whether a person is free or unfree in regard to the types of action it privileges, the principle itself privileges not negative liberty as such, but a certain distribution of it. This is a very clear example of what I mean by the distinction between atomic and molecular arguments about freedom.

Now I want to connect these comments back to what I said in Section 4 about moralized concepts of liberty. There are two ways in which a conception of liberty may be moralized. (1) It may be moralized with reference to morality in general, so we would say that being free from interference with one's vicious or depraved or wrongful action is not true liberty. (2) Or it may be moralized specifically with regard to issues about liberty itself: that is we may say (in Kantian fashion) that acting in a way that prevents similar action by others is not true liberty, because it is not universalizable. Put (1) aside. Noting the variations between full moralization and partial moralization, I have said all I want to say about that in Section 4: it's a version of positive liberty. But think about (2). If we say that the only liberty worth protecting is the equal liberty of a free society or, in Kantian terms, liberty that is compatible with the similar liberty of others under a universal law, then we are invoking the term "freedom" twice in our account. (a) We invoke it first to specify the raw material for the sorting and disciplining process that equalization and universalization involve. And (b), we invoke it to refer to some demand for non-interference that is privileged on account of the success of the sorting and disciplining process that equalization and universalization involve. Now we may reserve the terms "liberty" and "freedom" for the second usage (b), but we will certainly need something like them for (a) as well. If we do use "liberty" or "freedom" in sense (a), it doesn't follow that we are saying that there is value in negative liberty quite apart from its distribution. We may understand perfectly well a point that I have stressed several times in this section—that it is an open question (I mean a question open for normative argument) whether value is accorded to negative liberty as such, or to the property of being a free man, or to liberty as properly distributed, or whatever. But even if we are determined to withhold the element of value until we are in command of sense (b), we still need sense (a) of liberty. And we still need to have a theory of it, so that we can keep track of what it is that we have been doing in our construction of (b).

For this reason, and for the other reasons I have stated, I think it wise not to simply throw out the negative liberty conception, particularly for the sake of a concept of freedom as non-domination which seems to have been, in various ways, constructed on the basis of it.

8

Contestatory Citizenship; Deliberative Denizenship

John Braithwaite

RETHINKING DEMOCRACY

Political philosophy is construed as having a relevance problem to a world where power has become pluralized, governance networked. We cannot assume that the Westphalian project of progressively centralizing power in the hands of the state at the expense of other centres of power such as the church, granting the state a monopoly over the use of armed force, continues to be a project with explanatory force. Philip Pettit's political philosophy of republican dispersal of power and contestatory democracy to secure freedom as non-domination is a serviceable framework for coming to grips with pluralized governance through networks. At the same time, Pettit's doubts about the feasibility of citizens being empowered with a direct voice in a deliberative democracy can be revised in accordance with the realities of networked governance as developed by Clifford Shearing and his co-authors. At the nodes of governance that make networked governance buzz, deliberative democracy is a feasible ideal. The ideal articulated here is of a circle of expanding circles of deliberative democratic contestation. There is deliberative accountability within each circle and contestatory accountability from other circles in a circle of checks and balances. The nodal governance of crime is used to illustrate the feasibility of this blend of contestatory and deliberative democracy for securing freedom as non-domination against arbitrary power.

The structure of the chapter will be to argue first that governance has become more networked, making central state planning the governance technology of a time past and nodal governance of growing importance. These facts render most political philosophy anachronistic. Then it will be argued that Philip Pettit's republicanism provides an analytic repertoire that can escape this irrelevance. Particularly important is his idea of the republic as a contestatory democracy. Yet Pettit's philosophy needs adaptation to the possibility of crafting nodes of

governance for the deliberative democracy of what Shearing calls 'denizens'. The nodal governance of security is then used to illustrate these ideas. The conclusion argues that while contestatory citizenship must remain central to Pettit's republican project, deliberative denizenship becomes more central to securing freedom as non-domination.

BEYOND WESTPHALIAN POLITICAL PHILOSOPHY

Political philosophy naturally became a Westphalian tradition since the 1648 Peace of Westphalia reconfigured the world into sovereign territorial nation-states. This was a world in which nation-states were the sites of most of the politics that mattered. Today nation-states remain extremely important sites of politics. But it is no longer true that they are the sites of most of the politics and governance. But it is no longer true that they are the sites of most of the politics and governance that matter most. Political philosophy, like much of the discipline of political science, continues to act as if this were still true. Therein lies its relevance problem to a world in which governance has pluralized rather radically. Of course, many plural forms of governance of people's lives beyond nation-states have been with us for a long time—sub-national levels of government at the province, county, or city level, schools, families—and have been long accommodated by at least some strands of political theory such as feminist philosophy. Some of these long-standing non-state sites, notably religious institutions, actually declined as centres of governance that mattered in the West during the Westphalian era, though Islamic religious institutions may do more governing of people's lives than they did when colonial regimes suppressed them.

The biggest real changes in the governance of the world over the past century are a result of the growth of private corporations. A century ago most of the most consequential actions in the world were actions of individuals, with state action being the second big category. Today, in contrast, when important things are done in the world, whether for good or for ill, they are more likely to be the actions of corporations than of individuals. Ronald Burt has shown (in Coleman 1982: 12) that during the century from the 1870s to the 1970s the percentage of front-page space in the *New York Times* devoted to individual persons fell continuously, and the proportion devoted to corporate actors rose continuously. By the end of the Second World War three times as much of the front page was devoted to corporate actors compared to persons. In the middle of the nineteenth century, fewer than 20 per cent of participants in New York State Court of Appeals cases were corporations; in 1923 for the first time the number of corporate participants exceeded the number of individuals (N. Grossman, cited in Coleman 1982: 11).

