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Citation: 67 Rev. Jur. U.P.R. 608 1998



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Mon Nov 16 21:16:06 2015

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## EDUCATION, TRUTH, RECONCILIATION: COMMENT ON SCHEFF

JOHN BRAITHWAITE\*

Tom Scheff's contribution to the dialogue between restorative justice and therapeutic jurisprudence is, as always, fertile and firmly grounded in empirical experience. His definition of the "core sequence" of restorative justice as remorse followed by forgiveness, his elevation of symbolic reparation above the material reparation that dominated the victim-offender mediation literature of the 80s, his explications of how loops of shame play out in conferences, have been seminal contributions.

The policy conclusion on education for mediation is also important. Children can and should learn to mediate disputes at school. They should also engage with it in their history classes through studying events such as the Camp David mediations of President Carter, struggling for an elusive peace in the Middle East.

The best way to learn mediation is to be involved in it. Unfortunately, the evidence suggests that peer mediation of bullying in schools are among the most ineffective restorative justice programs.<sup>1</sup> On the other hand, whole school approaches to a dialogue that confronts bullying with the involvement of parents and teachers show reductions of bullying up to 50 per cent.<sup>2</sup> What this means, I think, is that Scheff is excessively pessimistic when he says that: "[t]he idea of mediation might be too sophisticated for elementary and junior high school students"<sup>3</sup>. The idea is not beyond them and they can learn to appreciate it

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\* John Braithwaite is Professor and Head of Law in the Research School of Social Sciences, Australian National University.

<sup>1</sup> See Denise Gottfredson, *School-Based Crime Prevention*, in PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING: A REPORT TO THE UNITED STATES CONGRESS (Lawrence Sherman, et al eds. 1996).

<sup>2</sup> See *id.*; Dan Olweus, *Annotation: Bullying at School: Basic Facts and Effects of a School Based Intervention Program*, 35 J. CHILD PSYCHOL. & PSYCHIATRY 1171-90 (1993).

<sup>3</sup> Thomas J. Scheff, *Community Conferences: Shame and Anger in Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 95, 116 (1998).

through participation in restorative justice conferences. Very few, however, would seem to be ready at a tender age to actually be the mediator in formal mediations of difficult cases. Even this is not to deny that most of the little acts of peacemaking in school playgrounds may be done by the wiser heads among the children themselves. Notwithstanding the limits of their competence, we should want to help them become even wiser at the peacemaking that comes naturally to them.

Tom Scheff does not underestimate the remarkable spread of restorative justice programs, particularly for juveniles. Even the famously tough Singapore courts have adopted *Restorative Justice* as the *Justice Model* for its juvenile courts.<sup>4</sup> For its adult criminal courts, the model remains *Protecting the Public*, while for Civil Justice it is *Effective and Fair Dispute Resolution* and for Family law, *Protecting Family Obligations*. Restorative justice now has more than a toehold in some of the most punitive criminal justice systems of recent times, including Singapore, South Africa, the United States and Palestine.

In none of these systems, however, has restorative justice taken over as a more dominant force than punitive justice. Even in New Zealand, which has the largest restorative justice program for juveniles, the imprisonment rate for young adults is growing. Scheff is in error in believing that "more than half"<sup>5</sup> the juvenile offenders in New Zealand have been dealt with by conferences. While in some parts of the country more may be going to conference than to court, most juvenile offenders are dealt with in neither way. They are simply cautioned by the police.

It is in fact extremely difficult to drive imprisonment rates down substantially by relying primarily on a conferencing or mediation program. The throughput of cases in the criminal justice system is so huge that one must resort to either a quick and dirty conferencing program or rely on restorative police cautioning as in Japan. My preference would be for a high quality conferencing program that learns the lessons in Scheff's paper complemented by a large quick and cheap restorative police cautioning program.

Such a high quality conferencing program could tackle *capital crimes*, which Scheff wants to exclude. Here there is much we can learn from the traditional Palestinian peacemaking process,

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<sup>4</sup> SINGAPORE SUBORDINATE COURTS: EXCELLENCE AND BEYOND (1997).

<sup>5</sup> Scheff, *supra* note 4, at 96.

the Sulha.<sup>6</sup> This restorative justice tradition of pre-Islamic Semitic origins is still practiced in Galilee today:

[T]he residents know those who are well respected and noted for straightforwardness, honesty and decency. The family of the killer must go from one house to another and humbly ask. In fact, we use the term "begging them", something like, "We are in your house and you must help us. We are in serious trouble: one of our sons committed a crime and we are in your hands."<sup>7</sup>

If these respected persons agree to mediate, they will tell the offended family:

We are asked by the offender and his family to come and pay you a visit in order to have the honor of offering their repentance and to express their sorrow for what has happened and to ask you to be kind -to have a great deal of honor on your own part and to let us take the case into our hands and see how we can help to restore peace between you. We are asking you to agree that we play the role of the mediators . . . .<sup>8</sup>

