

Restorative Justice and Therapeutic Jurisprudence

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The biggest methodological similarity between Therapeutic Jurisprudence and Restorative Justice is empathy for human survivors of legal conflicts; this demands a holistic grasp of the human consequences—in loss, pain, emotion and relationships—of the legal encounter. While Therapeutic Jurisprudence is mainly a lens for focusing on these concerns, Restorative Justice involves more concrete commitments to just processes and values. Distinctively holistic approaches to thinking restoratively about criminal responsibility and shame are used to illustrate.

Therapeutic Jurisprudence

Therapeutic Jurisprudence instructs us on the enormous impact the justice system can have on people's psychological and physical well-being.¹ Understanding this is also a large part of what motivates Restorative Justice. Both traditions share an interest in how to overcome the problem of criminal offenders denying the pain of their victims, both for the sake of healing the offender and preventing further victimization.² Restorative Justice and Therapeutic Jurisprudence share a commitment to an evidence-based structure, including the use of rigorous social science methods in pursuit of an understanding of the effect of legal practices on people. More controversial is my belief that both approaches share what David Wexler has referred to as an inclination to "play the believing game".³ Meaning that after searching for encouraging research on innovations where there is some evidence

¹ BRUCE J. WINICK, *THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW* 3 (1997); see also *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds., 1991); *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* (David B. Wexler & Bruce J. Winick eds., 2000); DAVID B. WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (1990); *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds., 1991).

² See David Wexler, *Therapeutic Jurisprudence in a Comparative Law Context*, 15 *BEHAVIORAL SCIENCES AND THE LAW* 233, 236 (1997).

³ DAVID B. WEXLER, *Therapeutic Jurisprudence and the Culture of Critique*, in *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION*, supra note 1, at Chapter 15.

that beneficial impacts of an innovation are possible, you work on developing that innovation with a degree of belief in its capacity to help people. The idea is that too many promising innovations are killed in the womb by critics. Linguist Deborah Tannen suggests in *The Argument Culture: Moving from Debate to Dialogue*⁴ that a culture of critique can fetter creative problem solving.

The critique game is equally important. However, there is an imbalance in the academy of large numbers of scholars wanting to play the critique game because it is a safer game to play. The good thing about the critique game is that it helps us to be systematic about discovering the negative effects of an innovation. Preoccupation with it, however, will preclude us from ever getting systematic about discovering yet-to-be-developed positives.⁵ This is what playing the believing game delivers. We need to alternate between the believing game and the critique game if we want to be systematic about researching both positives and negatives. Neither chronic cynicism nor conversion and commitment to reform that does not look back can deliver that result. We need to be capable of asking both "what's wrong with this?" and "what can we use from this?"⁶ The dialectic of the believing and critiquing games is also relevant to how we think about specific cases. We must be willing to play the believing game with the victim of an alleged rape to have the ability to empathically engage with all the dimensions of what happened to her and the resultant suffering. Listen as if you believe, and see where it takes your understanding. However, there must equally be a place for the critique game with her testimony to ensure that all reasonable doubts available to the accused are explored. The dialectic of feminist law reveals the difficult relationship between the two games - how the believing game can compromise the gains from critique and vice versa. For example, a central feminist critique is that the law has granted women a less than full status as responsible agents. On the other hand, advocates playing the believing game with women who kill domineering husbands might in certain ways compromise the gains from such critique by advancing a battered women's syndrome defense (a gendered conception of capacity for less than fully responsible choice).⁷

The abstract resolution for both therapeutic and restorative jurisprudence in reconciling such contradictions is holism.⁸ This means a capacity to see the same case as many things at once, with respect for the dignity of all

⁴ DEBORAH TANNEN, *THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE* (1998).

⁵ I am indebted to David Wexler for this insight.

⁶ DEBORAH TANNEN, *supra* note 4, at 19.

⁷ I am indebted to Nicola Lacey both for this point and for this way of illustrating it. See NICOLA LACEY, *UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY*, Chapter 7 (1998).

⁸ See also Thomas Scheff's work on part-whole analysis. THOMAS J. SCHEFF, *MICROSOCIOLOGY: DISCOURSE, EMOTION, AND SOCIAL STRUCTURE*, (1990). See also The International Alliance of Holistic Lawyers website, <http://www.iah.org/index.htm>;

actors involved, which enables the law to craft particularistic solutions that are as responsive as possible to all injustices inhering in the case. Susan Daicoff would see Restorative Justice and Therapeutic Jurisprudence as just two of a number of vectors of a more comprehensive law movement that includes preventative law, procedural justice, facilitative mediation, transformative mediation, holistic law, collaborative law, creative problem solving, and specialized courts.⁹ Holism rules out crude narrowing of the injustices at issue by slogans like "equal punishment for equal wrongs." The fact is equal justice for victims will often conflict with equal justice for offenders. The holistic remedy of equal concern for justice for all affected does not preclude certain guaranteed rights that must always be delivered for both victims (like a right to have a say about what should be done, a right to state support in securing their safety) and offenders (such as a right to counsel, to protection against punishment beyond a maximum for that offence). Beyond such guarantees, however, holism requires contextual justice rather than consistent justice, serious engagement with the particulars of the specific case in search of a solution to the problem that best remedies all the injustices hiding within those particulars. Easily said, but of course difficult and contradictory to do. Narrow framings like "what is the right punishment?" are eschewed in favor of "what is the right solution to the problem?" because the "right punishment" of retributive theory will almost always be the wrong solution to the problem. Perhaps then the most solid common ground between Therapeutic Jurisprudence and Restorative Justice is that they are both part of a return to problem-oriented adjudication.