In the nineteenth century most of the people of the world had no experience whatsoever of being governed by private corporations, even allowing for the fact of the governance of substantial parts of the world by the British and Dutch East

Indies companies. Even in Europe in the late nineteenth century, the number and size of private corporations were small; the state-owned Prussian Railways was still the business in Europe that employed the largest number of workers. In the United States, where incorporation arose earlier and more vigorously than elsewhere, there had been only 335 incorporations by 1800 (Davis 1961: p. vii). But for the next two centuries the growth curve for the number of people who worked for corporations exceeded that of people in state employment. Today the largest transnational corporations have incomes higher than the GDPs of the majority of the world's states. For the first time in the mid-1990s, the majority of the 100 largest 'economies' in the world were corporations (Anderson and Cavanagh 1996).

The corporatization of the world has had profound effects on the competing source of power to the business corporation—states. Corporate governance colonized state governance. From the 1980s we saw corporatization within Western governments. Monolithic state bureaucracies were divided into separately managed corporatized operating units (Hood et al. 1998: ch. 9). The New Public Management in the UK and Europe, and 'reinventing government' in the USA, were about managing government in the image of business management—less control by hierarchy, more government by contract, more 'partnerships' with a plurality of business corporations. In the 1980s it was common for these developments to be referred to as privatization and deregulation, but actually privatization was associated with building new state regulatory capabilities. For example, when nations privatized telecommunications, they almost invariably established a new telecoms regulatory authority. So a more apt description is Osborne and Gaebler's (1992) of movement to a state that does less rowing but more steering—less direct provision and more regulation of privatized provision of formerly governmental services. In addition, there has been a shift in the way states regulate from direct command and control to regulated self-regulation. This means that not only has state provision been privatized, but front-line regulation of the quality of that provision is instituionalized as self-audit, with states auditing the quality of the self-audits. From the perspective of the consumer of formerly governmental telecommunications services, not only is the provider a private company, but if she has a complaint about the service that she tries to take to the state, she will be told in the first instance to call the company's complaints line, and if she gets no satisfaction there, to take it to the industry-funded Telecommunications Ombudsman. Iteratively across many domains of privatized or contracted-out government, this leaves us with a world of radically pluralized nodes of governance.

In addition to government that is delegated down or partnered sideways, a lot has been delegated upwards to international organizations. So the standards that shape the quality of our telecommunications service are mostly set by the International Telecommunication Union in Geneva. Our food standards are established by the Codex Alimentarius Commission in Rome. Many of our

pharmaceuticals standards have been set by a joint collaboration of the Japanese, European, and US industries and their regulators called the International Conference on Harmonization. For decades many of the world's air safety standards were written by the Boeing Corporation in Seattle, or, if not by them, then by the US Federal Aviation Administration in Washington. Our ship safety laws have been written by the International Maritime Organisation in London. Our motor vehicle safety standards come from Working Party 29 of the Economic Commission for Europe. In the most thorough study of the law of product standards globally, Harm Schepel (2005: 414) concludes by inverting a well-known quote from Habermas on how deliberation in civil society can generate impulses for national law making: 'National legal systems are but the "impulse-generating periphery" of global standardisation [by mostly private standard-setters].'

THE END OF THE REPUBLIC OF CENTRAL PLANS

The bottom line is that governmental capabilities have been pluralized in many different directions. This means that states no longer do indicative planning. To the extent that they still do strategic planning, they do it taking account of the strategic plans of a galaxy of pluralized nodes of governmental power beyond themselves. But really governments no longer plan so much as seek to mobilize networks of power to get things done. This is why networked governance is such a major theoretical theme in contemporary political science (Rhodes 1997; Bevir and Rhodes 2003), why Foucault's decentred views of governmentality have influenced all of the social sciences (Burchall et al. 1991), why sociologists theorize 'circuits of power' (Clegg 1989), why international relations theorists see international law and other global decision making being transacted by trans-governmental networks (Slaughter 1997).

Empirically, Braithwaite and Drahos (2000) found that while the governments of states, especially the USA, are important, the networks that assert global power are not primarily trans-governmental. NGOs, professional associations, and even intellectuals are frequently important within those networks, but more fundamentally the influence of business often shapes network action more profoundly than does the influence of states. An informal node of decision making often enrols the governmental heads of power in the network. So with the network that remade the global information order through TRIPS (the Trade Related Intellectual Property agreement of the World Trade Organization), two Washington legal entrepreneurs persuaded the CEOs of Pfizer and IBM that linking intellectual property to the trade regime would be in their interests. They organized a committee of sixteen US CEOs as a node of governance that enrolled the President of the United States, the European Commission, the government of Japan, and international trade secretariats to network for them (Drahos with Braithwaite 2003).

THE RISE OF NETWORKED GOVERNANCE

The most ambitious retheorizing of state and society in these terms has been Manuel Castells' (1996, 1997, 1998) three-volume magnum opus on *The Rise of the Network Society*. For Castells (1996: 500), 'Networks constitute the new social morphology of our societies . . . the power of flows takes precedence over the flows of power.' By this he means that the way to dominate others in such a society is to harness the right networks to your project of domination. This, for example, is how comparatively powerless Washington legal entrepreneurs managed to enrol a network that resulted in HIV–AIDS drugs being rendered unaffordable for the people of Africa. Castells (1997: 355) sees it as 'indeed a tragic irony that when most countries in the world finally fought their way to access the institutions of liberal democracy (in my view, the foundation of all political democracy), these institutions are so distant from the structure and processes that really matter that they appear to most people as a sarcastic grimace in the new face of history'. Networks with 'resistance identities', like Al-Qaeda, loom large in Castells's analysis. Five and six years before the wars in Afghanistan and Iraq he wrote: 'States can shoot, but because the profile of their enemies, and the whereabouts of their challengers, are increasingly unclear, they tend to shoot randomly, with the probability that they may shoot themselves in the process' (Castells 1997: 359).

