

Holism, Justice, and Atonement

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I. THE BELIEVING GAME AND THE CRITIQUE GAME

Erik Luna in his contribution to this Symposium has provided us with a critique of mainstream theories of punishment that is without exception. He laments the endless trench warfare between proponents of these different positions and advocates a theoretical synthesis that is procedural.¹ I agree there is much to be synthesized, and there is particular virtue in synthesizing explanatory and normative theories. But one of the reasons there is virtue in such synthesis is that it enables us to see that some normative theories may be coherent in some possible world, but not in any empirically plausible world. Obversely, explanatory theories of deterrence, incapacitation, and rehabilitation can motivate ugly practices unless they are regulated by normative theories. Hence, part of the rationale for synthesis is to confront incompatibilities, and the contributions to this Symposium certainly draw out some important ones.

That said, Professor Luna is persuasive that the academy has not got the balance right, that critique dominates the landscape too much. David Wexler and Deborah Tannen suggest that we should become more capable of playing the believing game, going with an idea and building on it for an extended period of research and development, ultimately being willing to discard it, but being careful not to kill fertile ideas in the womb.² Playing the believing game enables us to become more systematic in cataloging the positives of an idea, just as playing the critique game helps us to be systematic in accounting for the negatives.³ It is alternation between the believing game and the critique game that is the stuff of the most productive intellectual work, moreso than finding some middle way that is systematic about neither the positives nor the negatives.⁴ Not every article we write has to achieve this balance; balance between the critique and believing games is better conceived as a project of intellectual communities than of individual contributions. This Symposium has one contribution that more or less plays the believing game (Luna) with respect to restorative justice and two the

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¹See Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205.

²See DEBORAH TANNEN, *THE ARGUMENT CULTURE: STOPPING AMERICA'S WAR OF WORDS* 273-74 (1998); David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, in *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* 449, 449-64 (Dennis P. Stolle et al. eds., 2000).

³TANNEN, *supra* note 2, at 273-74; Wexler, *supra* note 2, at 449-64.

⁴TANNEN, *supra* note 2, at 273-74; Wexler, *supra* note 2, at 449-64.

critique game (David Dolinko and Robert Weisberg). All are splendid contributions: Luna for the way he challenges restorative justice to be more holistic;⁵ Professor Dolinko for the way he poses sophisticated and credible challenges to the philosophical foundations of the tradition;⁶ and Professor Weisberg for the nuance with which he explores the problematic nature of the community tradition.⁷ Particularly interesting from the belief/critique perspective are the contributions of Paul Robinson and Stephen Garvey, which both in quite different ways alternate between the critique and the believing games with respect to restorative justice.⁸ In both cases the dialectic is fertile; both throw up fresh perspectives on restorative justice. One interesting instance where Professors Robinson and Garvey actually converge is on arguments as to why “group conferences and circles are, by virtue of the group dynamics that constitute those processes, less likely than victim-offender mediation to result in excessively harsh or excessively lenient sanctions.”⁹ This is the first time I have seen this particular argument developed in the restorative justice literature.

Such balance matters if we consider that we must be careful with restorative justice that the story does not unfold in the twenty-first century in the way the story of rehabilitation unraveled in the twentieth. For the first three-quarters of the twentieth century, criminologists did not temper their commitment to rehabilitation with a robust willingness to play the critique game. Then in the mid-1970s came the “nothing works” revolution and with it the rise of the new retributivism.¹⁰ It was never true that nothing works; many types of rehabilitation programs, especially social cognitive and human capital development ones, achieve modest success in reducing reoffending for a substantial proportion of cases.¹¹ The excesses of indeterminate sentencing in the name of rehabilitation in the decades after World War II and of retributive sentencing since 1980 were great evils, both of which might have been avoided had we been more systematic in our dual commitments to playing the believing and the critique games with rehabilitation.

⁵See Luna, *supra* note 1, at 282–300.

⁶See David Dolinko, *Restorative Justice and the Justification of Punishment*, 2003 UTAH L. REV. 319.

⁷See Robert Weisberg, *Restorative Justice and the Danger of “Community,”* 2003 UTAH L. REV. 343.

⁸See Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303; Paul H. Robinson, *The Virtues of Restorative Processes, the Virtues of “Restorative Justice,”* 2003 UTAH L. REV. 375.

⁹Garvey, *supra* note 8, at 316; see also Robinson, *supra* note 8, at 375–77.

¹⁰See, e.g., R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME & JUST. 1, 1–2 (1996) (discussing how “nothing works” philosophy led to retributionist revival).

¹¹See Mark W. Lipsey, *Can Rehabilitative Programs Reduce the Recidivism of Juvenile Offenders? An Inquiry into the Effectiveness of Practical Programs*, 6 VA. J. SOC. POL’Y & L. 611, 640 (1999).

Luna is right in his scene-setting article that holism is fundamental to the philosophy of restorative justice.¹² For example, restorative justice requires us to think holistically about legal justice and social justice rather than to regard legal justice and social justice as quite separate things, best delivered by separate institutions (say, the criminal justice system for legal justice, the welfare system for social justice).¹³ But perhaps we also need to be more dialectical than Luna allows with holism. This means alternating between thinking holistically and pulling things apart to analyze them separately. Hence, a good question to work on is how can the criminal justice system help build social justice instead of crushing it (by, for example, creating a society where more young black men or indigenous people are in prison than in universities)? Equally, a good question is what are the activities in pursuit of social justice for which the justice system provides a deficient vehicle, compared to the welfare system, for example? So my prescription is that we can be systematic about discovering the positives from playing Luna's holism game. But we should also be as systematic as we can manage about playing the disaggregation game, partly by way of critique of the holism game so that we might account for the pitfalls of holism. So, for example, we need to take seriously Dolinko's challenge: Is not the tort system better designed to do the job of reparative justice than criminal law?

Luna's article is refreshing in the way it pushes the believing and holism games. However, it does gloss over some incompatibilities among the synthesized positions that cut pretty deep. Most importantly, I cannot see how one can nurture restorative values like mercy and forgiveness while taking retributive proportionality seriously.¹⁴ Upper limits against the imposition of disproportionately high punishments can and should be part of a synthesis of just deserts and restorative justice. But lower limits are a roadblock to victims being able to get the grace of mercy when this is what they see as important to their own healing. The *Clotworthy* case, heard by the New Zealand Court of Appeal in 1998,¹⁵ illustrates this tension:

Mr. Clotworthy inflicted six stab wounds, which collapsed a lung and diaphragm of an attempted robbery victim. Justice Thorburn of the Auckland District Court imposed a two-year prison sentence, which was suspended, a compensation order of \$15,000 to fund cosmetic surgery for an "embarrassing scar," and two hundred hours of

¹²See Luna, *supra* note 1, at 282–300.