Restorative Justice

Restorative Justice is an approach to justice that has both a process element and a values conception. Restorative Justice is a process where all stakeholders involved in an injustice have an opportunity to discuss its effects on people and to decide what is to be done to attempt to heal those hurts. Presently, victim-offender mediation is more a building block, and element, of Restorative Justice than the paradigm process. Increasingly, restorative processes involve a circle widened to include other stakeholders—extended family and friends of the offender and the victim and representatives or affected members of the community. In this circle, usually the nature of the injustice and its consequences will be discussed first—how stakeholders have been hurt by it. Then there will be a discussion of what needs to be done to heal the hurt. Ultimately an agreement to do a variety of things that the circle concludes are necessary to repair the harm is likely to be signed. These processes take many forms, including family group conferences, healing and sentencing circles, restorative probation and many other modalities. Restorative processes in recent years have been developed particularly in the

⁹ SUSAN DAICOFF, *The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE: THE LAW AS A HELPING PROFESSION, *supra* note 1, at 465-92.

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context of criminal offenses, though the relevance to civil law disputing should also be taken seriously.¹⁰

What of the values, as opposed to the process, conception of Restorative Justice? While Restorative Justice has a process ideal and Therapeutic Jurisprudence does not, both have a consequentialist normative position: for Therapeutic Jurisprudence, therapeutic consequences are good, anti-therapeutic consequences are bad.¹¹ Restorative Justice is concerned with a much wider net of consequences. We should take a considerable number of restorative values seriously. Philip Pettit and I have argued that these competing values can be balanced and rendered commensurable for purposes of practical reasoning by evaluating their priority according to how they contribute to advancing dominion or freedom as non-domination.¹² However, this is an overly abstract criterion for operationalization in empirical studies of whether values are realized and for giving practical guidance to practitioners.

Preliminary suggestions for restorative values will be ordered into three groups. The first group includes the values that take priority when there is any serious sanction or other infringement of freedom at risk. These are the fundamental procedural safeguards. In the context of liberty being threatened in any significant way, if no other values are realized, these must be. They are:

Priority List of Values 1

- Non-domination
- Empowerment
- Honoring legally specific upper limits on sanctions
- Respectful listening
- Equal concern for all stakeholders
- Accountability, appealability
- Respect for the fundamental human rights specified in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Second Optional Protocol, the United Nations Declaration on the Elimination of Violence Against Women and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

¹⁰ See JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION*, Chapter 8 (2002).

¹¹ BRUCE J. WINICK, *Introduction: The Approach of Therapeutic Jurisprudence*, in *THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW*, *supra* note 1, at 4.

¹² JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE*, (1990).

I will comment here only on the first two.¹³

Non-domination. We do see a lot of domination in restorative processes, as in all spheres of social interaction. But a program is not restorative if it fails to be active in preventing domination. What does this mean in practice? It means that if stakeholders want to attend a conference or circle and have a say in a matter where they have a serious stake, they must not be prevented from attending. Indeed, they must be helped to attend and speak. This does not preclude special support circles just for victims or just offenders; but it does mandate institutional design that gives all stakeholders a meaningful opportunity to speak and be heard when they could be hurt by the process. Any attempt by a participant at a conference to silence or dominate another participant must be countered. This does not mean the conference convenor has to intervene. On the contrary, it is better if other stakeholders are given the space to speak up against dominating speech. But if domination persists and the stakeholders are afraid to confront it, then the convenor must confront it. Preferably gently: "I think some of us would like to hear what Jane has to say in her own words."

Often it is rather late for confronting domination once the restorative process is under way. Power imbalance is a structural phenomenon. It follows that restorative processes must be structured so as to minimize power imbalance. Young offenders must not be led into a situation where they are upbraided by a "roomful of adults."¹⁴ There must be adults who see themselves as having a responsibility to be advocates for the child, adults who will speak up. If this is not accomplished, a conference or circle can always be adjourned and reconvened with effective supporters of the child in the room. Similarly, we cannot tolerate the scenario of a dominating group of family violence offenders and their patriarchal defenders intimidating women and children who are victims into frightened silence.¹⁵ When risks of power imbalance are most acute, our standards should expect of us a lot of preparatory work to restore balance both backstage and frontstage during the process. Organized advocacy groups have a particularly important role when power imbalances are most acute. These include women's and children's advocacy groups when family violence is at issue and environmental

¹³ For a more detailed discussion of these values, see J. Braithwaite, *SETTING STANDARDS FOR RESTORATIVE JUSTICE*, BRITISH JOURNAL OF CRIMINOLOGY (forthcoming).

¹⁴ KEVIN HAINES, *Some Principled Objections to a Restorative Justice Approach to Working with Juvenile Offenders*, in *RESTORATIVE JUSTICE FOR JUVENILES: POTENTIALITIES, RISKS AND PROBLEMS FOR RESEARCH* 93 (Lode Walgrave ed., 1998).

¹⁵ Sara Cobb, *The Domestication of Violence in Mediation*, 31 LAW AND SOC'Y REV. 397 (1997); Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999); L. Presser & E. Gaarder, *Can Restorative Justice Reduce Battering? Some Preliminary Considerations*, 27 SOCIAL JUSTICE 175 (2000); S. Hooper & R. Busch, *Domestic Violence and Restorative Justice Initiatives: The Risks of a New Panacea*, 4 WAIKATO L. REV. 101 (1996).

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advocacy groups when crimes against the environment by powerful corporations are at issue.

