

## Survey Article: Repentance Rituals and Restorative Justice

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### I. RESTORATIVE JUSTICE

FOR MOST OF THIS century, debate over how criminal justice should be transacted has alternated between an emphasis on retribution versus rehabilitation. Restoration has emerged in the 1990s as a credible third alternative.<sup>1</sup> The most influential definition of restorative justice is by Tony Marshall in the context of a Delphi process conducted by Paul McCold: 'Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future'.<sup>2</sup> Restorative justice means restoring victims, restoring offenders and restoring communities. Among the losses victims, offenders or communities might want restored are property loss, injury, a sense of security, dignity, a sense of empowerment, voice, harmony based on a feeling that justice has been done, and social support.

More operationally, restorative justice is defined by its rituals. I will argue that these are rituals of repentance. First, however, I will provide a theoretical framework for why repentance is something we should nurture in the design of institutions. This framework is grounded in Thomas Scheff and Suzanne Retzinger's work on shame–rage spirals. Second, I shall introduce a concept called reintegrative shaming as an alternative form of shame that may break the shame–rage spirals described by Scheff and Retzinger and form a central component of restorative justice. Third, I shall discuss why restorative justice leads us into a discussion of repentance rituals.

### II. SHAME–RAGE SPIRALS

One genesis of Scheff and Retzinger's account of shame–rage spirals is Jack Katz's evocative analysis of violence in *The Seductions of Crime*. Katz finds violence to

<sup>1</sup>Zehr 1990.

<sup>2</sup>Marshall, in McCold 1998, p. 20.

be ‘livid with the awareness of humiliation’.<sup>3</sup> Rage both recalls and transforms the experience of humiliation. Righteous indignation is the stepping stone from humiliation to rage. What I seek to develop in this paper is the alternative—the repentance ritual as the stepping stone from shame to restoration of peace, dignity and damaged social bonds. This opens up the possibility of integrating normative theories of why humiliation is an evil to be pushed out of our institutions and explanatory theories of the sad consequences of humiliation.<sup>4</sup>

For Katz, the embrace of righteous violence resolves humiliation ‘through the overwhelming sensuality of rage’.<sup>5</sup> It is therefore not coincidental that spouse assault is sometimes associated with taunting about sexual performance or innuendo of sexual infidelity. Domestic homicide can transform such sexual degradation ‘in a last violent stand in defence of his basic worth’.<sup>6</sup> Rage transcends the murderer’s humiliation by taking him to dominance over the situation. Katz’s righteous slaughter takes us as far to an opposite pole from repentance as it is possible to go. The victim is not cast as worthy of being restored; its life is profane rather than sacred. Mounted in a flurry of curses, the attack ‘will be against some morally lower, polluted, corrupted, profanized form of life’.<sup>7</sup> It will reassert respect by punishing someone who is responsible for or represents the degradation the murderer has suffered. Katz’s criminal is not a self-interested instrumental evildoer, who also, of course, exists. Rather these criminals are immersed in a frenzy of upholding the decent and respectable. Just as the humiliation of the offender is implicated in the onset of his rage, so the need to humiliate the victim enables her victimization.

It becomes clear that one thing these empirical insights launch is an attack on retributive moral philosophies. This is because criminals often turn out to be card-carrying retributivists. Liberal retributivists like to say that punishment is more dignified than rehabilitation.<sup>8</sup> This view has long been disparaged by those who question how dignified it can be to have one’s head shaved, put in prison fatigues, subjected to rectal searches for drugs, live in daily fear of bashings and rape and countless more subtle humiliations. Actual punishment practices seem more plausibly described in terms of communal lusts for afflicting indignity on the evil. Now if we come to see crime as that response to indignity which inflicts indignity on imputed wrongdoers, we begin to see retributivist philosophers and criminals as in the same business, the business of sustaining shame–rage spirals. Restorative consequentialism might seem more attractive if the consequence of going deontological about dignity through punishment is to cause a downwards spiral of indignity.

<sup>3</sup>Katz 1988, p. 23.

<sup>4</sup>Margalit 1996.

<sup>5</sup>Katz 1988, p. 24.

<sup>6</sup>Ibid., p. 26.

<sup>7</sup>Ibid., p. 36.

<sup>8</sup>See, e.g.: Morris 1968; 1981; Von Hirsch 1976.