Because our historical vision has become so used to orderly battalions, colourful banners, and scripted proclamations of social change, we are at a loss when confronted with the subtle pervasiveness of incremental changes of symbols processed through multiform networks, away from the halls of power. It is in these back alleys of society, whether in alternative electronic networks or in grassrooted networks of communal resistance, that I have sensed the embryos of a new society, labored in the fields of history by the power of identity. (Castells 1997: 362)

REVIVAL OF NODAL GOVERNANCE

Clifford Shearing with various colleagues has developed the theme of nodal governance in a way that has been greatly influenced by Pettit's republicanism (Brogden and Shearing 1997; Shearing and Wood 2003). Because a network society is more fluid, complex, and indeterminate than older structures of government like parties and ministries, understanding how governance unfolds is more challenging. This challenge has increased the appeal of nodal governance as a way of thinking about possibilities for strategic regulatory action. The question becomes what are the nodes where networks can be organized, where the levers at the disposal of one network can be tied in to the levers available

to another network, or a number of them. A node is a place where resources, ideas, deliberative capability, and leadership are available to make networked governance buzz. These nodes are the focus of attention in this theoretical tradition, because synoptic understanding of how whole networks and sets of networks operate is beyond our grasp. What we may be able to grasp is whether there are effects when nodal governance is mobilized to bind networks together. This is an old idea in Eastern philosophy. Sima Qian around 89 BC quotes the following exchange with Confucius:

'Do you think me a learned, well-read man?'

'Certainly,' replied Zi-gong. 'Aren't you?'

'Not at all,' said Confucius. 'I have simply grasped one thread which links up the rest.' (Quoted in Castells 1996: 1)

Each strand of a web of controls that seeks to govern some persons or some phenomenon may be weak. We may have a dim understanding of this complex web of governance. Yet, if we learn to pull the right strand at the right time, we may find that the entire fabric of the web of controls tightens to become quite strong. Conversely, we can learn that if we pull the wrong strand at the wrong time, the entire fabric of control can unravel. From a republican point of view, we should be interested in how to cause the unravelling of webs of control that dominate citizens in an arbitrary way and how to secure webs of control that prevent domination. This will be accomplished by strategic deliberation at strategic nodes of networked governance.

PETTIT'S CONTESTATORY DEMOCRACY

Philip Pettit's work is less vulnerable than most in political philosophy to the discipline's relevance problem in a post-Westphalian world. Pettit is concerned not just with the micro of individual and the macro of state action. He is also philosophically engaged with the meaning of the meso of collective action at various intermediate levels, and more recently with supra-state collective action (Pettit 2002). His republican ideal of freedom as non-domination is obviously as relevant to non-state as to state domination and protection from it. Instead of being focused in a traditional state-constitutionalist way on the separation of powers between legislature, judiciary, and executive, Pettit's (1997: 177) theory is oriented to the 'dispersion of power'. This way of specifying a key condition for republican governance is well designed to be as applicable to concentrations of corporate power as to concentrations of state power. That said, Pettit's work is overwhelmingly in the Westphalian tradition of political philosophy.

Pettit does not see democracy narrowly as the means whereby a society as a whole asserts its collective will—its own autonomous will as opposed to

that of a dictator or a colonial overlord. He sees this as an important side of democracy—the side that makes it important to have referenda at times and to elect the legislatures that enact the laws that protect against arbitrary exercise of power. This is the (indirect) 'authorial' role that democracy requires the people to have. But Pettit also emphasizes the 'editorial' role of the people, which he describes as the 'contestatory' side of democracy. For Pettit, contestability is more important than consent in preventing exercises of power that are arbitrary (Pettit 1997: 184–5). For contestation to be possible, decision making must be open enough for there to be potential for public reason to contest it, and there must be many channels of contestation—writing to an MP, complaint to an ombudsman, judicial appeals, rights to take to the streets in protest, and so on. Because Pettit rejects democracy as a purely electoral ideal, he disagrees with hand-wringers who see in every global decision-making forum an erosion of national electoral sovereignty. If a global institution, say a UN human rights agency, effectively contests a national form of domination, then that national polity has more channels open for public reason to contest its power. Hence, democracy may be enlarged rather than reduced by it.

Pettit's republicanism is in better shape than a unidimensional electoral conception of democracy for application to a world of networked governance. You can't elect a network; you can't have written constitutions for all the nodes of governance that matter. We cannot ensure that networked power is a product of popular will. The contestatory dimension of democracy is more useful for a world of nodal governance of networks. We can ensure that networked power is required to survive popular contestation by setting up multiple nodes of popular contestation at strategic intersections of networks. Before challenging the supremacy of electoral democracy with contestatory democracy, Pettit is rather dismissive of the feasibility of the ideal of direct deliberative democracy. We are no longer in the village, the New England town, or ancient Athens. The scale and institutional complexity of a mass society with a sophisticated division of labour means that direct participatory democracy, even in the most important domains of governance, is for Pettit an impossible ideal.

Just as the realities of plurally networked governance make electoral democracy a less serviceable ideal than contestatory democracy, so the realities of nodal governance should cause us to return to a rediscovered serviceability of deliberative democracy at the nodes that count. It is the contestatory ideal that accounts for the importance of democratic citizens joining together at a node of governance to contest networked power that they believe oppresses them. Once those citizens are assembled at that place, even if it is in cyberspace, deliberative democracy is the ideal that can most fruitfully be deployed to enrich freedom as non-domination. I presume here that giving direct democratic voice to people affected by a decision is the best way to respect the autonomy and empower the public reason of citizens wherever it is institutionally feasible and affordable to do so.