Empowerment: Non-domination does imply empowerment. In case readers misread non-domination to be a passive value, empowerment has been explicitly added to the list. Moreover, empowerment does the useful work of trumping other values on our second and third list. For example, forgiveness is listed below. But if a victim rejects an apology, choosing to hate, the ideal is that the conference empowers the victim to do so. Empowerment takes precedence over forgiveness. Citizen empowerment, I wish to argue, should be a higher-order value of Restorative Justice than, for example, non-punitiveness. Genuine empowerment means that the punitiveness of punitive people is not ruled out of order. Restorative Justice allows punitive outcomes so long as they do not exceed upper constraints imposed by the law nor abuse fundamental human rights. The evidence is at the same time that Restorative Justice conferences help people to become less punitive.¹⁶ Restorative Justice is democratically pragmatic in its aspiration to move the justice system from retribution to restoration. The analogy to electoral democracy is strong. Democrats do not resort to arms if a democratic electoral process leads to the election of an anti-democratic government. Rather they prefer to work towards the next election; in the meantime they try to mobilize constitutional constraints against anti-democratic shifts the elected tyrants seek to bring about.

On empowerment, there may be a degree of philosophical difference between Restorative Justice and Therapeutic Jurisprudence, though not as wide a difference as some would assume. Leading Therapeutic Jurisprudence thinkers emphasize that their approach does not assume paternalism, that the views of the expert, in particular the therapeutic professional, should not be privileged over those of citizen stakeholders. Bruce Winick has indeed argued that paternalism can be anti-therapeutic.¹⁷ The difference arises from the acceptance of the empirical claim, which I am not disputing as an empirical claim, that sometimes paternalism will be more therapeutic. Here the Restorative Justice theorist says on normative grounds that stakeholder empowerment should be privileged over a paternalism that may in some circumstances be more therapeutic. The problem is "who is going to be the judge?" of when the preferences of stakeholders and the preferences of the professional will prevail. Unfortunately, the history of professionalism in justice is that the professional almost always prevails unless we empower stakeholders to make the final decisions in a Restorative Justice process. So the therapeutic professional sits in the circle, explains therapeutic options to the group, but the professional does not decide, the group decides. The professional may be a participant in that decision. On the other hand, the stakeholders may decide to ask one therapeutic professional to leave the circle and invite others to join it to explain other therapeutic options. This is

¹⁶ JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION*, Chapter 3 (2002).

¹⁷ BRUCE WINICK, *The Jurisprudence of Therapeutic Jurisprudence*, in *LAW IN A THERAPEUTIC KEY* 653 (David B. Wexler & Bruce J. Winick eds., 1996).

a different vision than the Therapeutic Jurisprudence vision sometimes articulated for drug courts of the judge becoming a "coach."¹⁸

The second group of Restorative Justice values includes values participants are empowered to ignore. Their being ignored is not reason for abandoning a Restorative Justice process. It might, however, be reason for asking the participants to agree to an adjournment so that new participants might be brought in to give these values more chance of realization. While the second group consists of values that can be trumped by empowerment, they are values against which the success of restorative processes must be evaluated. Moreover, they are values around which the restorativist is democratically active, seeking to persuade the community that these are decent values.

Priority List of Values 2

- Restoration of human dignity
- Restoration of property loss
- Restoration of safety/injury
- Restoration of damaged human relationships
- Restoration of communities
- Restoration of the environment
- Emotional restoration
- Restoration of freedom
- Restoration of compassion or caring
- Restoration of peace
- Restoration of a sense of duty as a citizen
- Provision of social support to develop human capabilities to the fullest
- Prevention of future injustice

This way of formulating the values has been influenced by two sources. First, I have attempted to craft them as consensus principles by choosing values that are used to justify the international human rights in the above-mentioned treaties that have been ratified by most nations.¹⁹ Second, I have selected values from these consensus documents that also come up repeatedly in the empirical experience of what victims and offenders say they want in Restorative Justice processes in the criminal justice system.²⁰ They represent what restoring justice means for participants. The privilege of empowerment on the first list means that participating citizens are given the power to tell their own stories in their own way to reveal whatever sense of injustice

¹⁸ David S. Hobler, *Drug Treatment Court: The Making of Judicial Capital by Therapeutic Practices*, (2001). Paper to Second International Conference on Therapeutic Jurisprudence, Cincinnati, Ohio, May 3-5, 2001.

¹⁹ See Braithwaite, SETTING STANDARDS FOR RESTORATIVE JUSTICE, *supra* note 13.

²⁰ See Heather Strang, *Victim Participation in a Restorative Justice Process: The Canberra Reintegrative Shaming Experiment*, (2000) (unpublished PhD Dissertation, Australian National University) (on file with author).

they wish to see repaired. At times, this can involve an utterly idiosyncratic conception of justice. Again, this is the pragmatic democracy of the restorative tradition. Elsewhere, with Pettit²¹ and Parker,²² I have elucidated my own, perhaps idiosyncratic, conception of what justice entails—republican justice.²³ The paradox of being a republican is that your commitment to non-domination means that when you yourself participate in a Restorative Justice process you are obliged not to try to force republicanism down anyone's throat. You try respectfully to make the republican case for justice; sometimes you persuade, sometimes you fail—then as the pragmatic democrat, you shrug your shoulders.