A number of psychiatric scholars working with clinical data have reached similar conclusions as Katz reached from his analysis of several hundred criminal acts: many instances of violence are attempts to transcend humiliation.<sup>9</sup> The most developed form of this tradition is found in the work of Scheff and Retzinger.<sup>10</sup> For them, shame is both the major cause of violence and the emotion most implicated in preventing violence. They agree that a shame–anger–violence sequence is most likely when shame is unacknowledged and communicated disrespectfully. Further, people get angry when the shame evoked by disapproval or humiliation is repressed rather than confronted. The evidence they adduce for this ranges from conversational analysis of marital disputes through to documentary analysis of the reasoning of key actors in the genesis of wars between states. Scheff and Retzinger's conclusion is that shame and rage can spiral ever downwards both within persons and between persons. Between persons, the disrespect one shows fuels the disrespect of the other, which engenders further disrespect back, at each step escalating anger.

How do human beings spin out of these spirals? According to Scheff and Retzinger, they do this by acknowledging shame to themselves (thereby taking a crucial step toward self-respect) and to others (thereby engendering interpersonal respect and restoring damaged social bonds). Deeper descent into shame–rage spirals is likely unless we can bring repentance rituals into play which will transform unacknowledged shame into restorative acknowledged shame.

Scheff and Retzinger's analysis applies to shame–rage spirals from the most micro to the most macro sort. One reason World War II ushered in a period of peace among the belligerent states while World War I sowed the seeds of another was that the second war was terminated by rituals of repentance and reconciliation, while the first was terminated by the ritual of humiliation which was Versailles. Scheff points out that, 'Every page of Hitler's *Mein Kampf* bristles with shame and rage'.<sup>11</sup> Hitler's appeal was the appeal of humiliated fury, one which struck a responsive chord with Germans who felt they had been tricked and humiliated at Versailles.

Indeed, Versailles was explicitly reported in newspapers of the day as a degradation ritual: 'Count von Brockdorff-Rantzau appeared to feel the humiliation of his position, and stood bareheaded...' <sup>12</sup> Exit from as long an iteration of humiliation–anger sequences as we see in the Middle East is no simple matter. If the prognosis is difficult, the diagnosis seems clear enough if we listen to the words of Saddam Hussein's broadcast to his people of 10 August 1990: 'Rise up, so that the voice of right can be heard in the Arab nation. Rebel against all attempts to humiliate Mecca. Make it clear to your rulers, the emirs of

<sup>9</sup>Kohut 1972; Lewis 1971; Lansky 1984; 1987.

<sup>10</sup>Scheff and Retzinger 1991.

<sup>11</sup>Scheff 1987, p. 147.

<sup>12</sup>Sydney Morning Herald, 3 May 1919.

oil, as they serve the foreigner; tell them, the traitors, there is no place for them on Arab soil after they have humiliated Arab honour and dignity'.<sup>13</sup>

### III. REINTEGRATIVE SHAMING

If shame must be acknowledged to escape shame–rage spirals, tolerance and acceptance of violence and other unrestored harms is hardly a benign prescription. Disapproval must be communicated; harmful consequences must be discussed with those who have inflicted them and those who have suffered them. Shaming there must be, not sweeping under the carpet, but what kind of shaming? The key distinctions seem to be between shaming that is respectful versus shaming that is disrespectful of the person or humiliating; between shaming that treats the person as a good person who has done a bad thing and shaming that treats the person as bad; between shaming that is terminated by repentance and forgiveness and shaming that permanently ruptures social bonds. These are the key dimensions of the difference between reintegrative shaming and stigmatization. Stigmatization accelerates the movement into a shame–rage spiral, while reintegrative shaming can pull conflicts out of this tailspin. At least that is my contention in *Crime, Shame and Reintegration*.<sup>14</sup>

This theory contends that reintegrative shaming prevents law-breaking, stigmatization makes it worse, a claim that now has some modest empirical support.<sup>15</sup> How do we nurture reintegrative shaming in preference to stigmatization or tolerance of harmdoing? Of course we can teach people from childhood to be respectful of others regardless of the evil they have done, to disapprove the evil of the deed without treating the person as evil, to apologise, to forgive. Political leaders, like General Macarthur in postwar Japan or King Hussain of Jordan in the Middle East, or President Mandela in establishing a Truth and Reconciliation Commission in South Africa, can be moral exemplars of forgiveness and respectfulness. Obversely, as with our political leaders, our celluloid heroes, Clint Eastwood or Arnold Schwartzenegger, can be moral exemplars of reciprocated vengeance and disrespect of persons.