¹³John Braithwaite, *Restorative Justice and Social Justice*, 63 SASK. L. REV. 185, 186–94 (2000).

¹⁴This is not to deny that there is a retributive conception of mercy and that there could be a retributive theory of forgiveness. It is just to say that mercy and forgiveness as restorative values mean something very different from what they could mean under any retributive formulation.

¹⁵The texts of the opinion and sentencing notes for *The Queen v. Clotworthy* [1998] are available at <http://www.restorativejustice.org.nz/Judgements%20Page.htm>.

community work. These had been agreed [upon] at a restorative conference organized by Justice Alternatives. The judge found a basis for restorative justice in New Zealand law and placed weight on the wish of the victim for financial support for the cosmetic surgery and emotional support to end through forgiveness “a festering agenda of vengeance or retribution in his heart against the prisoner.” The Court of Appeal allowed the victim to address it, whereupon the victim “reiterated his previous stance, emphasising his wish to obtain funds for the necessary cosmetic surgery and his view that imprisonment would achieve nothing either for Mr. Clotworthy or for himself.” The victory for restorative justice was that “substantial weight” was given by the court to the victim’s belief that expiation had been agreed; their honors accepted that restorative justice had an important place in New Zealand sentencing law. The defeat was that greater weight was given to the empirical supposition that a custodial sentence would help “deter others from such serious offending.” The suspending of the two-year custodial sentence was quashed in favor of a sentence of four years and a \$5,000 compensation order (which had already been lodged with the court); the community service and payment of the remaining compensation were also quashed. The victim got neither his act of grace¹⁶ nor the money for the cosmetic surgery.¹⁷

Overwhelmingly, retributivists and utilitarians would think the court of appeal right to overturn this decision, whereas restorativists like me see Justice Thorburn as correct. When push comes to shove, the choices get pretty stark, and perhaps on some fronts Luna is too sanguine about the integrative possibilities between retributive, utilitarian, and restorative aspirations.

Nevertheless, he is surely right that a fundamental part of restorative justice is a procedural ideal that allows retributivists, utilitarians, and others to agree to disagree. The holistic process on offer with restorative justice focuses on the particulars of a given crime rather than simply abstracting the offense into a general category. Empirically, there is little doubt that retributivists and utilitarians often agree on the same outcome in particular cases for philosophically incompatible reasons.

¹⁶In his contribution to this Symposium, Robinson says that this was a case of a desperate victim agreeing “to fore[go] justice in order to rid himself of the disfiguring scar the offender caused.” Robinson, *supra* note 8, at 378 n.7 (discussing *Clotworthy*). This is not at all my understanding of the position of the victim. The victim felt that prison was a destructive institution. For him, foregoing an imposition of imprisonment was not foregoing justice but was the right way to achieve justice.

¹⁷John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 87–88 (1999) (citations omitted). The victim has since committed suicide for reasons unknown.

II. EQUAL JUSTICE AND PROPORTIONALITY

The *Clotworthy* case also shows that there is no puzzle, in Dolinko's terms, as to "precisely why treating equally culpable offenders equally should be said to entail treating victims unequally."¹⁸ In restorative justice processes, most victims who say they would like the grace of forgiving their offender and helping them to get on with their lives are actually given that, at least in Australia and New Zealand.¹⁹ Most cultures and most major religions encompass the notion of the grace that can come of giving a gift to one who has wronged us instead of exacting a punishment. This is true of even unusually punitive cultures like that of the United States—the Marshall Plan was the finest moment of the American century.²⁰ One reason victims are not equally empowered to replace punishment with gifts to the offender is that objections are raised about equal punishment of offenders. It is not an answer to say that the victim who wants to replace the exaction of a punishment with the giving of a gift could make such a claim in tort. The law of tort simply does not accommodate the idea of inflicting a gift upon the harmdoer.

Dolinko rightly suggests that we could take the view that "repairing the victim's injury is no part of what the criminal justice system does, and that system has not treated the two victims unequally."²¹ But he also in his very fair presentation says that this is precisely the move restorativists reject.²² Luna's holism actually is the better move here because it is pie in the sky that tort law would do anything for the aspirations of even one percent of crime victims. Dolinko is right that we can and should ameliorate this with "a government fund to compensate those victims who either lack the resources needed to pursue civil litigation or were victimized by judgment-proof offenders."²³ However, both a government bureaucracy and tort litigation would be grossly inefficient compared to a criminal justice system with a restorative justice orientation for minor criminal cases (the bread and butter of the system). For example, most juvenile shoplifting in the most restorative-focused jurisdictions is dealt with by diversion through a police caution; the police take the children home to their parents/guardians, who are invited to take responsibility for a resolution/discipline package that will normally involve returning all stolen goods. Do we really want a world where this commonsense efficiency/fairness is replaced by one where

¹⁸Dolinko, *supra* note 6, at 332.

¹⁹See Braithwaite, *supra* note 17, at 25–26 (discussing concepts of grace, or "shalara").

²⁰MARK A. STOLER, GEORGE C. MARSHALL: SOLDIER-STATESMAN OF THE AMERICAN CENTURY 1 (1989).

²¹Dolinko, *supra* note 6, at 333.

²²See *id.*

²³*Id.*

offenders are legitimated in saying "I've paid my dues through my punishment; if you want your stuff back, sue me or ask the government to compensate you"?

The holistic move here is to see equal punishment for equal wrongs as a subsidiary concern to, or just a part of, what most of the great legal philosophers of the past, and contemporary ones such as Ronald Dworkin²⁴ as well, have regarded as our most fundamental obligation—to show equal concern and respect for all persons.²⁵ It is systematically disrespectful of victims to say that the criminal justice system is not there to respond to their reasonable aspirations for justice and for a voice, that if they want that they can go somewhere else, another place whose doors will in practice be equally closed to them.

Moreover, philosophers who take the equal application of rules very seriously in a wide range of contexts—from Cass Sunstein to Fred Schauer—are also clear that if we could perfect equal concern for all affected by an injustice, we would not do it by enforcement of simple rules like equal punishment for equal wrongs. As Sunstein puts it: "If human frailties and institutional needs are put to one side, particularized judgments, based on the relevant features of the single case, represent the highest form of justice."²⁶ Schauer argues even more emphatically:

When we entrench a generalization, therefore, we do not further the aim of treating like cases alike and unlike cases differently. On the contrary, it is particularism that recognizes relevant unalikehood, drawing all the distinctions some substantive justification indicates ought to be drawn. And it is particularistic rather than rule-based decision-making that recognizes all relevant similarities, thereby ensuring that substantively similar cases will in fact be treated similarly.²⁷

Schauer's case for rules is argued in terms of reliance, efficiency, stability, and enabling a proper allocation of power. The restorativist can argue that reliance that punishment will never exceed an upper limit proportional to the seriousness of the offence is quite enough reliance. Who wants the reliance of knowing that

²⁴RONALD DWORKIN, *LAW'S EMPIRE* (1986).

