR is already widespread in both the organizational sector and civil society generally. Power imbalance in those programs is also widespread. Privatized, corporatized ADR is where making the private more public is imperative, where we must be on guard against victims of injustice being rendered quiescent by domination. So we need regulation of access to justice not only to expand and regulate new restorative justice options but also to regulate the quality of this large quantum of organizational ADR that already exists. We need regulators who get out and discover what is happening in some of those extant programs, who blow

the whistle on them so appropriate NGOs get concerned and take their concerns up to be exposed to the justice of the courts. Or NGOs that simply counter quiescence by speaking truth to power.

The ideal, as articulated by Parker (1999, 2002) and Braithwaite and Parker (1999), is for the justice of the law, particularly fundamental human rights, to filter down into restorative justice and for the justice of the people given voice in restorative deliberation to percolate up into the justice of the law. Advocacy groups that are politicized in their capacity to see a private trouble that should be turned into a public issue are the critical mediators for opening up both these channels of communication. It is hard to see a simple mechanical solution to the filtering down of law to the people and the percolating up of the peoples' justice into law.

It requires informal brokers. In Parker's (2002) work on how the justice of the law finds its way into corporate self-regulation, compliance professionals, like health and safety managers, are those brokers. They are also among the brokers who take private sector managerial innovations into the law to ultimately become legal mandates through epistemic communities of health and safety professionals. The brokerage function is even messier with taking reform ideas from restorative justice circles deliberating on a specific injustice into reform of the law - in that it requires the agency of a plethora of NGOs concerned about many different types of injustices. Yet when we live in a world of networked governance where it is nodes of governance that grasp together networks of influence to effect change, restorative justice circles can count among those nodes (see Castells, 1996; Shearing and Wood, 2003). This is why advocacy of a radical strategy for better funding NGOs seems an important part of a reform agenda for meta regulation of justice. If this seems romantic radicalism, remember that NGO strength is naturally growing

as a response to the opportunities that networked governance provides them (Kaldor, 2003; Braithwaite and Drahos, 2000: 497-501).

Our conclusion is not quite that restorative justice can deal with the three main pathologies of ADR better than mediation. Aspects of the micro-design and the value-framing of restorative justice as justice surely do help with the domestication of injustice as conflict, the privatization of the public and imbalance of power. However, the main conclusion is that these pathologies of ADR are not mainly addressed by measures internal to ADR design, but by the way ADR is articulated to a macro restructuring of access to justice where justice is no longer seen as something that falls out of a market for lawyering (with a bit of *pro bono* on the side). Rather justice is seen as a responsive regulatory accomplishment.

You get justice on this view by applying restorative justice and responsive regulation to the provision of justice itself. Justice is most unlikely to fall out of a system where we simply rely on lawyers to be trained in law schools to be ethical and then paid to be the guardians of justice. Equally, justice is unlikely to be a product of a market for commercial arbitration and other forms of ADR that constitute simply a competing professionalism to law. Many ADR advocates think it will. In this they are being starry eyed, self-serving, or both. We can only transform our legal system from an injustice to a justice system if we reinstitutionalize justice with a framework of justice values (I would urge responsive republican values) that perhaps should be given a constitutional status (Braithwaite, 1995) and a set of responsive processes for regulating for justice, for ensuring that all the professional guardians of justice are guarded, for preventing ordinary citizens from being crowded out of the courts by those who pay the piper. Otherwise the tune becomes a lament for citizen justice corrupted as corporatized justice.

Certainty for Business?

One of the paradoxes of corporatized justice, however, is that constant corporate game playing in the courts is actually not the best way to deliver the macro-certainty in the law that is in the interests of the economy and business as a whole (McBarnet and Whelan, 1999). The complex uncertainty of the domains of law most dominated by commercial lawyering – corporations and tax – are adequate demonstrations of that. The text of these laws gets longer every year and further beyond the comprehension of business people. That is the price of the courts becoming captured as a stage for the most creative legal entrepreneurs.