CONTESTED DENIZENSHIP

Clifford Shearing and Jennifer Wood (2003) have resurrected a distinction between citizens (in the discourse of state governance) and denizens (in that of nodal governance). 'Denizen' is a pre-Westphalian term that has disappeared from the latest edition of the on-line *Oxford English Dictionary* (<http://dictionary.oed.com>) but is still to be found in the previous edition. For Shearing and Wood (2003) a denizen is a habitual, even if temporary, visitor to a place, who has rights and responsibilities in the governance that occurs in that place. This is consistent with a 1655 attribution of the online *OED* that 'The Charter of London . . . is the birth-right of its own Denisons, not Strangers.' Denizens were often frequent travellers to a place where they were not native-born. Genoan merchants who frequented the Genoan Guild in Bruges or London would be described as denizens of those places. So the *OED* refers from 1632 to 'An authenticke Bull, charter or patent of denizonship or borgeousship of Rome'. But by 1871, the triumph of Westphalianism seems to have devalued the currency of denizenship: 'Denizenship is a mongrel state, not worth preserving when the process of obtaining naturalization is so simple.'

Consider national and nodal governance of armed conflict. Citizens of Israel who are concerned about their state's conduct in Palestine can mobilize electoral democracy, voting against their current national leadership. They can engage with contestatory democracy by attending peace rallies, signing petitions, etc. Or they can strategically engage with the networked governance of armed conflict by initiating or joining a node of second-track diplomacy in Geneva which has key participants from the crucial networks of stakeholders in the conflict. As that node of governance develops an alternative peace plan to the US state's Roadmap, the number of participants around the table in Geneva is sufficiently small for the democracy of the node to be directly deliberative. Contestatory democracy from citizens of Israel can take them to the node of second-track diplomacy; deliberative democracy can inform their participation in the public reasoning at that node. When that node delivers up a draft peace plan, contestatory democrats will come out to criticize the plan from many directions. Then good democratic practice involves inviting those critics into a widened circle of democratic deliberation at the node. In summary, we have three stages of contestatory citizenship with deliberative denizenship:

1. In a world of networked governance, democratic citizenship contests domination most effectively at strategic nodes of deliberative governance.

2. The decisions of that node of deliberative governance should be contested by citizens who did not participate in it.

3. The circle of deliberation should be widened by inviting in the most vigorous and contentious contestors.

THE NODAL GOVERNANCE OF CRIME

Pettit sees criminal justice and crime as peculiarly important to both securing and threatening dominion. Shearing and Wood (2003) discuss local Peace Committees in South Africa as one strategy of nodal governance to respond to crime and other insecurities. Here I will develop the theme of contestatory citizenship and deliberative denizenship with respect to restorative justice conferences—an approach from the same family of nodal approaches as the Peace Committees. Restorative justice is conceived as a horizontal process of democratic deliberation that is integrated into external processes of accountability to courts and the rule of law. This integration of direct democracy and the rule of a representative democracy's laws is an opportunity to enrich thinking about the relationship between responsibility and accountability in a democracy. Responsibility is conceived here as an obligation to do some right thing, accountability as being answerable to give a public account of some thing. The restorative justice ideal of responsibility is active responsibility as a virtue, the virtue of taking responsibility, as opposed to passive responsibility we are held to. The restorative justice method for engendering active responsibility is to widen circles of accountability. This is conceived as part of a civic republican institutional design of *a circle of widening circles of deliberative accountability.*

When responsibility is taken, and accounts accepted as sufficient to acquit that responsibility, justice is done. From a restorative justice perspective, justice is always unfinished business until an account has been accepted by the stakeholders in the injustice. Even when the state intervenes to hold someone passively responsible by imprisonment after they fail to take sufficient active responsibility for their wrongdoing, there should be no giving up on active responsibility. Responsibility may be admitted and acquitted on release from prison. Victims, with the family of the offender and other stakeholders, may accept the offender's account at that time with considerable benefit to all if they choose to be involved. Injustice on all sides may still be hurting at the time of release, so justice can still heal then. Deeper democracy, on this account, is one where the institutional preference is for responsibility that is active rather than passive, bottom-up rather than top-down, but where failure of bottom-up responsibility results in a form of state accountability that never gives up on restoring bottom-up, deliberative accountability.

THE CONCEPT OF RESTORATIVE JUSTICE

Restorative justice is a process designed to involve, to the extent possible, those who have a stake in an injustice to identify collectively and address harms,

needs and obligations in order to heal and put things as right as possible (adapted from Zehr with Gohar 2003: 40). It involves an attempt to help solve problems by moving emotions from anger to reconciliation and repair. The idea is that because crime hurts, justice should heal. Restorative justice has much in common with other Alternative Dispute Resolution ideologies like mediation. But there are important differences. Restorative justice facilitators are not morally 'neutral' about mediating 'conflicts'. Restorative justice is about righting the wrongs of injustices. A restorative justice conference to confront domestic violence is not morally neutral about violence as merely a conflict between two people. Most mediation is between two parties to a conflict; restorative justice views it as morally important to give an opportunity for all those who see themselves as key stakeholders in an alleged injustice to participate in the deliberation about what to do. So the predominant structural form of restorative justice is deliberation among people seated in a circle, as opposed to two people negotiating across a table. Empirically, the outcomes from a plurality of stakeholders sitting in the restorative justice circle tend to be different from those from dyads assisted by professional mediators. Some think they are often better outcomes (Braithwaite 2002).