²⁵*See id.* at 195–215. I am actually not in the least attracted to evaluating criminal justice in terms of whether it dispenses more equal justice for equal wrongs, in contrast to the view attributed to me on this matter by Dolinko. Philip Pettit and I have been keen to show those who do set more equal justice for equal wrongs as their desideratum that, paradoxically, a theory that does not set out to achieve this objective can do better against it than one—retributivism—that does. *See* JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 182–201 (1990).

²⁶CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 135 (1996).

²⁷FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 136–37 (1991).

you are prevented from getting less than this, or much less? The reliance argument makes a good case for criminal law with upper limits, as opposed to open-textured evaluation of wrongdoing unconstrained by rules. But it does not make much of a case for lower limits or proportionality all the way down. I could work through a restorativist spin on all of Schauer's reasons for rules and why in criminal law they do not make a case for equal punishment for equal wrongs. But this would distract me from my core point, which is that equal punishment for equal wrongs is a travesty of equal justice.

Restorative justice has no easy escape from the horns of the dilemma that equal justice for victims is incompatible with equal justice for offenders. First, because it is a trilemma: restorativists are enjoined also to be concerned with justice for the community. So of course restorativists must reject a radical vision of victim empowerment that says any result the victim wants she should get so long as it does not breach upper constraints on punishment. Restorativists must abandon both equal punishment for offenders and equal justice (*e.g.*, compensation, empowerment) for victims as goals and must seek to craft a superior fidelity to the goal of equal concern and respect for all those affected by the crime. The restorative justice circle is an imperfect vehicle for institutionalizing that aspiration (though for a wide range of cases, less imperfect than courts of law). But I would argue that the aspiration is right.

The restorative circle heads down the path of the holistic consideration of all the injustices that matter in the particular case, as suggested in the quotation from Schauer, but in a way constrained by limits on punishments, rights, and rules that define what is a crime and what is not. We might be stumbling as we feel our way, but it does seem a better path than the narrow road of proportional punishment.

While we should not seek to guarantee offenders equal punishment for equal wrongs, the law can and should assure them that they will never be punished beyond upper limits. While victims cannot be guaranteed their wishes, the law should assure them of a right to express their views in their own voice. It should also guarantee a minimum level of victim support when they are physically or emotionally traumatized by a crime. This falls far short of an equal right of victims for full empowerment and full compensation. But the minimum guarantees I propose on the offender side and on the victim side put some limits on us as we stumble down the path toward holistic justice. We are constrained in that however we try to implement the ideal of equal concern and respect for all affected, we must assure that certain minimum guarantees are always delivered to certain key stakeholders. This puts limits on the atomistic inequality we can inflict while enjoining us to eschew the error of single-minded pursuit of equality for the one that is incompatible with equality for the other. But it does not resolve Dolinko's legitimate worry that offenders will be treated differently "depending

on the temperament and circumstances of their respective victims and on the skills and emotions that they and the victims bring to the negotiating process.”²⁸

While the worry is a legitimate one, it must be kept in empirical perspective. It would be a deep worry if restorative justice meant that offenders who had a vengeful victim got more punishment than they would have by going to court. To protect against this, restorative justice should be constrained against punishing more heavily than courts would for the same offence. But in practice the worry is one of courts punishing more punitively than restorative justice and more punitively than they should by restorative lights. *Clotworthy* is a paradigm case, albeit an extreme one, rather than a crazy case, because all the evidence is that when courts overrule restorative justice conferences, it is overwhelmingly to increase punishment, to trump the mercy victims have voted for, and is rarely to reduce punitive excess successfully demanded by victims at conferences. Empirically, Dolinko’s concern reduces to one of offenders in restorative justice cases with kindly victims getting more mercy than they deserve by retributive lights. This is a worry to retributivists but not to restorativists.

Dolinko’s more philosophically foundational concern is that the republican theory Philip Pettit and I deploy to motivate restorative justice allows zealous agents of the criminal justice system to consider whether there would be good consequences from punishing the innocent.²⁹ We have had a lot to say on this,³⁰ and it would be tedious to repeat it. But our most distinctive claim compared to greater minds than ours—such as those of Hare, Kaplow, and Shavell, who Dolinko says have used the same ploy of reliance on the dangers of the framing of innocent people becoming widely known³¹—is this. It is that the subjective component of dominion or freedom as non-domination as a value means that people cannot enjoy it if they fear that they might be punished even if they are innocent. Dominion can be threatened in this way even if it has not in fact happened that the innocent have been framed. The crucial point is that citizens cannot enjoy freedom as non-domination in a society that fails to criminalize the framing of the innocent. What is needed is a legal institutionalization of a rejection of the notion that it is only contingently wrong to punish the innocent. The law must assure us of our dominion by saying that it will never accept punishment of the innocent.

Of course it is true that in the crazy case where punishment of the innocent is necessary to save all human life, any consequentialist would agree with such punishment. But the question is whether there are any scenarios in the real workings of the criminal justice system where this would be permissible and where therefore it would be right to exonerate a person who has punished the

²⁸Dolinko, *supra* note 6, at 331.

²⁹*Id.* at 324–25.

³⁰*E.g.*, BRAITHWAITE & PETTIT, *supra* note 25, at 71–80.

³¹Dolinko, *supra* note 6, at 325.

innocent. Pettit and I contend that the answer is no, and that republicans erect a stronger ethical edifice against punishment of the innocent than do utilitarians. This is because if officials do not disavow punishment of the innocent and take steps to precommit themselves to not punishing the innocent, then there will always be a suspicion that they may, a suspicion promoted in publications like the *Utah Law Review*! As a result, we would all have our freedom as non-domination compromised so far as these officials reserve the right to exercise such discretion against any one of us. In doing that, they are standing over us with an arbitrary power. The difference between republicans and utilitarians arises because officials that reserve this right may impact only a little on our happiness, or even increase it, as Dolinko points out.³² The relevant difference between utilitarians and republicans is that for republicans it is fundamental to institutionalize constraints against arbitrary exercise of power; otherwise there is no dominion for citizens.

Dolinko's challenge against our position on this front is both the most formidable and fair minded that I have read. He gives the hypothetical of the detective framing for some burglaries a derelict who is so drunk and suggestible that he believes he did commit them, confesses, apologizes, and mends his ways, making victims feel more secure.³³ It is certainly something that could happen. But could a republican sanction the detective's conduct? Never. Ingenious as it is, the scenario depends on the detective being sure that the drunk will not suspect he is being framed. The detective can never be sure that a witness will not later come forward to testify credibly that he saw the burglar run from the home and that he was of a completely different appearance or gender from the defendant, that the alleged offender will not later remember something he was doing that night that he has currently forgotten, or that another witness will not come forward and testify that she was drinking with him at the time. The republican defense of institutions to forbid ever punishing the innocent stands; to compromise them would, even in the face of the most plausible situational challenges, risk the erosion of citizens' subjective sense of dominion.