While efforts in civil society to transform the personas of our political and cultural icons are important, they hardly amount to a robust strategy for a more restorative world. That requires institutionalization of reintegrative shaming rituals. One such ritual is the restorative justice conference. The conference is a ‘common sense’ ritual. Yet because it is held at the edge of a precipice, with a soul at risk of falling into the clutches of the criminal justice system, there is often spirituality and poetry in the appeals of citizens. Conferences ritualize ordinary-language oratories of love and hate.

<sup>13</sup>The Times (London), 11 August 1990, p. 1.

<sup>14</sup>Braithwaite 1989.

<sup>15</sup>Makkai and Braithwaite 1994.

#### IV. CONFERENCES AS REPENTANCE RITUALS

Family group conferences, community accountability conferences, diversionary conferences are a species of repentance ritual that I will refer to as the restorative justice conference.<sup>16</sup> The underlying philosophy comes from New Zealand Maori justice traditions. During the 1980s, Maori people became deeply aggrieved at what they believed to be a weakening of the Maori extended family by the Western justice system. They saw social control as primarily a responsibility of the extended family that should not be appropriated by the state. Moreover, they saw Western justice as barbaric in the way it left the accused to stand alone in the dock. The Maori way was to have the family of the accused stand beside them to share the shame of the accusations made by victims. The shame the offender was then expected to feel was the shame of letting his family down. One virtue of this kind of shame is that it is easier to transcend than the Western sense of guilt that can eat away at individuals who keep it to themselves. The shame of letting the family down can be terminated through expressions of forgiveness by the family, reciprocated by gestures of repentance by the offender. In a forgiveness–repentance or repentance–forgiveness sequence family bonds are restored amidst hugging and shedding of tears. Often with Maori conferences, the reintegration ritual is sealed with a final prayer shared by the family.<sup>17</sup>

Restorative justice conferences are proving to be popular among not only Maori citizens, but among Western and Eastern citizens in nations as diverse as Australia, New Zealand, Canada, England, the United States, South Africa and Singapore. Native American philosophies about putting the problem rather than the person in the centre of a ‘healing circle’ turned out to have much in common with Maori philosophy.<sup>18</sup> These ideas are now also acquiring an international influence through the social movement for restorative justice.

In some restorative justice programs, coordination of conferences or circles is in the hands of the police, in others the courts, state welfare agencies, or institutions of civil society such as churches or schools. It is proving to be an alternative ritual of social control for the multicultural metropolis because it empowers citizens to decide how to run the rituals in a culturally appropriate way to them—so they can end it with a prayer if they want. The basic framework that allows this community empowerment to flourish is simple to describe.

A facilitator invites to a conference the offender and the people who the offender and his family say care about them most. That structures reintegration into the conference. Also invited are the victim plus family and friends of the victim. Their concerns structure shaming into the conference.

<sup>16</sup>Alder and Wundersitz 1994; Brown and McElrea 1993; Burford, Pennell and Macleod 1995; Hudson, Morris, Maxwell and Galaway 1996; LaPrairie 1995; McDonald, Moore, O’Connell and Thorsborne 1995.

<sup>17</sup>See Braithwaite and Mugford 1994.

<sup>18</sup>Melton 1995.

Shaming happens naturally through the process of the victim and their supporters simply describing the consequences of the crime for them personally and for their loved ones. Often offenders are surprised to learn of the consequences. What they thought was a minor act of theft of \$50 from a home turns out to be something that leaves an elderly woman (and her next-door neighbour) feeling insecure in their own homes.<sup>19</sup> There is no need to force the production of shaming. It happens through a natural process of dialogue. Attempts to orchestrate shaming are not respectful and are likely to degenerate quickly into stigmatization. Orchestrated shaming is like orchestrated punishment in that it crushes dignity through humiliation.

Victims who are understated about their suffering, yet whose understatement is revealed by supporters and by their own emotional deportment, are actually more likely to engender shame. Mothers of offenders who are understated about the worries the trouble has caused are more influential than complaining mothers, so long as other members of the family point out how much more deeply mother has been upset than she shows. All this goes to reinforce how deeply mistaken it is to seek to whip participants up for the communication of shame.