I have argued (Braithwaite 2002) that criminologists know quite a lot now about what can be done to prevent crime. The challenge is to get societies to be rationally interested in investing in those things rather than investing in prisons and retribution. Restorative justice is seen as a strategy of nodal governance with the potential to supply that motivation. To take a banal example, in areas where natural surveillance is not effective, burglar alarms work in preventing burglary. The best opportunity for targeting police crime prevention work on this is when a person has just been burgled. In a restorative justice conference, both the convicted burglar and the police can offer good technical advice on how to do this. It is also the best time to motivate the investment, because the police can explain to the victim that the single best predictor of future burglary victimization is having been a victim of burglary in the past three months. We will see below that restorative justice is much more successful in persuading offenders to actually complete rehabilitative programmes that work—like anger management and drug rehabilitation programmes. This is because the direct participatory justice of the stakeholders in the circle delivers superior commitment to complete agreements than the hierarchical justice of court orders. The legal citizenship obligations of a representative democracy's justice are less effective than the participatory obligations engendered among the denizens of a place.

Restorative justice is a nodal governance strategy for connecting crime prevention to where the resources are in police bureaucracies—responding to crimes once they have occurred. In strategic cases, I argue (Braithwaite 2002), these nodes of deliberative governance can and do initiate major reforms to the law, to public policy, and to the policy making of large private corporations. One of the referees for this chapter is doubtful at this point. She or he ponders:

There is a big difference between neighborhood watch committees, which seem to me "clean" examples of associative democracy, and restorative conferences which are, I think, as much concerned with emotional reconciliation as with any matter of policy making or enforcement. Although technically public, restorative conferences are very largely personal and they seem to have no intrinsic connection with democracy or representative government.

I have argued that the empirical evidence runs the other way (Braithwaite 2002: 215–16). Citizens are less motivated to attend neighbourhood watch meetings than they are to attend restorative justice conferences. Neighbourhood watch is seen as a form of community policing in decline, while restorative justice is growing. One reason is that neighbourhood watch meetings discuss more depersonalized security concerns than restorative circles. Restorative justice offers people an opportunity to make the personal political. Mothers can and do take the police to task for using excessive violence against their sons in restorative justice conferences in a way they never could in a court of law or through electoral politics. What we cannot claim, however, is that this frequently leads to changes in police policy. While there are many isolated examples where restorative justice processes have led to significant changes in national laws and national policies, the contemporary state of restorative justice is so far failing to realize its promise as a deliberative process that bubbles up policy change. Truth and reconciliation processes following armed conflicts are restorative justice processes that have stronger claims in that regard (see Braithwaite 2002: ch. 6). So do restorative circles to confront injustices such as bullying in schools, which have stronger claims for influencing education policy. In all this, we must remember that it can be more important to reform policy in a police district or an education district (or even a single school) than nationally. In a world of corporate power, it can be more important for restorative justice to change the culture of a single large corporation on an issue like sexual harassment than to have an elected representative speak on the matter in the parliament.

RESTORATIVE JUSTICE: DEMOCRATICALLY EXPERIMENTAL[1] BUT UNACCOUNTABLE?

Many of the concerns about restorative justice rest on a belief in the virtues of hierarchical accountability. Roche (2003) concludes from his survey of

[1] Dorf and Sabel 1998. Research and development on restorative justice has also been experimental in a scientific sense. The Centre for Restorative Justice at the Australian National University in 1995 commenced a randomized control trial on 1,300 criminal cases randomly assigned to court versus a restorative justice conference. Research/practitioner groups from Indiana, Pennsylvania, and the UK subsequently visited the Canberra experiment and then conducted a number of follow-up randomized controlled trials in their own jurisdictions. Preliminary evaluation results as of 2002 are summarized in Braithwaite 2002 and Strang and Sherman 2005.

accountability in twenty-five restorative justice programmes across six nations that while hierarchical accountability to prosecutors and courts that sit above restorative justice circles do useful work, horizontal deliberative accountability of one actor in the restorative justice circle to others in the circle does more work in practice. One of Roche's examples concerns accountability of the police for excessive use of force during arrest, or for coercing an innocent person to confess, which is more likely to be forthcoming within the circle from a citizen who pleads with the circle about such unfair treatment. In a court case, such a citizen will be silenced unless she is called as a witness relevant to the conduct of the offender, as opposed to the conduct of the police. As Dolinko (2003) has pointed out, in the case of an innocent offender coerced into a guilty plea, he will find it impossible 'to discuss with the victim what he's done and how to repair the harm he's caused when he knows quite well he has in fact done nothing and has caused no harm. And even if his participation in a conference could somehow be secured, the conference will hardly be a success—the putative offender will simply insist "I'm innocent; they're framing me; I didn't do anything to you and there is nothing for me to 'restore' or 'repair'!" ' Again, the accountability mechanism that is doing the work here is horizontal deliberative accountability in the restorative justice circle, for an account of how we could repair harm to a victim when we have not inflicted any harm upon them.

In criminal cases, Roche (2003) argues that there are some simple reasons why empirically it turns out that deliberative accountability in the circle does more of the work of accountability than accountability to higher-level institutions like directorates of public prosecutions and courts. One is timeliness. An obligation to give an account that occurs in the circle in the process of making a decision elicits immediate responses from other stakeholders: 'That's no excuse.' 'Is that all you are proposing to do?' 'What about the emotional havoc this has heaped upon your mother?' Such contestation of accounts inside the process of deliberation more often than not attracts an immediate response: 'What I want to say to mum is that I recognize that. I am so sorry, mum. I will never cause you that pain again. You know my plans to be a better son from now on.' This example of giving an account is not chosen casually. It is meant to illustrate Strang's (2002) empirical conclusion that emotional reparation like this turns out to be more important to accountability being accepted in the circle, even to victims of violent crime, than material reparation. Immediate face-to-face accountability therefore not only has the virtue of timeliness; it also has the virtue of authenticity of emotional communication in the giving of accounts.