The first eleven values on the second priority list are different forms of healing that I will not defend in detail. The twelfth value—providing social support to develop human capabilities to the fullest—is essential as a response to the concern that Restorative Justice may be used to restore an unjust status quo. The key design idea here is that regulatory institutions must be designed to nurture developmental institutions. Too often regulatory institutions stultify human capabilities, the design of punitive criminal justice systems being a classic example. Regulatory institutions cannot do the main work of social justice; developmental institutions of families, civil society (eg. charities), schools, workplaces, state welfare and global institutions of redistribution, such as the IMF and World Bank, must be reformed to deliver that. Yet, as I have attempted to argue in more detail elsewhere,²⁴ punitive justice is a great disabler of social justice—causing unemployment, debt, disease, drug addiction, suicide and racial degradation—whereas Restorative Justice can be an important enabler of social justice.²⁵

For the final value, preventing future injustice, there are as many modalities of evaluation as forms of injustice. The one being most adequately researched at this time is prevention of future crime, an evaluation criterion that has shown progressively more encouraging results over the past two years.²⁶

²¹ JOHN BRAITHWAITE & PHILIP PETTIT, *Republicanism and Restorative Justice: An Explanatory and Normative Connection*, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE, (Heather Strang & John Braithwaite eds., 2000).

²² JOHN BRAITHWAITE & CHRISTINE PARKER, *Restorative Justice is Republican Justice*, in RESTORING JUVENILE JUSTICE: AN EXPLORATION OF THE RESTORATIVE JUSTICE PARADIGM FOR REFORMING JUVENILE JUSTICE, (Lode Walgrave & Gordon Bazemore, eds., 1999).

²³ For an overview, see BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION, *supra* note 16, at Chapters 4 and 5.

²⁴ See *id.* at text accompanying note 17.

²⁵ See *id.* at Chapters 5, 7.

²⁶ See *id.* at Chapter 3. See also the recent meta-analysis of 32 studies by Jeff Latimer, Craig Dowden, & Danielle Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, DEPARTMENT OF JUSTICE, OTTAWA, CANADA, 2001.

Priority List of Values 3

- Remorse over injustice
- Apology
- Censure of the act
- Forgiveness of the person
- Mercy

Priority list 3 differs from priority list 2 in a conceptually important way. It is not that the list 3 values are less important than list 2. When Desmond Tutu says *No Future without Forgiveness*,²⁷ many Restorative Justice advocates are inclined to agree. Forgiveness differs from, for example, respectful listening as a value of Restorative Justice in the following sense. We actively seek to persuade participants that they ought to listen respectfully, but we do not ask them to forgive. It is cruel and wrong to expect a victim of crime to forgive.²⁸ Apology, forgiveness and mercy are gifts; they only have meaning if they well up from a genuine desire in the person who forgives, apologizes or grants mercy. Apart from it being morally wrong to impose such an expectation, we would destroy the moral power of forgiveness, apology or mercy by inviting participants in a Restorative Justice process to consider proffering it during the process. People take time to discover the emotional resources to give up such emotional gifts. It cannot, must not, be expected. Similarly, remorse that is forced out of offenders has no restorative power. This is not to say that we should not write beautiful books like Tutu's on the grace that can be found through forgiveness. Nor does it preclude us evaluating Restorative Justice processes according to how much remorse, apology, forgiveness and mercy they elicit. Some might be puzzled as to why reintegrative shaming²⁹ does not rate on my list of restorative values. It is not a value, not a good in itself; it is an explanatory dynamic that seeks to explain the conditions in which remorse, apology, censure of the act, forgiveness, mercy and many of the other values above occur. There is redundancy in listing remorse, apology and censure of the act because my theoretical position is that remorse and apology are the most powerful forms of censure of the act since they are uttered by the person with the strongest reasons for refusing to vindicate the victim, for resisting censuring the injustice. However, when remorse and apology are not elicited it is imperative for other participants to vindicate the victim by censuring the act.

Let us clarify finally the distinctions among lists 1, 2 and 3. List 1

²⁷ DESMOND M. TUTU, *NO FUTURE WITHOUT FORGIVENESS* (1999).

²⁸ As Martha Minow puts it, "Forgiveness is a power held by the victimized, not a right to be claimed. The ability to dispense, but also to withhold, forgiveness is an ennobling capacity, part of the dignity to be reclaimed by those who survive the wrongdoing." MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 17, (1998).

²⁹ JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989).

includes values that must be honored and enforced as constraints; list 2 consists of values Restorative Justice advocates should actively encourage in restorative processes; list 3 comprises values we should not urge participants to manifest—they are emergent properties of a successful Restorative Justice process. If we try to make them happen, they will be less likely to happen in a meaningful way. Constraining values, maximizing values and emergent values.

Many will still find these values vague, lacking specificity of guidance on how decent restorative practices should be run. That specificity will come from shared sensibilities acquired by swapping stories about the implementation of the values.³⁰ Standards of the good must be broad if we are to avert legalistic regulation of Restorative Justice that is at odds with the philosophy of Restorative Justice. What we need is deliberative regulation where we are clear about the values we expect Restorative Justice to realize. Whether a Restorative Justice program is up to standard is best settled in a series of regulatory conversations³¹ with peers and stakeholders rather than by rote application of a rulebook. That said, certain highly specific standards from our first list are so fundamental to justice that they must always be guaranteed—such as a right to appeal.

The Values of the Legal System

On its website, the Institute for Court Management says Therapeutic Jurisprudence is about selecting options that promote health and are consistent with the values of the legal system.³² Yet the Restorative Justice values I have just attempted to formulate are different in important ways from the extant values of western legal systems. Indeed, Restorative Justice is a radical program for transforming the values of the legal system. The ideal is that our institutions be redesigned so that the justice of the people is better able to bubble up into the justice of the law and the justice of the law more effectively filters down into the justice of the people. Communication between conferences or circles on the one side and courts on the other is the key channel for accomplishing this. Professors Wexler and Winick are also quoted on the Institute of Court Management web site as advocating the enhancement of therapeutic consequences “without subordinating due process and other justice values.”³³ This more limited formulation is more con-

³⁰ Clifford D. Shearing & Richard V. Ericson, *Towards a Figurative Conception of Action*, 42 BRITISH JOURNAL OF SOCIOLOGY 481, 481-506 (1991).