Mind, many violent people tend to shamelessness, just as they tend to undeterrability. So when the victim and victim supporters catalogue the harms that have been suffered as a result of the violence, the offender sits unmoved. He has learnt how to erect a shield to protect himself from shame. But sometimes the shameful consequences that the victim communicates across the room during a conference will be deflected by that shield only to pierce like a spear through the heart of the offender's mother, who sits beside him. She begins to sob. It is the shame of hurting her that then gets behind the offender's shield. As Maori wisdom instructs us, it is the shame of letting down those we love and trust that has the greatest power over us.

The genius of the conference is therefore that it is a meeting of two communities of care, rather than a meeting of two individuals, as in traditional Western mediation. While the criminal trial assembles in a room those who can do maximum damage to the other side, the conference assembles those who can offer maximum support to their own side, be it the victim or offender side. These two communities of care then engage in a dialogue, first about the consequences that have been endured, and then about how the harm might be repaired.

Another part of that genius is the way it ameliorates the power imbalances that arise in Western mediations between individual men and women, adults and children, powerful corporate executives and powerless consumers, school bullies and school weaklings. In well-organized conferences, both sides will include men and women, adults and children, the organized and the disorganized. Power imbalance remains, but in more cross-cutting manifestations. A key job of the

<sup>19</sup>Braithwaite and Mugford 1994.

facilitator is to enhance the complexity of conference participation so that dominations are checked by other dominations, so there is always someone who will speak up against every kind of dominating speech. R and D programs on conferences and circles are becoming leading sites for experimental manipulation of such variables which are central in debates about deliberative philosophies, especially in feminist philosophy (for example, Young 1995; Phillips 1991). To date, the data suggest that women do not assert themselves less than men in conferences, but children continue to be dominated vis-à-vis adults (Braithwaite 1999).

#### V. NAIVE COMMUNITARIANISM?

Pessimists despair that in Western cities, Maori or Cree communitarianism is naive. The worst offenders are alienated from their families and from the community. This is a misplaced pessimism. When conference facilitators come back with the claim that the offender is alone in the world, estranged from their family, unemployed, alienated from school, homeless, that a community of care cannot possibly be organized around them, we tell them to go back and try again. However estranged they are from the nuclear family, there will usually be a grandparent or aunt or cousin whom they respect and trust, even if they have to be brought in from another city. There will usually be someone at school who has treated them decently. This is true because human beings are fundamentally social organisms; some are more lonely than others, but few are devoid of anyone who cares. Hagan and McCarthy report that homeless youth in Toronto and Vancouver speak of their 'street families'; a majority say they have lived in a family since they left home.<sup>20</sup>

Respondents frequently noted that above all else, street families were a source of companionship that helped to mitigate the loneliness and isolation of street life. A comment of Nick's captures this sentiment: 'Well, we lived together. We were always there for each other. It's like you're on the street and you get involved with people down there. Um, you really learn what friendship is ... If I need them, they're there for me'.<sup>21</sup>

In other words, part of our stigmatization of the homeless is our view of them as somehow asocial, non-communal. This view is simply wrong. Care and crime prevention, as well as tutelage in crime are shown by Hagan and McCarthy to be alive in street families. They find homeless youth not to be untouchable, but touched in destructive ways that might be repaired.

My hypothesis is that conferencing rituals will not prove much of an advance over court processing of criminal offenders for first-timers who live with strong loving families, study in caring schools in homogeneous rural communities. The

<sup>20</sup>Hagan and McCarthy 1997.

<sup>21</sup>Hagan and McCarthy 1997, p. 163.

family and community will rally around those offenders to the point where 90 per cent of them will never be arrested again, regardless of whether they go to court or conference. For homeless, unemployed offenders who have suffered violence at the hands of their parents, however, the work of finding and strengthening a community of care around them may make a major difference to their considerable chances of reoffending. The aunt who travels from another city might offer a home; the caring victim help with finding a job (something that does occasionally happen in conferences); the street family with daily support to get along to a drug treatment program. Any caring of this kind is a major advance over another stigmatizing experience with the criminal justice system that may lead to prison.

The communitarianism of the conference does not assume a geographical community that may not exist. Rather, it is an individual-centred communitarianism that can work in a world of weak geographical communities. It looks for community on many and any bases that can be built around a single person. In one Australian case where community based on family and neighbourhood was hopeless, all families of a homeless young offender's football team were asked if they would consider giving him a home. Several offered. He chose one and did not like them much more than the family he was born into. Then he moved onto his second choice. That worked out.