Authenticity of emotional communication also builds commitment to follow through on accountability. One of the puzzles to those who have not experienced the emotional power that can be generated in a restorative justice conference for serious crime is why compliance is more likely to happen with

a victim-compensation agreement or community service agreed as a voluntary, non-enforcible outcome of a conference than with the legally enforcible order of a court. One reason is that the emotional dynamic of the offender discussing with a victim the pain she has suffered builds commitment when the offender promises to do something to try to heal that hurt. But, second, commitment to follow through is built among other stakeholders in the circle. An offender promises to attend an anger management programme. His mother says he was ordered to an anger management programme last time he offended. An uncle is moved to say: 'This time I'll take responsibility for making sure he goes. I'll pick him up every Tuesday night to get him there.' Then the uncle becomes a signatory of a conference agreement that says that this particular responsibility belongs to him. Roche (2003: 159) found the most elaborated version of this kind of commitment building in two American programmes that institutionalized a 'celebration circle' that reconvened the stakeholders when all the undertakings in the agreement were successfully completed. As a matter of research evidence, we cannot be sure which of the foregoing mechanisms is most important to the superior accountability that restorative justice delivers. What we can now be reasonably sure of is that it does deliver it. In a meta-analysis of thirty-two restorative justice evaluations by the Canadian Department of Justice, the biggest, most statistically robust, effect size was that completion of restorative justice agreements was higher than compliance with orders/agreements in control groups (Latimer, Dowden, and Muise 2001). A subsequent review by Poulson (2003: 187–9) combined data from several studies to show that both offenders and victims were significantly more likely to perceive offenders to be 'held accountable' in restorative justice cases compared to controls that went to court.

Now let us return to juxtaposing the immediate deliberative accountability in the circle to the delay of hierarchical accountability. The biggest problem with hierarchical accountability is precisely that it *is* hierarchical. By this I mean that an infinite regress of accountability is required. If guardians of accountability are arranged in a hierarchy as in the left-hand side of Figure 8.1, we have a problem when the top guardian is corrupt. And unfortunately criminal justice institutions such as police departments, and indeed whole states, are like fish; they rot from the head down. The only solution to the corruption of nth-order guardians is to add an $n + 1$th-order guardian. But if we arrange guardians of accounts in a circle (Fig. 8.1, right-hand side), each guardian can be a check on every other guardian. We can escape from the infinite regress of hierarchical accountability. The more separated public and private powers there are in a polity, the richer the checking of one guardian by many other guardians can be (Braithwaite 1997). So abuse of power by a restorative justice conference might be checked by a prosecutor, while abuse of power by the prosecutor might be checked by a court, the media, human rights NGOs, or indeed by a restorative justice circle reporting a complaint about the prosecutor to a court, an ombudsman, or a human rights commission.
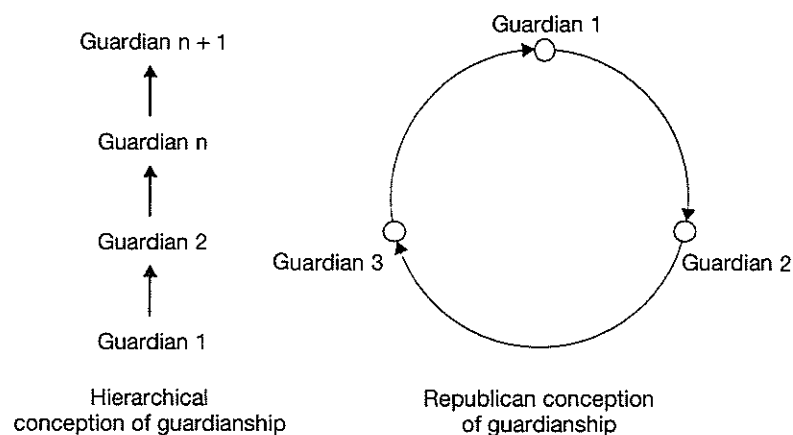
Fig. 8.1. Formal models of hierarchical and republican conceptions of accountability.

Deliberative accountability among a group of denizens who meet face to face has its own pathologies—like groupthink (JkernJanis 1971). So we actually need a prudent mix of deliberative accountability within the circle and accountability from a separate source of power that is external to the circle. What Figure 8.1 argues is that we can still get that mix of internal deliberative accountability and external accountability to separated powers by organizing circles of deliberative accountability in a circle. The republican ideal is for all nodes of governance in a separation of powers to become more deliberative in their decision making. This means a more deliberative parliament (Uhr 1998), more deliberative courts (Sunstein 1988), and more deliberative regulatory agencies (Braithwaite 2002). So we end up with a checking and balancing circle of deliberative circles.

Parker and I (Braithwaite and Parker 1999) have argued that restorative justice circles should be checked by the rule of law, and the rule of law should be permeable to messages bubbling up from the rule of the people as articulated in restorative justice circles. This is Roche's (2003) conclusion as well—deliberative accountability and external accountability have different effects;[2] while deliberative accountability is cheaper and more contextually grounded, and can therefore do most of the hard work of practical accountability, external accountability is also needed, particularly because of the superior linkage it can offer to a rule of laws enacted by democratically elected governments.

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[2] E.g. Roche (2003: 216) finds that horizontal accountability more often leads to interventions to 'prevent overly harsh outcomes', while vertical accountability more often leads to interventions to prevent outcomes that are 'too lenient'. Put another way, horizontal accountability works best for checking upper limits on punishment, vertical accountability for checking lower limits on punishment.