³¹ Julia Black, *Talking About Regulation*, SPRING PUBLIC LAW 77 (1997).

³² INSTITUTE FOR COURT MANAGEMENT, (September 17, 2001), available at <http://www.ncsc.dni.us/ICM>.

³³ See further, BRUCE J. WINICK, *The Jurisprudence of Therapeutic Jurisprudence*, in LAW IN A THERAPEUTIC KEY 645, 652 (David B. Wexler & Bruce J. Winick eds., 1996), “There are many instances in which a particular law or legal practice may produce antitherapeutic effects, but nonetheless may be justified by considerations of justice or by the desire to achieve various constitutional, eco-

sistent with the restorative approach outlined above to requiring the justice of the law to constrain the justice of the people. That is, perhaps we should be happy to retain various due process protections and other fundamental justice values, such as honoring human rights, so long as we can utterly transform most of the other values of the legal system and radically reposition the role of the courts in it.

Many western nations confront a crisis of access to justice. Legal aid for the poor is declining. For civil disputes, only the rich effectively have access to the courts. In criminal cases, the poor are the dominant presence as the court's victims; the courts continue to be utterly uninterested in that part of the crime problem which is highest in volume and most serious in impact, white-collar crime.³⁴ Band-aid solutions to the deep structural problems of our injustice system, like more legal aid for the poor, have limited value.³⁵ A revolution is needed in our legal system that substantially replaces adversarial legalism with Restorative Justice institutions, where the role of the court is substantially relegated to oversight of the injustices of restorative processes, which do the real work of access to justice.³⁶ On this, perhaps it is not right to say there is a distinction between Restorative Justice and Therapeutic Jurisprudence. Perhaps the reality is that both movements have radical wings that are interested in transformatively restructuring access to justice and conservative wings that privilege the traditional values of the legal system.

The Jurisprudence of Responsibility

One domain that illustrates the radically different jurisprudence of Restorative Justice is responsibility. As a starting hypothesis, Declan Roche and I have asked if restorative responsibility might be conceived as that form of responsibility most likely to promote restoration—of victims, offenders and communities.³⁷ Given that framework, we found a useful distinction between active and passive responsibility. Passive responsibility is something we are held to for a past injustice. Active responsibility is the virtue of taking responsibility for correcting in the future the injustices of the past, for taking active responsibility for restoration, particularly restoration of relationships. Then we showed how that distinction maps onto distinctions

conomic, environmental, or other normative goals." See also, Pamela Casey & David B. Rottman, *Therapeutic Jurisprudence in the Courts*, 18 BEHAVIORAL SCIENCES AND THE LAW 445 (2000).

³⁴ See JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS; A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990).

³⁵ CHRISTINE PARKER, JUST LAWYERS: REGULATION AND ACCESS TO JUSTICE (1999).

³⁶ JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION *supra* note 10, at Chapter 8.

³⁷ JOHN BRAITHWAITE & DECLAN ROCHE. *Responsibility and Restorative Justice*, in RESTORATIVE COMMUNITY JUSTICE, (M. Schiff G. Bazemore eds., 2000).

between active and passive deterrence, rehabilitation and incapacitation. While passive deterrence, passive rehabilitation and passive incapacitation do not work very well; active variants of these utilitarian ideas have more promise.³⁸

Restorative Justice cannot do without some concept of passive responsibility. The argument is not that Restorative Justice abandons passive responsibility. Restorative Justice uses passive responsibility to create a forum in which active responsibility can be fostered. Restorative Justice then is about shifting the balance from passive towards active responsibility.

The empirical insight that underpins this reframing of responsibility is Carol Heimer's : "it is the humanity of other people that inspires responsibility".³⁹ Restorative Justice and Therapeutic Jurisprudence share an interest in putting people in touch with the humanity of others, and therefore might also share the agenda of active responsibility.

Retributivists, in contrast, are obsessed with passive responsibility because their priority is to be just in the way they hurt wrongdoers. The shift in the balance toward active responsibility is because the priority of the restorativist is to be just in the way they heal.

Toward a Jurisprudence of Active Responsibility

So far, we have conceived of active responsibility as the essential ele-

³⁸ We can illustrate with rehabilitation. Therapeutic Jurisprudence takes rehabilitation seriously (as does Restorative Justice). See David B. Wexler, *How the Law Can Use What Works: A Therapeutic Jurisprudence Look at Recent Research on Rehabilitation*, 13 BEHAV. SCI. & L. 365, (1997); James McGuire, *Can the Criminal Law Ever be Therapeutic?*, 18 BEHA. SCI. & L. 414, (2000). As McGuire's review indicates, the evidence is now encouraging that rehabilitation programs can reduce reoffending. It is likely, however, that a condition for success is active engagement with and taking responsibility for the rehabilitation program not only of the offender but of loved ones and friends who can offer him social support during the rehabilitation process. See Francis T. Cullen, *Social Support as an Organizing Concept for Criminology: Presidential Address to the Academy of Criminal Justice Science*, 11 JUSTICE QUARTERLY 527, (1994); Francis T. Cullen & Paul Gendreau, *Assessing Correctional Rehabilitation: Policy, Practice, and Prospects*, in CHANGES IN DECISION MAKING AND DISCRETION IN THE CRIMINAL JUSTICE SYSTEM VOL. 3, (U.S. Department of Justice, 2000); Francis T. Cullen, John Paul Wright & Mitchell G. Chamlin, *Social Support and Social Reform: A Progressive Crime Control Agenda*, 45 CRIME AND DELINQUENCY 188, (1999). There is also strong evidence that restorative justice processes are more likely to lead to active commitment to implement agreements than the compliance achieved with court orders. See the review of this literature in JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION *supra* note 10, at Chapter 3. Also see Jeff Latimer, Craig Dowden, & Danielle Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, Department of Justice, Ottawa, Canada, (2001).