A *no revenge* period is then agreed until the parameters of the peacemaking process are settled. This period can last more than a year. Money is paid by the offender's family to the victim's family as a guarantee of the peace; disgrace follows for the victim family if they take revenge during this period after accepting the traditional payment. Money payment (*diya*) is also always part of the final peace settlement between the families. In Scheffian terms, this material reparation is explicitly redefined as symbolic reparation:

We tell them: '[*Diya* is] not the price of your man, for there is no price for a human life.' This money is only a symbolic amount for the man's blood, which has no price. This is done because there are two basic elements of the *sulha*: rights and honor.<sup>9</sup>

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<sup>6</sup> See ELIAS J. JABBOUR, *SULHA: PALESTINIAN TRADITIONAL PEACEMAKING PROCESS* (1996).

<sup>7</sup> *Id.* at 27.

<sup>8</sup> *Id.* at 31-32.

<sup>9</sup> *Id.* at 41.

Mediators in this tradition have to be extraordinary human beings to manage the process of discharging the grief, shame and anger associated with a matter as serious as murder. They do this in part by inviting upon themselves the initial surges of anger, until the parties are ready for more direct symbolic reparation. Mediators as shock absorbers of revenge.

The strong, wise, leader that my father told me about said to the women pouring ashes on them, "You have the right to do that. Go on, go on." This was as if to help them discharge their grief. As the story goes, it is said that this good man's black beard turned gray because of the ashes. This was true patience and tolerance. This was wisdom. Such work will tell how wide one's heart should be. If one screams, "You poured ashes on me!" then he spoils the whole case. The man said, "you have the right - pour the ashes- you have the right". The women might wonder, "What kind of 'angel' do we have here? Perhaps we should be ashamed." . . . Thus an important rule of the Jaha is to have the people see that someone accepts them with great love despite what they do. When the jaha does this, its members increase their stature by making personal sacrifices for the sake of peace -not just between the two parties, but for the sake of the entire village and surrounding region.<sup>10</sup>

The end of the process involves the killer shaking hands publicly with all members of the victim's extended family, often hundreds of them, both sides visiting each others' houses, drinking coffee and sharing a meal. The sulha illustrates the possibilities for taking the principles of restorative justice illuminated by Scheff further than we contemporarily imagine in the West. Keeping those possibilities open requires us to dedicate ourselves to learn from restorative justice traditions that remain alive in the modern world and to ponder how they might be adapted to other times and places.

The wonder of working in this field is that one gradually discovers how much there is to learn from other cultures about matters that we have unlearn in our own. I am also constantly finding new respects in which I may have been too conservative about the possibilities for restorative justice. For example, I

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<sup>10</sup> *Id.* at 46-47.

have long articulated agreement with the following perspective in Scheff's essay: "mediation is not useful for truth-finding. For crimes in which significant facts are in dispute, there is still no substitute for a court trial".<sup>11</sup>

Yet today I wonder if we have both been wrong. My doubt arises from contemplating the healing circles convened by First Nations peoples in Canada, especially in the Manitoba community of Hollow Water. Forty-eight adults in the latter community of 600 confessed to child abuse.<sup>12</sup> Western criminal justice has been notoriously ineffective in truth-finding with secret offences that occur in private space such as child abuse. Certainly, I know of no community of less than a thousand where anywhere like 48 adults could be brought to confess guilt. Yet Hollow Water is not so unusual in being a community half of whose members have been victims of child abuse<sup>13</sup>.

It may be that the prospect of confronting the shame, attempting to repair some of the harm and most importantly, the prospect of forgiveness, can elicit a truth that has eluded mainstream adversary process. Of course this does not mean we can or should abandon courtroom trials. Where the prospect of remorse-forgiveness fails to elicit truth, remorseless cross-examination might. The most ambitious attempt at restorative justice the world has seen -the South African Truth and Reconciliation Commission- will be an experiment we can all watch on TV in the months ahead to make our own judgement as to whether Desmond Tutu's truth about Winnie Mandela might be nearer or farther from the actual truth than the truth of her criminal trial.

Tom Scheff shows in his essay some of the many ways restorative justice in practice fails to live up to the promise of its theory. His concerns about the deficiencies of the conferences he has observed in Canberra are well placed. He does a great service in bringing them to our attention. We must overcome our failures to tackle them because the potential of restorative justice for truth as well as crime control may be more profound

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<sup>11</sup> Scheff, *supra* note 4, at 98.

<sup>12</sup> RUPERT ROSS, RETURNING TO THE TEACHINGS: EXPLORING ABORIGINAL JUSTICE 29-48 (1996).

<sup>13</sup> See CAROL L'PRAIRIE, SEEN BUT NOT HEARD: NATIVE PEOPLE IN THE INNER CITY, REPORT 3: VICTIMIZATION AND DOMESTIC VIOLENCE. OTTAWA: DEPARTMENT OF JUSTICE iii (1994).

than even Tom Scheff or Desmond Tutu think. If only we can learn from our mistakes.