Under responsive regulation of access to justice, organizations would have a right to test uncertain laws in the courts, even an obligation to do so in circumstances where such uncertainty is blocking the access to justice they would be required to provide. However, organizations that persistently opt for legal gamesmanship in the courts to evade the spirit of the law would increase the risk of failing to demonstrate to the accredited access to justice auditor that they have improved access to justice. This may escalate the regulatory oversight to which they are subject, shorten their audit cycle, expose them to exemplary damages when they lose cases in the courts, to being named in reports to the legislature as a firm that has failed to improve access to justice. If this responsive regulation worked in reducing the appeal of the entrepreneurs of legal obfuscation, business leaders would spend less time in court, more time running their businesses according to laws that might be more certain. Certainty might improve because law would mostly move up from the good faith operation of private justice systems to the public courts because there genuinely was an issue of law that needed to be clarified.

In general business people who meet face to face with their suppliers, competitors or customers want to keep life simple, respect their relationships, by complying with the principles of fair play in the law (Collins, 1999). If the other side is captured by a legal entrepreneur who advises them of a way of getting around the law, however, they tend to get angry and hire their own legal mouthpiece to do likewise. Often in that circumstance, the business later realises that litigation was not in their interests. An empirical literature on business disputing going back to Macaulay's (1963) classic study demonstrates that this is so. What is also true, however, is that it is not in the interests of business to have a legal *system* where the law is recurrently made more complex by other business people engaging in this kind of disputing. Business has a profound interest in the kind of culture of justice Parker (1999, 2002) advocates - a culture where it is poor form in the world of business relationships to be someone who seeks business advantage by corrupting the spirit of a just law. Notwithstanding the rise and rise of commercial ADR, business is far away from realising that collective interest in legal certainty and a business culture of justice they can rely upon as shared by those they do deals with. As Hugh Collins (1999) points out, one reason is that private law is insufficiently open to continual reconfiguration to absorb changing business expectations. Business gets more certainty when legal doctrine is continuously and contextually returned to business expectations.

Parker's (1999, 2002) two-channel communication - top-down from the courts to business restorative justice and bottom-up from business restorative justice to the courts - would increase business demand and legal responsiveness for principle-based law, as opposed to complex and detailed rule-based law. If the law is to be a comprehensible guide to business people who sort out disputes face to face, complex rules that can only be mediated through lawyers is not as useful as simple principles. Tax may be an exception where big business has a macro interest in a

hopelessly complex law as well as a micro interest in exploiting and adding to that complexity in specific disputes. It is the macro complexity in the law that makes it possible for big business to iteratively play for the area of the law left grey after each round of law reform (Braithwaite, 2005). This enables many large corporations to pay only as much tax as they want to pay (which usually means none at all). Although a more principle-based tax law may not be in the interests of large businesses and very wealthy individuals, it is clearly in the public interest. In some domains, big business has come to the party with negotiated justice. The US and Australia have shown a lead with the notion of Advanced Pricing Agreements, whereby the tax authority reaches a product by product agreement on how prices on international intra-corporate sales will be set for the purpose of transfer pricing. The tax authority gets a guaranteed tax take from intra-corporate sales and the company is spared audits on this matter. To make restorative justice and responsive regulation work well in an area like this, however, two things are needed: a formidable capacity of the tax authority to audit and contest the transfer prices of multinationals who stay out of Advance Pricing Agreements and a willingness of the courts to respond to such challenges with a principle-based approach to the interpretation of tax law.

Recent evidence suggests that one reason the Australian Taxation Office has been able to increase corporate tax revenue at three times the growth rate of GDP for more than a decade, while the US corporate tax collections as a percentage of GDP constantly fall, is the deployment of a responsive meta-regulatory strategy (Braithwaite , 2005). Australia's innovative meta-regulation of profit shifting by transfer pricing has netted a billion dollars in extra tax for each million dollars spent on putting new target companies into the meta-regulatory program. There may be many areas of law where businesses will continue to pursue self-interest by exploiting an uncertainty that is against their collective interests, but tax may be

the exception where business in some ways has a collective interest in an uncertain law. All the more reason why ordinary people should push for a structural transformation of the law that makes the wealthy pay their fair share of public provision.