Of course, it does seem reasonable to expect conferences to work better in Canberra than in South Central Los Angeles. Yet it seems reasonable to expect almost any strategy to fail more often in South Central Los Angeles. What is the crucial prediction of the theory of reintegrative shaming here? The theory predicts a difference in crime between reintegrative and stigmatizing strategies. A randomized controlled trial of conferencing versus court in South Central Los Angeles might produce a bigger difference in reoffending rates than in Canberra. Why? One reason is that the negative effects of traditional stigmatic criminal justice processing are likely to be dramatically greater in Los Angeles than in the comparatively caring criminal justice system of Canberra. Eighty per cent of offenders who go to court in our Canberra experiment say they are treated politely, a perception that might not prevail in South Central Los Angeles.

The theoretical logic here is the same as that which predicts that the gap in domestic violence reoffending rates between processing by stigmatizing arrest versus non-arrest will be greater for black, unmarried, unemployed men than for 'respectable', well-bonded (married, employed) white men. This is because we should predict the effects of stigmatic processing in increasing crime to be much worse for black, unemployed men who are deeply resentful of the racism they believe they have suffered at the hands of an alien system. Broadly, this prediction is supported by the results of American experiments on the effect of arrest on domestic violence.<sup>22</sup> Hence the prediction that the comparative

<sup>22</sup>Sherman 1992.

advantage of conferencing over court will be greater in the multicultural metropolis suffering high unemployment than in the homogenous white town with little unemployment.

Hagan and McCarthy show that traditional criminal justice processing does more to amplify the subsequent reoffending of children who have been victims of sexual abuse or physical violence (with bruising or bleeding).<sup>23</sup> Again, the implication is that while restorative justice might have more difficulty in working well with such hard cases, it can avert the maximally negative effects of punitive justice on those who have suffered the deepest degradations.

## VI. THE NATURALNESS OF REPENTANCE EXPECTATIONS

When participants at a conference are forgiving, especially when they are forgiving to the point of offering an offender a home, the offender knows that repentance is required. As a result of the discussion of the consequences, of what needs to be done to restore the victim, the offender knows that the participants are really concerned to prevent this harm from happening again. If the conference is successfully reintegrative, he also knows that they care about him; they want to help him to avoid a life behind bars for his own sake, out of love for him. Remorse in this context is the natural human reaction, natural for an organism which flourishes when nurtured by secure social bonds. The naturalness arises from the desire to preserve those caring bonds, even if they are newly emergent ones.

Empirically, we find that whatever their cultural group, most offenders will apologize in a conference without being asked to do so. In Canberra 74 per cent of victims get an apology from the offender in conferences compared to 11 per cent with cases randomly assigned to court.<sup>24</sup> Often the apology is written as well as spoken, sometimes ritualized with a handshake, a hug, a shared meal, a prayer, the presentation of flowers or in some Polynesian cases even kneeling before the victim. Offenders find apology especially difficult to resist when those who have suffered from the crime show them kindness at the conference, as they do with surprising frequency. Victims are punitive interlocutors in traditional Western justice systems because they are denied a voice in the outcomes. When they are given voice in a conference, they tend to go in angry and come out more forgiving. One reason is that a degree of forgiveness is a natural human reaction when someone apologizes to us. When someone who has wronged us says they are sorry and walks over to us to shake our hand, not many of us are so determinedly unforgiving as to refuse to extend our hand in response.

Strang and Sherman report preliminary results of a Canberra study that 60 per cent of offenders went into conferences feeling 'quite' or 'very' angry, while only

<sup>23</sup>Hagan and McCarthy 1997, pp. 191–7.

<sup>24</sup>Strang and Sherman 1997.

30 per cent felt this way afterwards. The proportion of victims feeling sympathetic towards the offender almost doubled (from 23 per cent to 43 per cents). They also became less afraid of the offender and more convinced that he or she was unlikely to offend again.<sup>25</sup>

These accomplishments are a result of the simple device of structuring the conference around communities of care. Participants are told the reason they are there is that this offender or this victim has nominated you as someone they especially love or trust. That knowledge is ennobling. It makes all the supporters in some sense flattered to be invited. They know they are there because of the contribution they can make as carers rather than as haters. And if the theory of reintegrative shaming is right, while stigmatizing speech will discourage repentance, respectful, caring speech will encourage it.