³⁹ CAROL HEIMER, *For the Sake of the Children: The Social Organization of Responsibility in the Hospital and the Home* 369 (1998).

ment for securing restoration. At the same time, Roche and I have argued that without passive responsibility there is a risk of injustice.⁴⁰ For example, a minimum requirement for punishing an offender for doing wrong would be an inquiry to demonstrate causal responsibility for the wrong. No punishment of the innocent.

Now we will complicate this picture by arguing that while passive responsibility remains indispensable to justice in this way, Restorative Justice propels us to develop a more just notion of criminal liability, on which passive responsibility depends. That is, the emphasis on active responsibility is not only a matter of the jurisprudence of restoration but also of the normative theory of justice.

We turn to Brent Fisse's theory of reactive fault for the key insights here.⁴¹ All criminal justice systems incorporate notions of causal fault and reactive fault. Causal fault is about being causally responsible, while reactive fault is about how responsibly one reacts after the harm is done. The balance between the two varies enormously from system to system. Western criminal justice systems (such as that of the U.S.) are at the causal end of the continuum, Asian systems (such as that of Japan) tend to the reactive end. Yet, even in the West, reactive fault sometimes dominates causal fault, as in our intuition that with hit-run driving, the running is the greater evil than the hitting. Fisse advocates "reactive fault" as the core criterion of criminal fault. In its most radical version, this would mean in a case of assault, the alleged assailant would go into a Restorative Justice conference not on the basis of an admission of criminal guilt, but on the basis of admitting responsibility for the actus reus of an assault ("I was the one who punched her").⁴² Whether the mental element required for crime was present would be decided reactively, based on the constructiveness and restorativeness of his reaction to the problem caused by his act. If the reaction were restorative, the risk of criminal liability would be removed; only civil liability would remain. However, if reactive criminal fault were found by a court to be present,⁴³ that would be insufficient for a conviction; the mental element for the crime would also have been demonstrated before or during its commission.⁴⁴ But it would be the reactive fault that would be the more important determinant of penalty than the causal fault.

⁴⁰ JOHN BRAITHWAITE & DECLAN ROCHE, *supra* note 37.

⁴¹ Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, (1983). These ideas are further developed in BRENT FISSE & JOHN BRAITHWAITE, *CORPORATIONS, CRIME AND ACCOUNTABILITY* (1993).

⁴² Functionally, New Zealand law already accomplishes this result by putting cases into family group conferences not on the basis of an admission of criminal guilt, but on the basis of formally "declining to deny" criminal allegations.

⁴³ For example, by a report from a conference that the offender simply cursed the victim and refused to discuss restitution.

⁴⁴ Brent Fisse takes the more radical view that if criminal liability is about punishing conduct known to be harmful and if failure to respond responsibly is harmful, then such reactive fault can be sufficient to establish criminal liability.

Braithwaite and Roche argue that this gives us an answer to the retributivist who says: "Where is the justice with two offenders who commit exactly the same offense: one apologizes and heals a victim who grants him mercy; the other refuses to participate in a circle and is punished severely by a court".⁴⁵ This answer is that while the two offenders are equal in causal fault, they are quite unequal in reactive fault. Viewed in terms of passive responsibility they might be equal, but in terms of active responsibility, they are not.⁴⁶

Shame, Restorative Justice and Therapeutic Jurisprudence

Tom Scheff has made the most important theoretical contribution to the integration of Restorative Justice and Therapeutic Jurisprudence.⁴⁷ His topic was shame both as something that can be therapeutically destructive and as something fundamental to understanding restoration as a process.

An important distinction in criminology is between explanatory theory and normative theory. An explanatory theory is an ordered set of propositions about the way the world is. A normative theory is an ordered set of propositions about the way the world ought to be.

Good normative theory generates concepts that can sharpen the concepts of extant explanatory theory, increasing the explanatory power of such theory. Obversely, good explanatory theory can offer concepts to normative theory that enhances its normative power.⁴⁸ Both Therapeutic Jurisprudence and Restorative Justice are interested in integrating normative and explanatory theory.

The theory of reintegrative shaming illustrates nicely. Even if shaming had all the power in the world for explaining crime, a normative theory would still be needed as to when shaming is a good and a bad thing. In that sense, we should think in the same way about shaming as the way we think about deterrence. From the perspective of many normative theories, and certainly from the perspective of the republican theory I favor, apology is a kind of shaming that is morally preferable to stigmatization. Stigmatization

⁴⁵ BRAITHWAITE AND ROCHE, *supra* note 37.

⁴⁶ This is not the whole answer, however. The other part of it is that the just deserts theorist is morally wrong to consider equal justice for offenders a higher value than equal justice for victims See BRAITHWAITE *supra* note 10, at Chapters 4, 5.

⁴⁷ Thomas J. Scheff, *Community Conferences: Shame and Anger in Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 97, (1999).

⁴⁸ JOHN BRAITHWAITE & PHILIP PETTIT, *Republicanism and Restorative Justice: An Explanatory and Normative Connection*, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE, (Heather Strang & John Braithwaite eds., 2000); JOHN BRAITHWAITE & CHRISTINE PARKER, *Restorative Justice is Republican Justice*, in RESTORING JUVENILE JUSTICE: AN EXPLORATION OF THE RESTORATIVE JUSTICE PARADIGM FOR REFORMING JUVENILE JUSTICE, (Lode Walgrave & Gordon Bazemore eds., 1999).

is morally inferior because it is debasing of the person.⁴⁹ But because it is morally so, it has some disastrous empirical consequences which are about the way people react when they see themselves as treated in a debasing way by others. To be treated in a way that is generally regarded as morally offensive is likely, in Lawrence Sherman's terms⁵⁰ to engender defiance, or in Tom Tyler's terms⁵¹ to be seen as simply unfair.