Getting Started

The program proposed for transforming the legal system would involve something of a revolutionary change. Before this can happen, perhaps we need more of a crisis of confidence, more and nastier lawyer jokes, a deeper cost of justice crisis, a deeper collapse of the integrity of the tax system. But reformers can and are getting on with the job of bottom-up restorative justice programs in many corners of the justice systems of dozens of countries (Braithwaite, 2002: Chapter 1). States can and are getting on with the job of meta-regulation for tax system integrity (Braithwaite, 2005). Numerous companies are developing the sophistication and fairness of their internal justice systems and relying more heavily on restorative justice. Standards Australia and comparable organizations have developed complaints handling and compliance system standards (AS4269; AS3806) for the private sector that are now being used by the courts and by regulators (Australian Competition and Consumer Commission, 2003). Parker (1999: 189) commends the example of the (former) Australian Affirmative Action Agency's strategy of paving the way for a new regime of enforced self-regulation by persuading lead companies to trial new affirmative action programs that can provide models for companies less confident of tackling a new access to justice challenge (V. Braithwaite, 1993).

So her idea is that the gradualist path to more radical change would involve a reforming state persuading lead companies and public sector bureaucracies to develop wide-ranging Justice Plans appropriate to their business. She adduces some persuasive empirical evidence that this would not be so difficult to do

because it is in fact good business to give superior justice to customers than competitors do, its good business to attract ethical investors (Margolis and Walsh, 2001; Orlitzky, Schmidt and Rynes, 2003), to hold and motivate excellent employees by treating them (and other stakeholders) justly. Its good business to be ready and able to restructure in response to a competitive environment by virtue of the trust built through just policies. Finally, it is good business to be able to keep environmental and other NGOs at bay who might threaten the firm's legitimacy.

Parker believes the lead firms increasingly do show that improving justice improves business. In time, the idea of mandating access to justice plans should therefore not seem so threatening to business; and indeed organizations that had already invested in them would press for others to be required to do so. In many domains of business regulation, such as pollution control (see Porter and van der Linde 1995a,b,c), we have seen this dynamic now – new forms of regulation that are bitterly resisted by most business are embraced by the innovative few, who then demonstrate them to be good for business in sophisticated markets. In deploying their management creativity to deliver the desired regulatory outcome, they discover innovative ways of doing so that had never occurred to state regulators. Parker (1999: p.188) notes that: “Lawyers and political philosophers are disinclined to think of the challenge of justice as a challenge of management creativity.” But we can actually get on with the task of creating simultaneously more efficient and just strategies of guaranteeing justice by talking to the innovators who might show the way at the cutting edge (the healing edge) of the organizational sector of the economy. In addition, we can educate the next generation of business and governmental leaders to an understanding of access to restorative justice by giving them direct experience of participating in restorative justice programs in schools that succeed in dealing with problems such as bullying

(Morrison, forthcoming). This step is also now being taken in thousands of schools around the world.

The argument is that real improvement in access to justice requires major structural change to the legal process so that there is both greatly expanded access to restorative justice and greatly expanded access to legal aid in the courts. The idea is that if there is quality in how the expansion of informal justice is done, demand upon the expanded access to legal aid will be modest and affordable. Research by Blankenburg (1994; see also Parker 1999: p. 77) comparing litigation in the Netherlands and the neighbouring German state of Northrhine-Westphalia shows that the analysis may hold up even when the revolutionary structural difference advocated is only partially in place. The Netherlands has much greater access of citizens to legal aid than Northrhine-Westphalia and more activist consumer organizations that are more willing to pursue legal complaints. Yet the latter has a litigation rate thirteen to twenty times higher than in the Netherlands. After eliminating a variety of other possible explanations for this difference, Blankenburg concludes that people litigate less in the Netherlands even though it is easier for them to do so because pre-court ADR is much more satisfactorily available in the Netherlands. It follows that while radical structural change to the legal process is advocated in this essay, this is not a case where no positive change can ever occur until the full revolutionary transformation is enacted. So long as the partial change is structurally significant, there is every reason to hope that the partial improvement in access to justice will be significant.