## VI. SIMPLE STRATEGIES FOR NURTURING REPENTANCE

While the idea is for conferences to be empowering of communities of care, rather than procedurally prescriptive, a few basic ground rules are necessary. The most important one is that people listen respectfully to the other without interrupting or shouting at them. Many of the indigenous peoples of North America institutionalize this prescription by enforcing a rule that only the person who holds a feather may speak (and must speak truthfully while holding the ritual feather). While this ground rule, however culturally manifested, is designed to secure a fair hearing for everyone, the requirement of respectful speech does nurture repentance, just as abusive speech inhibits it.

Secondly, as we have seen, the deadly simple strategy of allowing everyone affected to communicate the emotions they feel about the consequences of the crime makes it more difficult for wrongdoers to escape the imperative for repentance. A simple strategy for further encouraging this, adopted by many conference facilitators in Australia, is to ask the offender to summarize what he has learnt from the conference to be the most important consequences of the crime. Then the simple question, 'How do you feel about those consequences?', will often elicit the response, 'very sorry', if apology has not been proffered already. If the conference advances to a late stage without an apology having been offered, the facilitator will often say: 'Is there anything you want to say to Mrs. Jones?'

One of the mistaken ways of thinking about conferences, however, is that one must rely mainly on 'public policy' to train the facilitator so they get such things right. In conferences, the wise and restorative interventions of facilitators are greatly exceeded by the wise and restorative interventions of other citizens. We see so many conferences that have wonderful outcomes even though the facilitator makes terrible mistakes. Restorative institutions compensate for the

<sup>25</sup>Ibid.

folly of one citizen with the caring and perspicacity of others. For example, when one participant in a conference resorts to a stigmatizing, name-calling remark, we repeatedly observe other participants to come in with remarks that connote the essentially positive character of the named person. More participants in a restorative ritual come in behind the latter than the former for the simple reason that most participants in a community of care prefer positive speech to stigmatizing speech. This is what renders the success of conferences as repentance rituals robust. All of us have caring and uncaring selves, wise and foolish selves, self-seeking and other-regarding selves. Part of the genius of restorative justice institutions is that they induce expectations that we will all try to put our best self forward. Put another way, we all know we are there as an obligation of caring citizenship, so we do our best to play the responsible citizen role.

Hence, when offenders fail to proffer apology spontaneously and facilitators fail to use communication tactics that nurture repentance, other citizens often take steps to nurture repentance. For example, an offender's father may apologise to the victim on behalf of the family and this may encourage the offender to experience and communicate remorse. It is very common for victims to plead with families of offenders to not 'be too hard on the boy. We all make mistakes'. Often victims and other participants will put themselves below the offender by describing things they did when they were young that were even worse than the deeds of the offender. This can be a powerful means of inducing repentance from the offender. Here is another example from a conference where a self-deprecating gesture from the victim elicited repentance:

*Victim:* It was partly my fault. I shouldn't have left it unlocked'.

*Offender:* No, that's not your fault. You shouldn't have to lock it. We're the only ones who should be blamed.

The most important way that repentance is induced in conferences, however, is through appeals to the wrongdoer to relieve the burden he is placing on those he loves. This tends to happen in culturally plural, quite idiosyncratic ways grounded in the knowledge that only intimates share about how to touch one another. Let me illustrate.

One conference I attended in New Zealand involved a father and son who had a stormy relationship. A Maori elder counselled the father that he should put his arm around his boy more often, advice the father conceded that he needed to take. The father was a harsh and tough man, once a famous rugby forward with a reputation as an enforcer. The attempt of a Maori police officer to elicit empathy in these difficult circumstances was both innovative and effective, since tears began to stream down the face of the young offender, who up to this point had managed the impression of being a young tough:

*Policeman:* Look what you have done to your father and mother. If your father hit you, you'd stay hit. You wouldn't be getting up. But he hasn't. [Offender gasps, his

chest heaving with unnatural struggling for air.] I was always angry and bitter at my father. He was a hard man.

*Uncle interjects:* Yes, he'd hit you first, then ask questions afterwards.

*Policeman continues:* Then he died. Then I realized how I loved and missed the old bastard. Don't wait till your father dies, Mark.

At this point the mother buried her head in her lap with quiet sobbing. Then the father and then the son cried, by which point all in the room had tears in our eyes. How impressive an accomplishment this was, eliciting such empathy for a father about whom it was clearly difficult to say anything laudatory. Taken out of context, it does not seem a very positive thing to say about a father that he has refrained from ironing out his son. But for a son who himself was enmeshed in the culture of rugby and who knew his father's history of ironing out many strong men, the tribute was deeply moving.