Once the legal institutionalization of constraints on arbitrary power required by republicanism is robustly in place, Dolinko can believe that our philosophy was just another in a long line of consequentialist tricksterism in weaseling out of our obligation to punish the innocent, and we can remonstrate that we do have some distinctive republican reasons for why we must tie our hands against ever doing so. But the important thing is that Dolinko, Pettit, and Braithwaite can agree that the law should be in place. We will disagree on who has the most compelling grounds for the constraint that will provide the most forceful motivation to honor it, but the important thing then is really to put that behind us and do the more important work of institutionalizing vigilance to assure that those who frame the

³²*Id.* at 326–27.

³³*Id.* at 328–29.

innocent are charged criminally for doing so. Punishment of the innocent is not an unusual event, and when it occurs it deeply threatens our dominion, so the consequentialist must be preoccupied with the good consequence of reducing the incidence of innocents being framed.

Restorative justice makes some interesting moves to institutionalize a reduced probability that the punishment of the innocent could be contemplated. I appreciated Dolinko's insight in regard to a most important one:

Even so, the restorative justice proponent may insist, republican theory *applied to the real world* will never call for deliberately subjecting an innocent person to a restorative justice practice such as conferencing (to pick an example). For what would be the point? If the alleged offender is truly innocent, and is someone the authorities are trying to scapegoat, he will be protesting his innocence. If called on to take part in a conference he will almost certainly refuse—he is *not* going to agree to discuss with the victim what he has done and how to repair the harm he has caused when he knows quite well he has in fact done nothing and has caused no harm. 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’!”³⁴

In lower court trials with coerced guilty pleas, it is actually more plausible that intimidated offenders stand silently while they are dispatched to punishment from the bench. In a variety of ways, a republican institutionalization of restorative justice would deliver superior compliance with proper constraints against inappropriate punishment, such as the proscription of punishing the innocent, than retributive institutionalizations of criminal justice. Republicans must more often grant mercy in cases where the retributivist must punish. Consequently, in a system prone to error, the retributivist will more often make the error of punishing the innocent.

Consider the deontologist's dilemma of whether she is willing to be consequentialist about making enforcement work to assure that upper constraints on punishment (including no punishment of the innocent) are honored. Of course, that enforcement action must itself honor proper limits. At each level of this regress the republican theorist believes she can design a regulatory strategy that is maximally effective (at the first level for preventing the injustice, at the second level for preventing breach of the constraint) while honoring appropriate limits. The retributive deontologist is pessimistic about this capability at the first level

³⁴*Id.* at 328.

but seems to be an optimist at the second level. If we are a retributive deontologist at the first level, we must consider whether also to be a retributive deontologist at the second level. That is, do we impose a punishment proportionate to wrongdoing on a person who has breached proper limits on punishment—be that person a judge, police officer, parent, or citizen? What the consequentialist should do is regulate such conduct with the regulatory strategy best designed for achieving the good consequence of honoring the sentencing constraint, combating judicial corruption, regulating community stigmatization or corporal punishment of offenders that exceeds acceptable limits. If the deontologist says no, what we must do is give the noncompliant judge or citizen the punishment she deserves; then the deontologist has done a worse job of honoring the first constraint than the consequentialist. On the other hand, the retributive deontologist might say “I am only constrained to dispense just deserts when enforcing the law against injustice. When enforcing the law that regulates this law enforcement I will be a consequentialist who seeks to maximize the honoring of proportionality constraints.” This second answer is the one the pragmatic consequentialist hopes for. Still the consequentialist must ask: “What then will be your consequentialist theory in this second order enforcement task? How will it be secured against breach of proper constraints? And what is the reason you choose to regulate primary rule-breakers deontologically while regulating the regulation of rule-breaking (by judges, police, parents, or citizens in a conference) consequentially?”

One of my colleagues, Declan Roche,³⁵ has been working systematically to define the ways in which restorative justice processes might increase accountability in respect of threats such as the punishment of the innocent, and many others. In his empirical work he found a variety of ways in which criminal justice officials who abuse their power face greater risk in a circle than in a courtroom. And of course the accountability of the courtroom is not removed in restorative justice. It remains standing above the restorative justice conference should there be an alleged abuse of process or outcome that causes some participants to refuse to sign an agreement or a prosecutor to contest it.

In spite of Roche’s empirical results, Dolinko is probably right that I am overly optimistic that the further protection of publicly funded advocacy services for powerless delinquent youth could be secured in many jurisdictions.³⁶ But they are already in place in some, including my own, so this is not an impossible political struggle. In contrast, I stand by my view that I have never seen evidence of a place or time in the history of complex societies where the powerful—specifically, corporate criminals—have not been able to mobilize that power to be punished less severely than the poor for crimes of comparable culpability. Moreover, I continue to believe there are good theoretical reasons

³⁵DECLAN ROCHE, ACCOUNTABILITY IN RESTORATIVE JUSTICE (2003).

³⁶Dolinko, *supra* note 6, at 337.

why this is a sociological universal. We should be committed to evidence-based social science, however, so if Dolinko had provided an example of such a society, I would have been open to dissuasion from this theoretical dogma. Because I do not hold myself out as an expert on the United States and make no claims about the United States in my empirical work on restorative justice, I defer to Dolinko's judgments on the limited relevance of the research of we Antipodean scholars for the United States.³⁷

III. ABOLISH THE CONCEPT OF CRIME?

Dolinko wonders "if 'repairing the harm' is truly the focus and the touchstone of our response to crime."³⁸ Why have a notion of crime at all that is distinct from civil wrongs or torts? In a different way, Garvey asks the same question. He accuses restorative justice theorists of failing to make any distinction between harms and wrongs and therefore having no rationale for criminalization.³⁹ In the process, Garvey actually lays bare the deepest flaw in Dolinko's reasoning on the criminalization question. Dolinko asks, "why not permit a third party to substitute for the offender and provide the requisite compensation or other 'repair' to the victim?"⁴⁰ "Repairing the harm," Dolinko contends, will be as well accomplished if, say, a stolen car is replaced by the offender's "affluent and indulgent sister."⁴¹ There is no doubt that such an arrangement, a not uncommon kind of outcome for restorative conferences with indigent young property offenders, achieves the good from a restorative perspective of material reparation for the victim. If there is also the common form of side agreement of some future repayment of the generous relative in cash or kind, then there is the further virtue of repairing harm that has been done to this relative as a result of the crime. But Garvey points out that this material form of reparation is not as important in criminal law as the repair or restoration of relationships, which he conceptualizes as atonement.⁴² The empirical evidence on what victims say is most important to them in the criminal process is in accord with Garvey's position here: emotional and relational forms of reparation seem to be more important to most victims than material reparation.⁴³

That said, I do not think Garvey himself offers an appealing theory of criminalization. He argues that crimes are acts that not only cause harm but are also wrongs.⁴⁴ There is no restorative justice theorist I know who would disagree

³⁷*Id.* at 334–37.