ACTIVE AND PASSIVE RESPONSIBILITY

Roche and I (Braithwaite and Roche 2000) have suggested that restorative responsibility might be conceived as that form of responsibility most likely to promote restoration—of victims, offenders, and communities. Given that framework, following Bovens (1998), we find a useful distinction between active and passive responsibility. Then we show that the active–passive responsibility distinction usefully maps on to distinctions between active and passive deterrence, active and passive rehabilitation, and active versus passive incapacitation. We argue that the active versions of deterrence, rehabilitation, and incapacitation are likely to be more effective than their passive versions. While these consequentialist considerations are important in motivating a restorative justice jurisprudence which is a jurisprudence of active responsibility, this part of the argument will not concern us here except in one respect.

This respect is that an important part of a mechanism by which active responsibility delivers active deterrence, active rehabilitation, and active incapacitation is that the circle from which accounts are requested is widened. In our development of these ideas with business regulatory agencies in Australia, we would ask for a conference with those causally responsible for an offence within the company. That conference would often break down when these corporate executives would refuse to accept responsibility and say 'See you in court'. Instead of proceeding to litigation, however, what we would do is widen the circle. The regulator would ask for another conference with the boss of those directly responsible joining the circle. Inviting the boss to give an account would sometimes backfire even more badly, because the boss might be an even tougher nut than her subordinates. Then our idea was to widen the circle even further. In one case with this approach while I was a part-time commissioner with our national antitrust and consumer protection agency, we widened the circle right up to the Chairman of the Board. The Chairman could be moved by shame about the corporate offence and by a simple appeal to his sense of moral responsibility. He fired his CEO (not very restorative!), participated in an agreement where generous compensation was paid to victims, impressive internal compliance measures were put in place to prevent recurrence of the offence, and a program of industry-wide compliance reform was led by the company. The idea is that we can keep widening the circle of accountability; at each step there are extra people with extra capacities to prevent recurrence of injustice and to right the wrongs of past injustice. With active deterrence, we keep widening the circle beyond hard targets who are not deterrable until we reach a responsible target who can be deterred by shame. With active rehabilitation of a homeless young offender, we widen the circle beyond a nuclear family who will not have him back until we find a more distant relative or family friend, perhaps in another city, who will take him into their home.
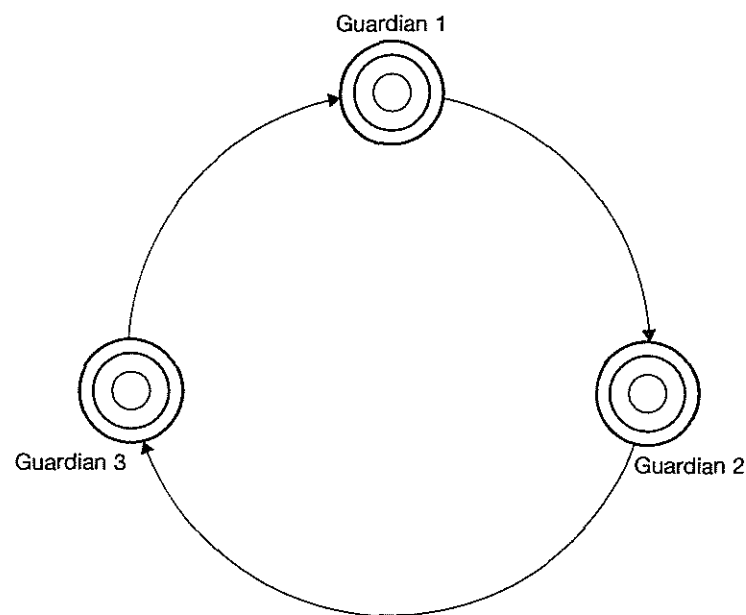
Guardian 1

Guardian 3

Guardian 2

Fig. 8.2. The ideal of a circle of checking and balancing separated powers, each of which is potentially a widening circle

In Figure 8.1 we ended up with a checking and balancing circle of deliberative circles. Now we have added the further idea that the circles should be iteratively widened to remedy responsibility and accountability failures. So the ideal is a circle of widening circles of deliberative accountability (Figure 8.2).

Mark Bovens (1998: 27) first distinguished active from passive responsibility. Elaborating Bovens's conception somewhat, passive responsibility is something we hold wrongdoers to; we hold someone responsible for something they did in the past. Active responsibility means *taking* responsibility for putting something right into the future. One can be actively responsible for righting a wrong in the future without being causally responsible for the wrong in the past. Family members of an offender might offer to work with the offender to help repair the damage that a victim of crime has suffered, for example. Restorative justice is partly about community building, by encouraging citizens who are not offenders to assist in righting wrongs that offenders have caused. One virtue of the active responsibility of an offender's loved ones is that it nurtures active responsibility on the part of the offender. Restorative justice is about creating a space in which offenders are most likely to take responsibility. Conventional Western criminal justice is about creating spaces in which offenders will be held responsible in proportion to their culpability.

HOW DOES THE RESTORATIVE JUSTICE ACCOUNT OF RESPONSIBILITY DEEPEN DEMOCRACY?

The first respect in which the account of responsibility/accountability sketched here is claimed to deepen democracy is that there is a shift in the balance of how responsibility is exacted, from responsibility as a coercive imposition of states upon citizens to responsibility as something that autonomous citizens take after listening to a democratic conversation about harms done, dues owed. Second, the principal stakeholders in a directly democratic conversation about an injustice—offenders and victims in the case of a crime—can directly veto any allocation of responsibility they view as unjust. Then, however, these principals must put the determination of responsibility into the hands of the less participatory but more authoritative process for allocating responsibility in the mainstream legal system. That is, principals should retain their right to adjudication of responsibility according to rules of law enacted by a democratic state. Without abandoning this old democratic right, restorative justice should mean a new right to the option of directly participatory democracy over responsibility allocations. Citizens are simultaneously accorded citizenship rights to accountability of the rule of the law and denizenship rights to deliberation at a node of governance that directly affects their lives.