To facilitate such contextual family work, it is important that repentance rituals have a backstage as well as a frontstage. New Zealand conferences have a coffee break once all of the consequences of the crime have been talked through. During the break, the offender's family meets alone to come up with a plan of action that might restore the victim and the community. Just as importantly, there may be things they are willing to say within the smaller family group that they are reluctant to expose beyond the family. During this break, other dyads might make repair one to the other over a beverage. Similarly, when the formal conference closes, one observes dyadic repair work breaking out in many parts of the room or outside on the street: a female victim hugs an offender here, there an uncle suggests that a niece keep an eye on her mum for the next couple of days, in another corner a policeman and a priest check with another victim whether she now feels safe, an offender strides across the room and extends his hand gratefully to the facilitator.

## VII. RECONCEPTUALIZING CRIMINAL FAULT TO INVIGORATE REPENTANCE RITUALS

Brent Fisse has developed the idea of 'reactive fault' in relation to corporate criminal responsibility.<sup>26</sup> His idea is that the degree of fault should depend less on the causal responsibility for the crime than on the responsibility shown by the corporation in repairing the harms done by its acts and moving to prevent recurrence of harmful acts. Fisse's notion touches deeply held feelings in the community about individual fault as well. With the hit-run driver, it is not so much the hitting but the running after the event that provokes reprobation.

<sup>26</sup>Fisse 1983.

Under the reactive fault paradigm for corporate crime, a court simply satisfies itself that the corporation is responsible for the *actus reus* of the offence (for example, the factory let the pollutant escape into the river) without enquiring as to whether the corporation had the knowledge and intent to be criminally responsible. If the corporation exhibits an exemplary approach to cleaning up the river, compensating fishermen and putting in place new pollution control policies and technologies, the court may find that it has reacted in a way that acquits it of all criminal fault.<sup>27</sup> Its liability remains civil only.

Particularly with the hardest-to-prove offences, like date rape, there may be merit in adapting the reactive fault strategy to individual offending. The wrongdoing may proceed to a restorative justice conference not on the basis of an admission of criminal guilt, but on the basis of admission of something like the *actus reus* of the offence, or of 'declining to deny' the offence, as under New Zealand conferencing law.<sup>28</sup> Then if there is a level of apology, emotional and monetary reparation to the victim and their family, community restoration through affirmation of respect for the law or community work, and undertakings that give tangible assurance of the prevention of recurrence (for example, participation in resocialization, anger control, or drug treatment programs, or programs to confront a culture of, say, violent masculinity in a school, church, workplace or family where the offence occurred), then the conference may judge criminal fault to have been acquitted reactively. The offender is recorded as having done a civil wrong rather than stigmatized with the criminal label; the victim and community gets the restoration and prospective protection that flows from the plan of action motivated by the repentance ritual.

A shift of the emphasis of our criminal justice system away from causal fault and toward reactive fault would invigorate repentance rituals in ways that might leave us better protected from crime. Criminal justice systems already vary on this causal-reactive dimension. Japanese criminal law emphasises reactive fault much more than Western criminal law. This, I have argued elsewhere, is one reason for Japan's comparatively low rates of violence.<sup>29</sup> Consider two illustrations, the first recounted by Haley and the second by Rossett and Cressey.<sup>30</sup>

The first is of two American servicemen accused of raping a Japanese woman. On Japanese legal advice, private reconciliation with the victim was secured; a letter from the victim was tabled in the court stating that she had been fully compensated and that she absolved the Americans completely. After hearing the evidence, the judge leaned forward and asked the soldiers if they had anything to

<sup>27</sup>See Fisse and Braithwaite 1993.

<sup>28</sup>The *actus reus* is 'the elements of an offence excluding those which concern the mind of the accused' (Rutherford and Bone 1993, p. 13). It is derived from the mistranslation of the Latin aphorism *actus non facit reum nisi mens sit rea*, which correctly translated means 'an act does not make a man guilty of a crime unless his mind be also guilty'.

<sup>29</sup>Braithwaite 1989.

<sup>30</sup>Haley 1982, p. 272; Rossett and Cressey 1986, p. 486.

say. ‘We are not guilty, your honour’, they replied. Their Japanese lawyer cringed; it had not even occurred to him that they might not adopt the repentant role. They were sentenced to the maximum term of imprisonment, not suspended.