The best way to get started towards transforming the legal system from an injustice to a justice system is to participate in building the social movements that we have found to be crucial to making decent transformation possible. These include all the social movements with an agenda of legal advocacy, of public

interest law, to ameliorate the dominations less powerful actors experience in the society – the gay and lesbian rights movement, Indigenous rights, consumer, environmental, animal rights, children’s and aged care advocacy, the women’s movement and so on. In addition, of course there is the work of building and enriching the social movement for restorative justice itself. All these social movements matter on the analysis herein not only because of their direct contribution to a richer democracy, but also because they are the key brokers of law’s currently feeble contribution to democratization. Social movements that confront injustice according to Parker’s (2002) analysis broker the permeability of the justice of the law to the justice of the people and broker the permeability of the justice of the people to the justice of the law.

One interim meta-regulatory strategy for strengthening anti-domination NGOs is to reconfigure ethical investment or social responsibility ratings processes away from technocratic box-ticking and toward deliberative NGO assessments. Under the Reputex ratings system before it was revised in 2004, an NGO like Greenpeace was one of 19 “research groups” who provided social responsibility ratings of the top 100 companies operating in Australia on a variety of environmental criteria (Reputation Measurement, 2003).⁸ Others like Diversity@Work and trade unions rated equal employment opportunity and occupational health and safety criteria. Fifty criteria were rated by 19 groups, mostly NGOs, though some like the Australian Shareholders’ Association and the Australian Institute of Management were rather pro-business NGOs.

⁸ I should declare that Reputex is a private company and I was a *pro bono* member of the Reputex Ratings Committee that approved the final ratings based on the work of the research groups.

The ways of getting started with meta regulation for access to justice are many. Those of us in jobs can start in the organizations where we work; children and those with children can start in their schools. One of the pragmatic appeals of the strategy is that the first mover to improve any particular kind of access to justice can be a private organization that uses the improvement as a competitive tool or as moral leadership, a state organization that requires it as a matter of regulation, or an NGO that demands it as a matter of politics from below. Meta regulatory strategy is about ratcheting-up incrementally. The meta regulatory institutional design is to push NGO, state and corporate ratchets in series – so when one justice ratchet moves up a click there are knock-on effects on the other ratchets (Braithwaite and Drahos, 2000: 282, 611-29).

Summarizing the Challenge of Access to Justice

Braithwaite (2002) argues that the late twentieth century saw a rise in the importance of ADR across the legal system driven by quite a long list of structural shifts:

- global competition with national court systems for commercial disputing business from arbitrators and mediators
- a crisis of the cost-efficiency of formal legalism in managing the risks of time-space compression manifest in developments such as derivatives trading across the globe (space compression) that accumulate profits or losses at a velocity not seen before (time compression)
- a shift toward responsive regulation by business regulatory agencies
- a privatization of security and compliance auditing in “risk society” fostering a privatization of dispute resolution and dispute prevention
- declining citizen trust in the courts and lawyers
- the growth of mediation as a quasi-profession, and

- pursuit of efficiency via the new case management by the courts themselves.

This means that a restorative and responsive transformation of the entire legal system is not as utopian as it first seems; it goes with the grain of these structural and cultural shifts and can be defended in neoliberal discourses that resonate in many corridors of corporate and state power. Yet it is not clear whether the growth in ADR has been good or bad from the perspective of restorative justice values. Informed by the feminist critique of ADR, there are three key restorative justice concerns: the domestication of injustice as conflict, the institutionalization of imbalance of power and the privatization of what should be matters of public concern. On the latter there is also a worry about the expansion of public coercion into domains that should be private – ADR netwidening for juvenile offenders, video cameras in workers’ washrooms to detect and confront drug abuse.