In wanting to open with this point about integrating explanatory and normative theory, I have jumped ahead in assuming an understanding of the basic concepts of the theory of reintegrative shaming. The pivotal concept of the theory in *Crime, Shame and Reintegration* is reintegrative shaming.^{52 53} According to the theory, societies have lower crime rates if they communicate shame about crime effectively. They will have a lot of violence if violent behavior is not shameful, high rates of rape if rape is something men can brag about, endemic white-collar crime if business people think law-breaking is clever rather than shameful.

That said, there are ways of communicating the shamefulness of crime that increase crime. These are called stigmatization. Reintegrative shaming communicates shame to a wrongdoer in a way that encourages him or her to desist; stigmatization shames in a way that makes things worse. So, what is the difference?

Reintegrative shaming communicates disapproval within a continuum of respect for the offender; the offender is treated as a good person who has done a bad deed. Stigmatization is disrespectful shaming; the offender is treated as a bad person. Stigmatization is unforgiving—the offender is left with the stigma permanently, whereas reintegrative shaming is forgiving—ceremonies to certify deviance are terminated by ceremonies to decertify deviance. Put another way, societies that are forgiving and respectful while taking crime seriously have low crime rates; societies that degrade and humiliate criminals have higher crime rates.

⁴⁹ JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION*, (1989). Stigmatization is also a bad thing from a Therapeutic Jurisprudence perspective, see BRUCE WINICK, *The Side Effects of Incompetency Labeling*, in *THERAPEUTIC JURISPRUDENCE APPLIED supra*, at note 1.

⁵⁰ L. W. Sherman, *Defiance, Deterrence and Irrelevance: A Theory of the Criminal Sanction*, 30 *JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY* 445, (1993).

⁵¹ TOM TYLER, *WHY PEOPLE OBEY THE LAW*, (1990); TOM TYLER & STEVEN BLADER, *Cooperation in Groups: Procedural Justice, Social Identity, and Behavioral Engagement*, (Philadelphia: Psychology Press, 2000); TOM TYLER & ROBYN M. DAWES, *Fairness in Groups: Comparing the Self-Interest and Social Identity Perspectives*, in *PSYCHOLOGICAL PERSPECTIVES ON JUSTICE: THEORY AND APPLICATIONS*, (Barbara A. Mellers & Jonathan Baron eds., 1993); TOM TYLER & YUEN J. HUO, *TRUST AND THE RULE OF LAW: A LAW-ABIDINGNESS MODEL OF SOCIAL CONTROL*, (2001).

⁵² BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION*, *supra* note 29.

⁵³ NATHAN HARRIS, *Part II — Shaming and Shame: Regulating Drink-Driving*, in *SHAME MANAGEMENT THROUGH REINTEGRATION* (2001).

RESTORATIVE JUSTICE AND THERAPEUTIC JURISPRUDENCE

Nathan Harris' research shows that at its foundation reintegrative shaming is not bipolar as the theory suggests.⁵³ Reintegration and stigmatization are orthogonal rather than polar opposites in the real world of Restorative Justice. Harris also finds that guilt and shame are not separate dimensions in a factor analysis of the emotions stirred by criminal processing. A more fundamental divide is between shame/guilt and exposure/embarrassment. Think of the distinction crudely as the bad feeling we have when we feel we have done something wrong as opposed to the rather different bad feeling we have when our nakedness is exposed.

Harris finds that embarrassment/exposure shame is higher in court than in Restorative Justice conferences, while guilt/shame is higher in Restorative Justice conferences than in court. Just as in a number of respects Harris's work causes a need for a revision of the theory of reintegrative shaming, in other respects the research supports the theory.

We suspect now that Harris has revealed a more subtle ethical identity conception of shame/guilt that might have special explanatory and normative power with respect to crime or other serious wrongdoing. It is easiest to explain at the normative level. What we had thought we wanted offenders to feel was shame about what they had done, but not shame about themselves. Now we think this may have been a normative error. If a man rapes a child or is repeatedly convicted for serious assaults, is it enough for him to feel that he has done a bad act(s) but there is nothing wrong with him as a person? It would seem more morally satisfactory for him to feel that he has done a bad act and therefore feels he must change the kind of person he is in some important ways (while still on the whole believing he is basically a good person). That is, we do not want the rapist to believe he is an irretrievably evil person; but we do want aspects of the self to be transformed. Harris's shame/guilt factor seems to capture empirically the nub of this halfway house of an ethical ideal. To a considerable extent you can't experience guilt about a criminal wrong without this spilling over into feeling ashamed of oneself as a person. So long as this does not go so far as to involve a total rejection of self, this now seems to us morally appropriate, at least for serious crimes.

We have noted that in some of the cultures with the strongest traditions of restoration or healing following wrongdoing, there is an explicitness of commitment to the halfway house of shame/guilt emergent in Nathan Harris's research. In Japanese culture, for example, apology can amount to dissociation of that evil part of the self that committed a wrong.⁵⁴ Japanese idiom sometimes accounts for wrongdoing with possession by a "mushi" (bug or worm). Criminals are hence not acting according to their true selves; they are under attack by a mushi that can be "sealed off" enabling reintegration without enduring shame.⁵⁵

⁵³ NATHAN HARRIS, *Part II — Shaming and Shame: Regulating Drink-Driving*, in SHAME MANAGEMENT THROUGH REINTEGRATION (2001).