The second story is of a Japanese woman arriving in the US with a large amount of American currency which she had not accurately declared on the entry form. It was not the sort of case that would normally be prosecuted. The law is intended to catch the importation of cash which is the proceeds of illicit activities, and there was no suggestion of this. Second, there was doubt that the woman had understood the form which required the currency declaration. After the woman left the airport, she wrote to the Customs Service acknowledging her violation of law, raising none of the excuses or explanations available to her, apologizing profusely, and seeking forgiveness. In a case that would not normally merit prosecution, the prosecution went forward because she had confessed and apologized; the US Justice Department felt it was obliged to proceed in the face of a bald admission of guilt.

### VIII. STATE JUSTICE OR COMMUNITY-BASED JUSTICE?

From a restorative perspective, the important thing is that we have institutions in civil society which confront serious problems like violence rather than sweep them under the carpet, yet do so in a way that is neither retributive nor stigmatizing. Violence will not be effectively controlled by communities unless the shamefulness of violence is communicated. This does not mean that we need criminal justice institutions that set out to maximize shame. On the contrary, if we set out to do that we risk the creation of stigmatizing institutions. All we need do is nurture micro-institutions of deliberative democracy that allow citizens to discuss the consequences of criminal acts, who is responsible, who should put them right and how. Such deliberative processes naturally enable those responsible to confront and deal with the shame arising from what has happened. And if we get the invitation list right by inviting along people who enjoy maximum respect and trust on both the offender and victim side, then we maximize the chances that shame will be dealt with in a reintegrative way.

While it is a myth that centralized state law enabled greater consistency and lesser partiality than community-based restorative justice, it is true that abuse of power always was and still is common in community justice, as Carol LaPrairie’s work shows for Canada.<sup>31</sup> And it is true that state oversight of restorative justice in the community can be a check on abuse of rights in local programs, local political dominations and those types of unequal treatment in local programs that are flagrantly unacceptable in the wider demos. Equally it is true that restorative justice can be a check on abuse of rights by the central state.

<sup>31</sup>LaPrairie 1995.

The restorative justice ideal could not and should not be the romantic notion of shifting back to a world where state justice is replaced by local justice. Rather, it might be to use the existence of state traditions of rights, proportionality and rule of law as resources to check abuse of power in local justice and to use the revival of restorative traditions to check abuse of state power. In other words, restorative justice constitutionalized by the state can be the stuff of a republic with a richer separation of powers, with less abuse of power, than could be obtained either under dispute resolution totally controlled by local politics or disputing totally dominated by the state.

To get there, however, we must abandon philosophies that insist the person rather than the problem must be in the dock, that our pursuit is of the right punishment rather than the right solution, that mercy can only be granted on a retributive rationale, and that punishment must be proportional to causal fault, regardless of reactive fault. This involves a major departure from punishment in proportion to backward-looking culpability which has been the central tenet of the philosophy of crime from Kant to Hart, Rawls and Nozick, even of Marxist philosophy.<sup>32</sup>

## IX. CONCLUSION

As Margalit argues, there is a case that *The Decent Society* is one that is designed to minimize humiliation.<sup>33</sup> Rituals which leave space for dignified restoration of the harm resulting from wrongdoing have a central place in such a decent society. The alternative is to allow shame–rage spirals to spin out of control. The alternative to the decent society is the dangerous society. One hope for the future is that the restorative justice rituals for micro acts of violence being revived in Palestine might inure a taste for reconciliation, for repentance rituals, into the consciences of future generations of Middle East leaders whose lot is to deal with the macro-violence of the region. Just as Versailles was a degradation ceremony that marked a downturn in Western civility, so the Marshall plan, MacArthur's mercy in extending respect rather than the war criminal's noose to the Emperor of Japan, marked the finest moment of the American century. The deeper the evil, the more profound the comparative advantage of rituals of repentance and forgiveness over rituals of degradation. Mandela and Tutu have been among those who have understood that. For the moment, though, our priority task is to learn how to run repentance rituals better through systematic research with large numbers of school bullies and other more banal villainies. So far, the evidence is encouraging that the decent school society that seeks to reason respectfully with bullies rather than stigmatize and expel them can cut bullying by as much as half.<sup>34</sup>

<sup>32</sup>Kant 1887; Hart 1968; Rawls 1955; Nozick 1974; Murphy 1979 on Marxism.

<sup>33</sup>Margalit 1996.

<sup>34</sup>Olweus 1994; Farrington 1993; Pitts and Smith 1995; Pepler, Craig, Ziegler and Charach 1993.

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