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Responsibility and Restorative Justice

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Restorative justice owes part of its growth in popularity to its broad political appeal, offering something to politicians of varying stripes. In particular, "getting offenders to take responsibility for their actions" has been part of the political appeal of restorative justice. So has "getting families to take responsibility for their kids." While it may seem appropriate to exploit such political appeal, restorative justice must have a more meaningful sense of responsibility than this. Restorative justice cannot sell itself in these terms yet simultaneously distance itself from similar sounding neoconservative ideas of responsibility, without clearly articulating its own conception of responsibility. As O'Malley says, "Discourses of responsibility for crime and crime prevention are . . . not possessions of the political Right, and they do not imply only a punitive response to offending" (O'Malley, 1994:22). Responsibility is a fundamental and contestable part of any scheme of justice, including restorative justice.

The purpose of this chapter is to explore the concept of responsibility within a restorative justice framework. As a starting hypothesis, let us see if restorative responsibility might be conceived as that form of responsibility most likely to promote restoration—of victims, offenders, and communities. Given that framework, we will first find a useful distinction between active responsibility and passive responsibility. Then we show how that distinction maps onto distinctions between active and passive deterrence, rehabilitation, and incapacitation. We then seek to develop the rudiments of a jurisprudence of active responsibility. Finally, we consider some worries about the restorative conception of responsibility we have developed.

Active and Passive Responsibility

Carol Heimer (1999:18) makes a distinction between being held accountable for the wrong one has done in the past and taking responsibility for the future. Mark Bovens (1998:27) makes a similar distinction between passive responsibility and active responsibility. Twentieth-century Western retributive justice has been mostly concerned with passive responsibility. Restorative justice, we will argue, shifts the balance toward active responsibility.

Bovens says that in the case of passive responsibility "one is called to account after the event and either held responsible or not. It is a question of who *bears* the responsibility for a given state of affairs. The central question is: 'Why *did* you do it?'" (Bovens, 1998:27). Bovens sees passive responsibility as requiring transgression of a norm, a causal connection between conduct and damage, blameworthiness, and sometimes a special relationship of obligation toward the person(s) harmed (Bovens, 1998:28-31). The literature is full of debates about the best way to conceive of passive responsibility (see, for example, Mulgan, 1997; Thomas, 1998). We will not add to those debates here. While we have some doubts about Bovens's conception of passive responsibility, we will not discuss them, as our interest is to move on to the special appeal for restorative justice theory of his concept of active responsibility.

First, however, it must be said that restorative justice cannot do without some concept of passive responsibility. For example, a restorative justice conference is held after the commission of a crime ("after the event," in Boven's terms) and in light of the admission of guilt by the offender (which determines "who bears responsibility"). Furthermore, a conference, at least in its early stages, will often involve asking the offender why he or she did it. Our argument is not that restorative justice abandons passive responsibility, but that restorative justice uses passive responsibility to create a forum in which active responsibility can be fostered. Restorative justice, then, is about shifting the balance from passive responsibility toward active responsibility.

So what is active responsibility, according to Bovens? He sees active responsibility as a virtue, the virtue of taking responsibility when something needs to be done to deal with a problem or put things right: "[T]he emphasis lies much more on action in the present, on the prevention of unwanted situations and events . . . The central question here is: 'what *is* to be done?'" (Bovens, 1998:27).

To interpolate in a restorative justice frame, active responsibility entails seeking to take responsibility to repair harm, and especially to restore relationships. According to Bovens, active responsibility requires: (1) an adequate perception of threatened violations of a norm, (2) consideration of consequences, (3) autonomy, and (4) tak-

ing obligations seriously. Restorative dialogue, in which the problem rather than the person is put in the center of the circle (Melton, 1995), and in which respectful listening is a central value, seems well designed to cultivate Boven's virtue of active responsibility. As Heimer and Staffen (1998:369) put it, "it is the humanity of other people that inspires responsibility." Bovens also sees active responsibility as requiring "conduct based on a verifiable and consistent code" (Bovens, 1998:36). This seems to be an excessively positivist requirement; families can nurture active responsibility through restorative dialogue without codifying their norms.

We argue that restorative justice reconceptualizes responsibility, so that when people claim that restorative justice offers *better* responsibility than traditional court sentencing,¹ they are impliedly making a claim about what is accomplished by active responsibility.

Those who favor retribution are concerned with passive responsibility because their priority is to be just in the way that they hurt wrongdoers. The shift in the balance toward active responsibility occurs because the priority of restorative justice proponents is to be just in the way that they heal.

While it is clear that a backward-looking, deontological theory such as retributivism is clearly concerned more with passive than active responsibility, the influence of passive responsibility also permeates forward-looking, consequentialist theories. Utilitarians along the lines of Jeremy Bentham are equally preoccupied with hurting rather than healing, and with passive rather than active responsibility. We will argue that utilitarians have an inferior theory of deterrence, rehabilitation, incapacitation, and crime prevention to that of restorative justice theorists. At the root of this inferiority is the utilitarian's obsession with passive responsibility to the exclusion of active responsibility.² First, we will show how under the restorative alternative, while passive responsibility maps onto passive deterrence, active responsibility maps onto active deterrence—and the latter is more powerful. Then we will do the same for rehabilitation and incapacitation.

Passive and Active Deterrence

Deterrence is not an objective of restorative justice. In fact, to make deterrence of wrongdoing a value would destroy restorative justice for the same reason that making shaming a value would destroy it. As Kay Pranis (1998:45) puts it, "An intention to shame [we add deter] is not respectful. An intention to help a person understand the harm they caused and to support them in taking full responsibility for that harm is respectful."³ However, this is not to deny that theories of shame and deterrence can help us understand why restorative processes might have more preventive potential than retributive/deterrent processes.