⁵⁴ H. Wagatsuma, & A. Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461, (1986).

⁵⁵ *Id.* at 476.

Another culture with especially rich restorative accomplishment through its peacemaking traditions is Navajo Indian culture in the United States. The Navajo concept of *nayéé* is an interesting part of this accomplishment.⁵⁶ Farella explains that *nayéé* or "monsters" are anything that gets in the way of a person enjoying his or her life, such as depression, obsession and jealousy.⁵⁷ "The benefit of naming something a *nayéé* is that the source of one's 'illness'—one's unhappiness or dysfunctionality—once named can be cured."⁵⁸ And healing ceremonies are about helping people to rid themselves of *nayéé*.⁵⁹

There seems a major difference between stigmatizing cultures and cultures such as these where the vague and subjective threat to a person's integrity of self is named to make it concrete, and able to be excised. Naming to excise a bad part of self creates very different action imperatives for a society from naming to label a whole self as bad (such as naming a person a junkie, criminal or schizophrenic). The former kind of shame can be discharged with the expulsion of the *mushi* or *nayéé*. The latter kind of stigma entrenches a master status trait like schizophrenic that dominates all other identities. We suspect that we can learn from other cultures the possibility of healing a damaged part of a self that is mostly good. This is the approach to which Harris's conception of shame/guilt cues us. It particularly cues us to the possibility of healing a mostly positive and redeemable self because of the finding that both shame/guilt and reintegration are greater when cases are randomly assigned to a Restorative Justice process.

As predicted by the theory of reintegrative shaming, Harris found that cases randomly assigned to Restorative Justice were higher in shaming and reintegration but lower in stigmatization than cases that went to court.⁶⁰ The findings provide evidence for the reliability and validity of these measures of reintegrative shaming.

Shaming was found to predict shame/guilt but only when it was by people the offender highly respected. Furthermore, shame/guilt was predicted by the offender's perception that the offense was wrong. Shame/guilt was also predicted by perceptions of having been reintegrated and perceptions of not having been stigmatized. It is argued that shame/guilt should be understood as a product of social influence in which internalized values, normative expectations and social context have an effect. In contrast to

⁵⁶ Coker, *supra* note 15.

⁵⁷ J. R. FARELLA, *THE WIND IN A JAR*, (1993).

⁵⁸ Coker, *supra* note 15.

⁵⁹ In one account of the creation in Navajo creation and journey narratives, there are two hero twins, Monster-Slayer and Born-for-Water. The two were born into a world where *nayéé* were preventing people from living full lives; so they journeyed in search of their father, the sun, to get the weapons to slay or weaken the *nayéé*. See James W. Zion, *Navajo Therapeutic Jurisprudence*, Paper presented at Second International Conference on Therapeutic Jurisprudence (Cincinnati, Ohio, May 3, 2001).

⁶⁰ NATHAN HARRIS, *supra* note 52.

shame/guilt, embarrassment/exposure and unresolved shame were predicted by perceptions of having been stigmatized and the belief that the offense was less wrong. This highlights the importance of distinguishing between the shame-related emotions. So does the finding that shame/guilt was greater in Restorative Justice conferences but that embarrassment-exposure was greater in court cases.

Eliza Ahmed's research program casts a different kind of light on the structure of shame and shame management.⁶¹ Hers is a large study of school bullying in Canberra. She found that parents of children who bullied others reported using stigmatizing shaming more than parents of non-bullies. Ahmed classified children into those who were neither bullies nor victims of bullying, those who were both bullies and victims of bullying, those who were just bullies without being victims and those who were victims without being bullies.

Self-reported non-bully/non-victims acknowledged shame and then discharged it. By this, Ahmed means acknowledgment of wrongdoing without transforming it into internalization or externalization of blame or transforming it into retaliatory anger. Non-bully-non-victims deal with shame with little transformation of shame into emotions like anger. Bullies in contrast were less likely to acknowledge shame and more likely to transform shame into anger. Self-reported victims acknowledged shame without transformation, but were more likely to internalize others' rejection of them. Bully/victims were less likely to acknowledge shame, were more likely to have self-critical thoughts and to transform their shame into anger.

Put another way, the shame problems victims have, which Restorative Justice needs to address, is internalization of the idea that I am being bullied because there is something wrong with me as a person. Internalization of shame. The shame problem bullies have is an inability to acknowledge shame when they have done something wrong and a tendency to externalize their shame as anger. Restorative Justice needs to help them be more like non-bully/non-victims who acknowledge shame when they do something wrong, who neither externalize it nor internalize it, but who discharge shame.

Conclusion

Shame is like trust, social capital, social intelligence and a handful of other concepts that the social sciences are rediscovering today in interesting ways. Both Therapeutic Jurisprudence and Restorative Justice can benefit from the new intellectual ferment around such concepts so long as they do not confine them, suffocate them, by interpreting them narrowly within extant disciplinary frameworks. Then, that is the attractive thing about both traditions. They work at the boundaries where entrenched disciplines meet in ways that will guide new research on important topics like the causes and consequences of shame.

⁶¹ ELIZA AHMED, *Part III — Shame Management: Regulating Bullying, in SHAME MANAGEMENT THROUGH REINTEGRATION* (2001).

Shame, like active responsibility, non-domination and the other concepts traversed in this essay on some of the most fertile similarities and differences between Restorative Justice and Therapeutic Jurisprudence, helps us to pull legal problems apart and see more of what lies below their surface appearances. Yet, this insight can be wasted if we fail to also move from an understanding of parts to an understanding of wholes and to a normative jurisprudence that values holism contextualized in each particular legal problem.