³⁸*Id.* at 338.

³⁹Garvey, *supra* note 8, at 306–07.

⁴⁰Dolinko, *supra* note 6, at 338.

⁴¹*Id.*

⁴²Garvey, *supra* note 8, at 311–16.

⁴³HEATHER STRANG, REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE 18 (2002).

⁴⁴Garvey, *supra* note 8, at 306–07.

that criminalization should never be considered for something that is not a wrong as well as a harm.⁴⁵ But restorativists also say most wrongs should not be crimes, something I am sure Garvey would agree with, but did not say. Infidelity and lying may be wrong, may even be injustices to a wronged party, but they should not be crimes. According to Pettit's and my republican theory, if we cannot protect ourselves from the predations of the criminal justice system by remaining blameless, the subjective element of our dominion is deeply threatened; we have no freedom from state domination. The theory argues that we should use utmost parsimony in criminalizing wrongs, resorting to civil law and informal dispute resolution whenever dominion (freedom as non-domination) can be as well secured as through criminalization. Criminalization is reserved for those unusual wrongs that can only be effectively suppressed if the full coercive apparatus of criminal justice is available. But even most of the types of cases in that subset of wrongs should not be criminalized; we should only criminalize when doing so will prevent more threats to dominion than the oppressive agents of the criminal law are likely to create. And finally, we need a methodology for making the latter judgments that reverses the biases of contemporary jurisprudence in favor of criminalization. The bare bones of this argument here is doubtless not convincing to readers;⁴⁶ I can only hope that it is sufficient to cause some to doubt suggestions that restorative justice theorists believe that harms that are not wrongs should be criminalized. In addition, of course, restorative justice theorists believe that restorative justice should be used on many kinds of injustices that are not crimes. For me, those judgments too can be made on the basis of a judgment of whether freedom as non-domination (dominion) will be advanced by a judgment, for example, that an incident of playground teasing should or should not be confronted by a teacher "corridor conference" on the run, or by a more structured meeting of children to discuss the consequences of the teasing in more serious cases where it is, say, racist.

In sum, from a restorative justice perspective, a world without a criminal law for certain very serious wrongs would be a world with a lot of domination that might have been prevented by criminalization. To deal with rape as just a harm, or worse as merely a conflict, would leave rape victims with greatly diminished dominion, with an impoverished assurance that the community takes their suffering at the hands of another seriously. While the criminal law is needed to

⁴⁵This is not to say that theorists like Pettit and I subscribe to a traditional *mens rea* theory of criminal wrong. The conduct of a pharmaceutical company that in a purely accidental way causes serious harm should not be criminalized, but criminalization can be countenanced on a recklessness or even a negligence standard in contexts where there are very special duties of care at issue. Again, however, parsimony requires that in most such cases where criminalization is morally permissible, it would not be the regulatory instrument of first choice and not the instrument actually chosen to protect dominion.

⁴⁶For a more elaborate discussion of the ethics of criminalization, see BRAITHWAITE & PETTIT, *supra* note 25, at 86–136.

protect dominion, in practice in nations such as mine and yours in the United States where such large proportions of the black population are in chains and deaths of young people in custody so widespread,⁴⁷ it is possible that the criminal law does more to reduce dominion than to increase it. So we need a criminal law, but a radically transformed one.

IV. ATONEMENT

Garvey is a major contributor to thinking on what might be involved in such a transformation with his seminal work on atonement.⁴⁸ Of course he is right to say that, despite so much of our rhetoric, we restorative justice advocates do not “really insist on the total elimination of punishment.”⁴⁹ I suspect Garvey is near the truth when he concludes that restorative justice conferences work best when they achieve atonement.⁵⁰ Certainly it is very possible to read in that way the review of the empirical evidence on the effectiveness of restorative justice that I have recently completed,⁵¹ and in Garvey’s own work, he footnotes some interesting and somewhat compelling empirical evidence.⁵²

The starting point for Garvey’s atonement theory is the notion, appealing to restorative justice advocates, that reconciliation, repair, or restoration of damaged relationships is fundamental to an understanding that because crime hurts, justice should heal.⁵³ Offender remorse, more than just being found guilty by others, is in effect Garvey’s first step to atonement.⁵⁴ The second is offender willingness to repair *all* the damage, both material and moral, that results from the crime.⁵⁵ While I understand that Garvey italicizes the *all*⁵⁶ in order to communicate his dissent from the narrow view of repair in, say, Dolinko’s article, he needs a footnote that concedes that it is very often not within the power of offenders to repair all the damage; we can only ask them to contribute to repairing all the kinds of damage that have been done within reasonable limits of their capacity to do so. I recall a South Australian conference I attended where, on the material side, three schoolboys had caused many millions of dollars of damage by lighting a bushfire. And Robinson must be right when he states that the amount that Nazi criminals

⁴⁷See ROYAL COMMISSION ON ABORIGINAL DEATHS IN CUSTODY, INDIVIDUAL DEATH REPORTS, available at <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic> (last updated Apr. 29, 1998).

⁴⁸Garvey, *supra* note 8, at 311–16.

⁴⁹*Id.* at 303.

⁵⁰*Id.* at 314.

⁵¹See generally JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 45–136 (2002).

⁵²Garvey, *supra* note 8, at 312–14.

⁵³*Id.* at 312–13.

⁵⁴*Id.* at 313.

⁵⁵*Id.*

⁵⁶*Id.*

could do to repair all the emotional damage and restore the lives they destroyed would be miniscule in comparison to their crimes.⁵⁷

Robinson is hardly fair to suggest that restorative justice makes no sense in this context because complete repair is not possible. If we take the case of the man who was arguably the biggest of the war criminals of World War II to escape punishment—Emperor Hirohito—we can see clearly why the consequentialism of restorative justice is a superior theory to retributivism in this context. My country's view was that Hirohito was criminally responsible for the death of millions of innocent civilians in Asia, for shocking atrocities in Nanking and further south, and for the murder of many thousands of Australian prisoners of war, including, as it happens, both my mother's husbands. The U.S. government's view was more pragmatic; it viewed execution of Prime Minister Tojo (who the Emperor helped install to replace a prime minister he regarded as too weak) as just, but it saw symbolic reconciliation with the Emperor as a keystone of reconciliation of the U.S. occupation with the Japanese people. With the hindsight of history, we would surely judge the United States as right on the latter point; the upshot of the occupation was to transform Japan into the most peaceful major power the world has seen. Garvey's atonement theory can accommodate this judgment as right, but only if the Emperor spoke the truth about his role (instead of orchestrating so many to lie about it) and sought to effect some reasonable level of repair in respect of all the types of damage done by his crimes. That would have meant donating some of his stupendous wealth to survivors of his crimes and apologizing, which in Asia is regarded as an even more important form of emotional restoration than in the West.