Third, even when the state takes over authorization for responsibility allocations, there should be further opportunities at each stage of state intervention (police, prosecution, court, prison, parole, etc.) for citizens to take responsibility back into the realm of direct stakeholder democracy. State accountability is reformed to enable responsibility to become something that autonomous citizens freely choose, as opposed to something the state enforces upon them. Every time accountability for justice obliges the state to "steal a conflict" (Christie 1977) from the direct control of stakeholders in that conflict, it should also create a path where denizens can take it back so long as they agree to provide an account to the state of how they use the new opportunity to take responsibility for any serious injustice.

Hence, on this theory, responsibility for injustice is thrown back to the realm of a direct democracy of denizens, qualified by accountability to the state to ensure that fundamental principles of the rule of law are not fudged. Yet that state accountability is itself being qualified by an exhaustive commitment to keep throwing the game back from external to internal accountability in the circle of stakeholders. Democracy is enriched when the justice of the people and the justice of the law each become more vulnerable to the other (Braithwaite and Parker 1999). Democracy can be enriched by the set of preferences for responsibility being active rather than passive, bottom-up rather than top-down, accountable both deliberatively and externally rather than just deliberatively

among stakeholders or just externally to a state agency. Together these preferences make restorative justice a more deeply democratic practice of justice both in terms of citizen participation and in terms of accountability to a rule of law that is an accomplishment of the people. Not only is it a practice that takes democratic accountability more seriously than does a rule of law that we are held to by grey men in white wigs. It is also a practice that takes responsibility more seriously because it never settles for passive responsibility, but always struggles to turn passive back into active responsibility owned by wrongdoers and other stakeholders. To settle for passive responsibility, cursed by the criminal as a rope breaks his neck, is to settle for a muted responsibility and a muted democratic conversation about justice.

ELECTORAL, CONTESTATORY, AND DELIBERATIVE DEMOCRACY

This extended consideration of restorative justice shows the feasibility of a major shift in a significant institutional arena from decision making by hierarchical state institutions to deliberative decision making by stakeholders in civil society partnering the state. Elsewhere I have attempted to show how these principles can be applied more widely to tort and contract law, corporate decision making, education, economic policy, and rebuilding democracy following a war, among other arenas (Braithwaite 2002). In some societies—for example, New Zealand, Norway, and Austria—the scale of this displacement with criminal justice is now substantial. In a world in which the real decisions that affect crime and security and any number of other important matters are less in the hands of states than in private–public networked governance by denizens of the place where the crime happens, nodal governance wherein democracy is deliberative makes more and more sense.

Contestatory democracy is what triggers nodal deliberative governance—the victim of crime complains of being offended against, an environmental NGO calls a conference to solve a pollution problem, a parent calls a school conference to discuss a bullying problem in the school, an Afghan warlord calls a conference to confront international peacekeepers who, he alleges, is harassing his men.

Contestatory democracy also plays the role that Pettit saw as its primary one—that of contesting the decisions dished up by electoral democracy. None of the revisionism of contestatory citizenship and deliberative denizenship denies the importance of electoral democracy. Indeed, in a world of pluralized governance, we need electoral democracy at many levels—city government, state government, European Union, United Nations, annual meetings of corporations to elect directors, annual meetings of NGOs and professional associations to elect officeholders. It is just that in a world of networked governance, perfect electoral democracy at all these levels would be a thin set of reeds to protect

against domination. Pluralized electoral democracy still leaves us with a shallow democracy unless we also invest in the kind of contestatory democracy of citizens advocated by Pettit, complemented by deliberative democracy of denizens at strategic nodes of governance, as advanced by Shearing and Wood (2003). A rich democracy gives us frequent opportunities to *vote* for people who represent our interests and many nodes of governance that give us an opportunity to *contest* power and *deliberate* in our own voice at that node of governance. Controlling domination does not require that we all spend our evenings in meetings, just that enough of us assume the responsibilities of denizenship when we see injustices that are not being righted. It requires a learning democracy, in which enough of us learn to care enough to engage, learn to be democratic through early experiences of deliberation in schools and families. Controlling domination requires that we learn how to convene nodes of governance at the strategic intersections of networks that can regulate abuse.

CONCLUSION

The crime example has illustrated that statist governance working on its own is not very effective in responding justly and effectively to a problem like crime. In contemporary conditions the effective governance of security is networked. Among its requirements is that denizens of a place forge nodes of governance that work to prevent the niches of criminal opportunity that emerge in that place. I have contended that there is evidence that deliberative denizenship sometimes works to secure our property and our persons from violence. This is a pragmatic participatory politics favoured by growing ranks of hard-headed state police, not a deliberative democracy confined to romantic dreamers of radical politics. But it is not enough. We also need a state with awesome powers to shoot at, interrogate, and incarcerate those who threaten our security. Here the classic form of Pettit's republicanism comes into its own. Pettit gives an account of why such frightening state powers are tolerable, but only if they are contested by active citizens of a democracy, and only if their exercise is non-arbitrary, constrained by a rule of law. A state with a Guantanamo Bay cannot be a republic.

Yes, freedom as non-domination requires contestatory citizenship. But our case study also shows that it requires deliberative denizenship. Let us assume that Castells is right—that while states still matter a lot, governance is becoming less statist, more networked, across the spectrum of all issues of public concern, not just crime. If so, deliberative denizenship that seizes opportunities for nodal governance will become increasingly central to institutions of republican governance. An emergent role for contestatory citizenship will then be to contest down to the decisions of the denizens of places as well as up to the rules and rulers of states.

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