The moral neutrality, the non-judgmentalism of mediation professionalism provides it with no normative basis for concluding what should be private issues and what should be public concerns. Restorative justice, which values non-domination, fairness and justice rather than neutrality, can develop the value framework for deliberating these judgements in a principled way. Non-domination and deliberation itself seem the most useful values for guiding what should be public or private. Public accountability of restorative justice in terms of these values is needed to guard against the domestication of injustice as mere conflict (Roche, 2003). While restorative justice values reconciliation, healing and forgiveness, these values cannot be realised through restorative injustice. Truth is valued before reconciliation, justice before healing, responsibility before forgiveness.

Of course non-domination as a value also requires restorative justice to be on guard against imbalance of power. Braithwaite (2002: Chapter 5) contends that restorative justice processes that engage a wide plurality of stakeholders in the circle are structurally more able to remedy imbalances of power than mediations that only engage two principals to a conflict (see also Roche, 2003). However, the more fundamental shift needed is one where ADR with an imbalance of power is not coerced because a disputant cannot afford a lawyer. And litigation that involves an imbalance of power has the alternative of guaranteed access to restorative justice, preferably to competing restorative justice models. The deepest source of the imbalance of power in our contemporary legal system is that the rich have effective access to both litigation and ADR, while the poor are forced to lump one or the other. The Indigenous criminal defendant is forced to lump the white man's court (while the corporate criminal can opt for ADR). The woman in a family law dispute is forced to lump ADR. The structural inequality in the availability of options means that a wealthy man can dominate in the family law ADR because he can go to court with the support of competent counsel and his wife cannot; the white-collar criminal can get criminal proceedings dropped in exchange for offers of compensation to victims and organizational reform; the unemployed offender cannot. A universal guarantee to rich and poor of access to both court and restorative justice for any serious claim of injustice seems a utopian structural shift.

The Meta Regulatory Response to the Challenge

Parker (1999) has shown one way universal access to both restorative justice and the justice of the courtroom might be fiscally possible. It is possible because in late modernity most serious disputes involve large organizations on one side or the other. The fact that we have become an organizational society is the source of our worsening access to justice problem. Harnessing organization is also the direction

for a solution to that problem. Growing organizational power is the driver of contemporary injustice – from local employment discrimination, to global warming, to Guantanamo Bay. For most disputes that appear to be conflicts between individuals, organizations are actually the big players, the drivers behind the disputes. So giving more individuals legal aid lawyers responds to the surface appearance of the access to justice problem.

It is the organizational-driver-organizational-solution analysis that leads us to meta regulation – regulating organizations to self-regulate injustice prevention and provision of access to justice when their injustice prevention fails. Doubtless we can apply our imagination to a meta regulatory paradigm shift in a variety of ways. But the most developed proposal before us for now is Christine Parker's. Her idea of responsively meta-regulating large organizations to continuously improve Justice Plans could cause the organizational sector of the economy to internalize most of the current public costs of civil disputing.

This huge cost shift could increase the competitiveness of economies for three reasons. First, most of the internalization of the costs of disputing in a risk society would be dealt with by dispute prevention rather than by dispute resolution. Second, where commercial dispute resolution was necessary, it would be rational to institutionalize win-win restorative justice options more than the win-lose and lose-lose options which Strang's (2003) research suggests to be more common in adversarial justice. Third, courtroom commercial law that was driven by the need to solve the problems thrown up by Justice Plans would be more principle-based, less costly, than the proliferation of complex rules driven by legalism. Because thickets of rule complexity built up by adversarial legalism ultimately cause a collapse in the certainty of commercial law, a move toward principle-based law

ironically increases the legal certainty required for efficient capitalism (Braithwaite, 2005; McBarnet and Whelan, 1999; Anderson and Kagan, 2000).