This would have met Garvey's third step to atonement—"some tangible burden or hardship through which he expresses his remorse, humbles his will, and thereby repairs the moral injury he has caused."⁵⁸ So my contention is that restorative justice, and specifically Garvey's atonement theory, offers a workable solution to the problem of the horrific war criminal. Consistent retributivism is totally unworkable; in the Hirohito case it would have been a threat to the future peace and prosperity of the world. In South Africa, on this view, Nelson Mandela was right to conclude that of his three options for the murderers of Apartheid—impunity, just deserts, and reconciliation on condition of truth and a restorative justice process—the last was the best choice.⁵⁹

Garvey distinguishes punishment from the bearing of a tangible burden of the offender in atonement.⁶⁰ Punishment imposes the burden on the offender,

⁵⁷Robinson, *supra* note 8, at 388.

⁵⁸Garvey, *supra* note 8, at 313.

⁵⁹See John Braithwaite, *Global Violence, Peacemaking and Restorative Justice* 11 (N.Y. Univ. Sch. of Law, Faculty Workshop, Fall 2001), at <http://www.law.nyu.edu/faculty/workshop/fall2001> (discussing Mandela's restorative justice efforts in South Africa).

⁶⁰Garvey, *supra* note 8, at 313.

whereas atonement involves voluntarily moving through its stages from remorse to repair.⁶¹ On this theory, with which I concur, atonement has more power in affirming a just moral order than punishment. But when criminals eschew atonement, punishment—or at least some solemn public condemnation of the crime—is needed to affirm that moral order and to vindicate victims. The latter is particularly important with those types of crime, such as rape, where victims can experience deeper shame than offenders. From the perspective of freedom as non-domination, there it is particularly critical for the community to say to the victim that you should not feel diminished because it was the person who dominated you who committed a criminal act and should feel diminished by it; through the criminal prosecution and other measures motivated by it, we will take steps to guarantee your freedom against another attempt to dominate you in this way. Similarly with the superior message that a South African Truth and Reconciliation Commission can give to victims of racist domination: forgiveness is granted only if the truth of racist domination is publicly spoken by offenders; otherwise offenders face prosecution so that the court will speak the truth of their crimes needed to secure the dominion of victims and non-whites generally. This is not to suggest that the ideal was anywhere near perfectly executed in South Africa, simply that it was a just and realistic ideal. Atonement and restorative justice at least, as Garvey suggests, are “far less likely to be . . . corrupted” than retribution and retributive punishment which “tend in reality to degenerate into practices no self-respecting retributivist would ever endorse.”⁶²

In sum, atonement backed by criminal prosecution when atonement fails is a more workable, less dangerous approach to the world’s most macro crimes than any kind of philosophical commitment to punishment as a preferred response. Second, at the most micro level, the evidence is overwhelming that inducing in our children the approach Garvey calls atonement is what succeeds in raising nonviolent, non-dominating children who respect the rights of others.⁶³ Consistently punitive parenting consistently backfires in these respects in the psychological research. In between, at the level of garden variety serious adult criminality, the evidence is not so clear cut, but it is becoming more persuasive that certain religious fanatics of the past who argued that atonement is the best path to justice and security may not have been wide of the mark in this respect.⁶⁴ But we have more empirical research to do at all these levels.

⁶¹*Id.* at 313–14.

⁶²*Id.* at 309.

⁶³See JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 69–83, 84–97, 108–23 (1989) (reviewing evidence). Eliza Ahmed and I are currently updating the literature review therein on this point. This updated review will be on file with the author from early 2003.

⁶⁴See BRAITHWAITE *supra* note 51, at 45–136 (reviewing evidence).

V. RESTORATIVE PROCESSES, NOT RESTORATIVE JUSTICE?

Robinson is supportive of the restorative processes he sees described in the restorative justice literature and is also fundamentally content with the way they are implemented in the context of the framework of existing criminal justice systems.⁶⁵ What he dislikes is the transformative agenda and philosophy of many restorative justice advocates—this is construed as an “anti-justice agenda” and, to call it otherwise, as “word-trickery.”⁶⁶ Certainly this charge is correct if we accept Robinson’s definition of justice, which he takes from no less authoritative a source than Webster’s Dictionary: “reward or penalty as deserved; just deserts.”⁶⁷ My first response was to be amazed at such a narrowly distributive conception of justice, to the exclusion of procedural justice, most notably. My Oxford Dictionary conceived of justice as “just conduct; fairness; exercise of authority in maintenance of right.”⁶⁸ So it seemed my initial reaction was correct and this myopically “just deserts” way of conceiving of justice was something peculiarly American. But then I remembered that most of the leading writers on the notion of procedural justice, as juxtaposed to distributive justice, were actually Americans. Then I thought, well, Rawls was an American, too, and come to think of it, so is Erik Luna. Then I remembered that it was the Americans who invented the term restorative justice and gave it such currency that New Zealanders, who had not been using that term, reverted to it so that the Americans would know what they were talking about.

It was the restorative part of the label that worried us most in the Southern hemisphere. Many were concerned it might connote restoring an unjust status quo. Some of my collaborators formed a group called Transformative Justice Australia to register this protest. But there was always an immanent holism in the way we conceived of justice, an approach formulated with explicitness by Luna in this Symposium that we had not at that time worked through. Justice is to some extent immanently holistic, though not totally holistic; otherwise there would be no point in distinguishing procedural justice from the justice of outcomes. Procedural justice has been conceived in the literature as having a number of facets—including consistency, correctability, decision accuracy, impartiality, ethicality, and process control⁶⁹—but these facets tend to be moderately highly intercorrelated. Second, we find that procedural and distributive justice tend to be positively correlated and that both are positively correlated with restorative

⁶⁵Robinson, *supra* note 8, at 375–77.

⁶⁶*Id.* at 378.

⁶⁷*Id.* (citing WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 766 (1970)).

⁶⁸THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 619 (3d ed. rev. 1946).