More important than the economic efficiency argument, a rule of law that grows from the impulses bubbled up from the restorative justice of the people, a legal system where the justice of the law has a conduit for filtering down to the justice of the people and vice versa, will be a more democratic rule of law than one shaped by legal entrepreneurs who work only in the service of the powerful (Parker, 1999). The most crucial determinant of the quality of justice in societies is neither the quality of their state justice system nor the quality of the culture of justice in private dispute resolution; it is the relationship between the two. When citizens are imbued with a culture of justice learned in part from a principled law that filters down to them (and that law is shaped by the principles that bubble up from their indigenous deliberation of disputes), when weaknesses of indigenous disputing can be remedied by legal enforcement of rights, then justice has the deepest meaning. It is not that the “balance” between restorative justice and state justice has been got right, it is that the one is constantly enriching and checking the other.

We know that in many domains, restorative justice routinely backfires (Braithwaite, 2002) and we know that court cases also routinely do more harm than good. So we should expect a lot of joint failure from joint access to circles and court. Even in advance of a thorough evaluation research agenda on the innovations proposed by the theory, we can identify domains where its claims would be utterly false. At one extreme are wrongs that matter, but where both restorative justice and litigated justice would be overkill for regulating them. Library fines will continue to be a good idea, and suspension of rights to use the library the way to deal with failure to pay them. At the other extreme, some of the biggest injustices in the world – genocide in Rwanda – require us to take up arms

against those perpetrating them. In between, all manner of contingencies about the way the world works, are sure to continue to make, for example, no-fault insurance systems more effective for compensating victims of traffic accidents than either restorative circles or litigation.

Even with a longer list of qualifications and exclusions, it remains plausible that once the state had been relieved of the burden of funding most of the commercial litigation that dominates its civil dockets, most of its criminal litigation and prison beds, it would have the resources to guarantee restorative justice to all individuals who want it, legal aid to all of modest means who are not satisfied with their restorative justice. Corporate Justice Plans might plausibly save the economy the resources to fund an access to justice accreditation agency to hold both private Justice Plans and publicly funded restorative justice programs accountable for continuous improvement in equality of access to superior justice. Annual reports debated in the legislature on changes in the patterns of injustice revealed by the accreditation agency's oversight of the private and public provision of justice might turn more private troubles into public issues. Public funding for advocacy groups to monitor the accreditation agency and directly monitor justice providers that fail to guard against the domination of the groups they represent might control a lot of capture.

Comparative empirical research on which funding models for NGOs extant in different societies deliver more vibrant NGO capability for meta regulated capitalism is one in a long list of types of research needed to develop and refine the theory herein. Another is the kind of critical empirical work Parker herself is undertaking evaluating specific innovations in meta regulation (Parker, 2002; Parker, Scott, Lacey and Braithwaite, 2004; see also Braithwaite, 2005), access to justice (Parker, 1999), responsive regulation (Nielsen and Parker, 2005) and

restorative justice (Parker, 2004), research of the likes of Strang (2002), Sherman (2004), Ahmed et al (2001), Murphy (2004), Morrison (forthcoming) and Valerie Braithwaite (2003) that explores the underlying emotional and micro-dynamics of these processes, of Gunningham and Grabosky (1998) and Haines (1997, 2005a, 2005b) that explore mismatches in their macro institutional dynamics, of Braithwaite and Charlesworth (2005) that aspires to test their limits in international arenas of injustice, of Levi-Faur (2005) and his colleague Jacint Jordana who are developing an empirical understanding of the global spread of regulatory capitalism, and critical empirical investigation of how democratic accountability works in the execution of restorative and responsive justice (Roche, 2003; Yeung, 2004; Fisse and Braithwaite, 1993).

While meta regulation of justice is a radically transformative agenda, all its elements are susceptible to incremental democratic experimentalism (Dorf and Sabel, 1998). Both competitive forces and collaborative evidence-based public administration can be harnessed to drive innovation in restorative and responsive justice. A talented international community of law and society researchers is already driving forward this R and D agenda. Hence the hope and the vision that the impoverished ADR on our horizon today could one day be richer.

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