⁶⁹See E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 93–110 (1988); Gerald S. Leventhal, *What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, in SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH 27, 27–55 (Kenneth J. Gergen et al. eds., 1980).

justice. Hence, one of the arguments of restorative justice theorists has been that restorative justice, compared to existing justice practices, contributes to procedural justice, perceived fairness of outcomes (distributive justice), and indeed social justice.⁷⁰ Zehr argues that this holism in the conception of justice is to be found in the biblical notion of justice as shalom.⁷¹ The intuition about the immanent holism of the shalom way of thinking about justice is that a restorative justice process that seeks to empower stakeholders to repair the harm of an injustice will produce outcomes that are more distributively satisfying to stakeholders than a process that seeks to deliver equal punishments for equal wrongs. Heather Strang's writing suggests one reason is that the narrower just deserts objective allows less leeway for a wider contract zone in which a win-win outcome can be crafted; hence, outcomes are produced that are more generally conceived as fair.⁷² The greater procedural control by stakeholders as opposed to justice professionals might also explain why restorative justice is perceived as more procedurally fair. We can also intuit why justice may be immanently holistic by going in the opposite direction in ways suggested by the writings of Rawls⁷³ and indeed most other writers on justice. An unjust procedure will be more open to domination by the person with the most power rather than the person with the best case and so will lead both to less fair outcomes and to social injustice by virtue of domination by the powerful.

The fact that justice is not fully holistic—that procedural and distributive justice often conflict, for example—means that there is value and great intellectual interest in studying the tensions between different versions of justice. Restorative justice innovation takes a different tack, however. It says that because there appears to be an immanent holism of justice as shalom, why not search for institutional ideas that maximize the synergy of holistic justice? Then it theorizes restorative justice as that institutional idea. Again, we would do well to alternate between the believing game and the critique game when exploring the possibilities for greater holism of justice.

Robinson cites me as supporting a ban on all punishment, “by which is meant, apparently, banning all punishment based on just deserts.”⁷⁴ I favor neither of these things. The republican ideal I favor has all stakeholders in the circle, including usually some who advocate just deserts, seeking to persuade the group to support this outcome or that. If I personally were a stakeholder, I would of course argue against retribution, but I could not argue against an outcome where a retributive result prevailed, unless that outcome exceeded consensual upper

⁷⁰See BRAITHWAITE, *supra* note 51, at 54–69, 125–33.

⁷¹HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 126–57 (1990).

⁷²See STRANG, *supra* note 43, at 176 tbl.7.9.

⁷³JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

⁷⁴Robinson, *supra* note 8, at 377.

limits on punishments, in which case common cause can be made with those who support upper limits on desert rather than civic republican grounds.

This misunderstanding is, I suspect, what makes the examples in Robinson's conclusion so wide of the mark. If a Nazi concentration camp criminal were apprehended for the first time in his old age, restorative justice advocates should be opposed to doing nothing about the case because the man was so old. They should want a restorative justice process to consider the just claims of all stakeholders. Certainly we can expect restorative justice advocates of my ilk to argue against imprisonment that would have no incapacitative value in light of the man's advanced years. But we could expect restorative justice advocates to push harder than the traditional prosecutors who make these decisions at the moment for truth, apology, and compensation, and to be more likely to get them than those who push for truth with a price tag of imprisonment for that little piece of life the criminal has left.

VI. THE EMOTIONAL NEED FOR RETRIBUTION

Robinson also pleads in his conclusion for restorative justice to recognize and respond to the emotional need—"inherent in human nature"—that people have for retribution.⁷⁵ Indeed I do suspect this is a desire deeply rooted in our biology that was probably once useful to the survival of peoples fighting off starvation by defending scarce assets of productive land. A person's deeply felt desires for retribution should be addressed openly in conferences. However, the restorativist's hope is that the conversation about the urge for retribution will result in it being transcended so that people can move on. The reason restorativists think this way is that they believe peoples' natural retributive urges are not healthy things to persevere upon. Moreover, in the conditions of contemporary societies, as opposed to the conditions of our biological inheritance, retribution is now a danger to our survival and flourishing. It fuels cycles of hurt begetting hurt. It is hoped that conversations that allow a space for the consideration of healing will help people to see this more clearly.

Deliberation motivated by helping people transcend their emotional hurts is a different matter than just giving people what the majority crave emotionally. Many of us crave good food and wine. But it does not follow that we live the best life in a mass culture that cultivates and advertises the maximum gratification of our lust for wine, women, and song. To the extent we live in a culture where it is mass society that "democratically" mediates these desires, we end up fat, addicted, and syphilitic. We do better to mediate these desires by deliberating with those we love about how to benefit from them in a healthy way. Pathologies of a titillating nondeliberative demos include mob rule, media violence, racist and

⁷⁵*Id.* at 387.

xenophobic social movements, political campaigning that cultivates a politics of character assassination, commercial advertising that cultivates addictions to tobacco, chocolate, and a little pill for every ill, and antiterrorism strategies popularized as wars or crusades. And so are law and order political auctions to wage a war on crime. The way to take retributive emotions, like any emotion, seriously, is to embed them in democratic conversations. Then we need to reinstitutionalize political will formation so that it bubbles up from those conversations more than it does at present. Healthy families, schools, community groups, internet conversation circles, and public broadcasting that does not seek to maximize profits by pandering to mass emotions of resentment all play important roles in overcoming these pathologies of modern societies. They are pathologies that, among other things, drive up the punitiveness of our criminal justice systems. Restorative justice can make the criminal justice system quite a useful place to start the struggle for such a transformation, as can antibullying programs in schools. They can provide an opportunity for people to learn why we often feel worse when we get our retributive way, why retributive urges are hard to satiate but easier to transcend through empathy and constructive problem-solving. This is why Pettit and I think republicanism is important to restorative justice. The key idea of civic republicanism from Montesquieu to Jefferson and Madison is not to replace the tyranny of kings with the tyranny of an unreflective will of the majority, but with democratic institutions that foster deliberative will formation.⁷⁶

VII. COMMUNITY

Weisberg's contribution on community offers some salutary warnings to restorative justice advocates.⁷⁷ Communitarianism does not seem attractive as a normative theory for restorative justice, at least not in the way it has been articulated in the American communitarianism debate. In a way, the problem with community is the same as the problem with shame in restorative justice theory: Active community involvement in confronting crime and shame management are both fundamental to a powerful explanatory theory of crime and to explaining why restorative justice as an intervention might "work" in various ways, including crime prevention. But neither communitarianism nor shaming are attractive normative ideals. It might be a bad thing to maximize the community of the Ku Klux Klan, to shame transsexuals. Community and shaming are both dangerous games. As Weisberg shows, they can be used for good or ill.⁷⁸ One might go so far as to say that there could be no theory of the good criminal justice system that did not involve mobilizing and empowering communities to confront crime and

⁷⁶PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 154 (1997).

⁷⁷Weisberg, *supra* note 7, at 349–63, 368–74.

⁷⁸*Id.* at 363–68.

heal its hurts, and no theory of the bad criminal justice system that did not diagnose its pathologies in terms of forms of community mobilization, including stigmatic shaming, that crush freedom and dignity.

Weisberg uses the example of the international community as a double-edged sword.⁷⁹ At one level, the international community is a warm and fuzzy thing we do want to cultivate. It connotes nations learning to cooperate, to beat their swords into ploughshares, to strengthen everyone's security against the terrible dangers that states with weapons of mass destruction pose to states without them so that states without them might conclude there is an alternative to acquiring them. For all its limitations, we know it would be folly to abandon the United Nations building in New York as a space for forging international community. But equally, international community implies exclusion as well as inclusion. So the United States president can call on the international community to mobilize against excluded states that are labeled an axis of evil or rogue states. Obversely, in many international debates that matter today, the United States is excluded in the eyes of many from the circle of civilized nations because it does not pay its dues to the relevant United Nations body and is seen as having separated itself from the international community through policies of unilateralist bullying. Both kinds of exclusion are dangerous elements of our current predicament as we fail to build a peaceful world. Both arise from the rhetorical deployment of community to make the dangerousness of outsiders a self-fulfilling prophecy.

In restorative international relations, however, just as in local restorative justice, we can shame and sanction dangerous acts of a state—such as manufacturing biological weapons—without stigmatizing either its citizens or its leadership by casting it as a pariah. At all levels of community, restorative justice theory seems to have something constructive to say here about how to embrace inclusiveness as we confront evil. And it has something theoretically decisive to say on precisely why it is a bad practice to seek political advantage from cultivating in-group community (of, say, “the civilized world”) by speech and actions intended to humiliate an evildoer.

So restorative justice theory takes some steps to specifying what kinds of community are dangerous and what kinds advance human flourishing. Normatively, for civic republicans of my ilk, community is a good thing when it advances dominion, a bad thing when it advances domination. And some explanatory mechanisms are put forward for empirical testing on the conditions for the creation of community that advance or destroy dominion.

So community should have an important place in restorative justice theory. Of course it also has an important role in traditional criminal law jurisprudence, as is evident from the frequent charge from that quarter that restorativists give victims what they want to the neglect of wider community interests. In cases like

⁷⁹*Id.* at 348.

*Clotworthy*⁸⁰ we see judges invoking a univocal community that wants to see criminals punished at a level that is believed to be consensually supported in the community. This seems as dangerous a reification of community as any discussed in Weisberg's article: the community is invoked as unified against an outgroup (criminals) who should be processed on a single metric of years of imprisonment that in some unproblematic way manifests community condemnation. Criminal law is univocal and spoken authoritatively on behalf of a community unconsulted by an elite class that has learned a particular rhetoric of community will formation in institutions called law schools. This is not quite fair because judges do consult a particular type of community representative called jurors. But modern jurors, as opposed to those of centuries past, are silenced when they speak in the authentic voice they bring from the community and told they must confine their remarks within the framework of community opinion allowed by the discourse of the courts. They are only allowed to speak at all when spoken to.

As a result of this silencing, straightjacketing and depluralizing of a community presumed to be unified against outlaws, the justice of the law has historically acquired an internal logic increasingly cut off from the justice of the people. This is why there are few, if any, governmental outcomes that leave communities less satisfied than those dished out by the state to criminals. Generally, communities the world over, whether they are in jurisdictions with capital punishment or without, with high or low imprisonment rates, want heavier penalties. Politicians respond by giving them more of the same, doubling or trebling punishment, and then wonder why the community is not more satisfied. They are perplexed when you tell them that community members are more satisfied with the outcomes of less punitive restorative justice processes in which they participate than in court cases. How can that make sense, their narrow community imagination asks, when the polls show they should be less satisfied with less punishment?

More of the same "giving the community what it wants," but within the straightjacket of the existing institutions of criminal law will formation, fails. One reason it fails is that fuelling vicious circles of heaping more and more retribution onto progressively more vilified outgroups does not heal anger. What is needed is emotional communication as opposed to the emotional suppression of community members who see themselves as stakeholders in our criminal courts. If this emotional communication is followed by healing of emotional hurts, particularly transcending anger, then community members are more satisfied. As Christine Parker and I have argued elsewhere, restorative justice should involve a radical reinstitutionalizing of a justice of the people that bubbles up into the

⁸⁰See *supra* notes 15–17 and accompanying text.

justice of the law through conference outcomes and a justice of the law that filters back down to the justice of the people.⁸¹

Restorative justice has a vision, an imperfectly tested one, of how to respond to both the pathologies of community and its potential. It is harder to argue that Western criminal jurisprudence does. Extant jurisprudence seems more resigned to surrender before the pathologies of community, even valorizing stigma, outgrouping, as a “function” of the criminal law.

All of this is a roundabout way of agreeing that all of Weisberg’s worries about community are apt, and so is his conclusion that he does not wish

to suggest the feasibility or even desirability of eradicating the vocabulary of “community” from our discourse. Rather, the danger is that we will be used by, rather than learn to use, this vocabulary, and will therefore fail to nurture the growth of strong restorative justice projects because our entrancement will overcome our common sense and reason.⁸²

VIII. PLAYING THE BELIEVING GAME HARDER

In ways not so different from the challenges of holism, atonement, and justice posed by Professors Luna, Garvey, Dolinko, and Robinson, Professor Weisberg’s critique of community should not push restorativists to some insipid formulation of the relevance of strong communities. For decades now the search for a balanced middle road for criminal justice has taken a middle road to disaster. We would not tolerate a hospital system that made the ill sicker; we would not respond to this by only slightly tweaking the system as we built more and more hospitals on the same model. We would not reform an air force whose planes mostly crashed whenever we tried to fly them by simply tightening the screws on all the planes. This is what we tolerate with the criminal justice system; modest reformism with more of the same paradigm that does not work in terms of either respect for human rights or crime prevention. The reason for this paralysis is a flawed understanding of “what the community wants,” informed by asking them wrongheadedly narrow opinion poll questions.

Instead of the middle road, we might put the useful critiques in this Symposium to work within a framework of belief that we can succeed in crafting institutional designs where communities participate meaningfully in a more effective justice system, where atonement can be compatible with a justice that is not narrowed in response to sensible justice critique, but that expands to

⁸¹John Braithwaite & Christine Parker, *Restorative Justice Is Republican Justice*, in *RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME* 103, 109–22 (Gordon Bazemore & Lode Walgrave eds., 1999).

⁸²Weisberg, *supra* note 7, at 374.

become a more holistic justice that swallows up the critiques—shalom grounded in democratic experimentalism.⁸³

⁸³Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 *passim* (1998) (identifying new form of government in which power is decentralized to enable citizens to fit solutions to their individual circumstances).