Most deterrence literature in criminology indicates that the severity level of punishment rarely has a significant deterrent effect. While a criminal justice system with no passive deterrence would clearly be one with a lot of crime, the data give utilitarians reason to be discouraged that increasing the quantum of passive deterrence will reduce crime (or that reducing passive deterrence will increase crime). Active deterrence, we will suggest, is a different story.

Ayres and Braithwaite (1992:19-53) have argued that deterrence theory in criminology is primitive compared to deterrence theory in international relations because it is excessively passive. When the United States seeks to deter a form of international behavior, it does not announce in advance that the punishment if states do X will be Y, if they do 2X, it will be 2Y, and so on with a passive deterrence tariff. Instead, its deterrence strategy is active in two important senses. First, the United States uses its power to persuade other states on whom the rogue state is dependent for some reason (for example, trade) to intervene (actively) to persuade the rogue state that it should refrain from the rogue action. What is being mobilized by this kind of active deterrence is a web of complex interdependency (Keohane, 1984). Second, the United States' strategic deterrence is active in the sense of being dynamic rather than passive. The deterrent threat does not just sit there as a passive promise of punishment; deterrence is escalated up and down an enforcement pyramid in response to the level of cooperative response and the concessions made by the rogue state. International relations theory has escaped the shackles of Benthamite thinking about certain response with punishments calibrated to be passively optimal.

Restorative Justice and Deterrence

How could restorative justice theory do better than legal deterrence theory? Let us illustrate with some restorative justice analogies to active webs of complex interdependence. Consider the restorative approach that has been developing in Australian business regulation. First, the regulator meets with the agents in the corporation who seem most passively responsible for the lawbreaking, along with some victims (where appropriate). Because the corporate actors most directly responsible have the most to lose from a criminal conviction of the corporation, they will be hard targets, difficult to deter. They are likely to fight passive deterrence by denial of responsibility. For Benthamite corporate crime fighters, that is the end of the story—another contested court case that they do not have the resources to fight, another defeat at the hands of those who control corporate power. However, what we know is that causal and preventive power over corporate crime is, as the philosophers say (Lewis, 1986), overdeter-

mined. So what we do is move up the organization, widening the circle of dialogue, convening another conference to which the boss of the passively responsible agent of the corporation is invited. Often the boss will turn out to be a hard target as well. When that fails, we convene another conference and invite her boss. Fisse and Braithwaite (1993:230-232) have described one restorative justice experience in which the process led right up to the Chief Executive Officer, who was the "toughest nut" of them all. After that, though, the Australian Trade Practices Commission widened the circle to include the Chair of the Board, who was shocked at this recalcitrant unwillingness to restore the victims' losses and reform the corporation's compliance systems. The Chair actually fired the CEO. (Not very restorative! A case of active deterrence leading to passive deterrence.)

In other more extended treatments of the deterrence theory of restorative justice, Braithwaite (1997a, 1999) has argued that corporate crime is not different from common crime in that it is mostly a collective, or at least a socially embedded, phenomenon, in which there are many actors with preventive capabilities. For example, one interpretation for the success of whole-school anti-bullying programs in reducing bullying up to 50 percent (Olweus, 1993) is in these terms. Whenever a fourth grader is bullying another child, many children in the school (particularly from the fifth grade up) are in a position to intervene to prevent the bullying. From a deterrence theory perspective, therefore, whole-school anti-bullying programs work because the deterrence target shifts from the bully (a hard target to deter passively) to active deterrence of responsible peers of the bully.

One reason that empowerment is a central value of restorative justice is that it encourages people to take active responsibility—and active responsibility delivers, among other things, active deterrence. The environmentally conscious citizen of the corporation intervenes to stop the environmental crime even though she has no passive responsibility for causing it. A school friend intervenes to stop bullying even though she bears no passive responsibility for it. An ideal of the design of restorative institutions is to create democratic spaces for the nurturing of the virtue of active responsibility among citizens, young and old.

In the context of violence against women, Braithwaite and Daly (1994) have argued that restorative justice is more likely to be attempted, taken seriously, and to actually work, if it is located within a dynamic enforcement strategy in which the upshot of repeated failure of restorative conferences will be escalation to deterrence and incapacitation. This is not to advocate restorative justice transacted on the basis of threat. Rather it is to say that powerful criminals are more likely to succumb to the entreaties of restorative justice when deterrence is threatening in the background instead of threatened in the foreground

(for the theory, see Ayres and Braithwaite, 1992:47-51). The idea is not that deterrence is there as an ever-present passive threat but that everyone knows it is democratically available as an active possibility if dialogue fails or is spurned. Because "everyone knows" this, there is no need to make threats; indeed, to do so is counterproductive. So an offender who chooses not to participate in a conference knows the alternative is an appearance in court, where he or she will be subject to passive responsibility.

The Restorative Justice Process and Responsibility

Conferences and circles provide opportunities to nurture active responsibility. If you empower citizens in a punitive society to decide how to put right a wrong, many choose to do so punitively against the wrongdoer. Kathleen Daly suggests that restorative justice does deliver a deal of retribution (Daly, 2000). Moreover, because restorative justice processes of confronting victims and their own families are often grueling even for hardened offenders, and because we know that "the process" in all systems is usually the greater part of punishment (Feeley, 1979), restorative justice also delivers a lot of process-related passive deterrence.

However, the empirical experience of restorative justice is that victims and other citizens are not as punitive as we expected they would be, and not as punitive as they are in the context of adversarial courtroom justice. When courts do intervene to overturn decisions of restorative justice conferences, it is rarely to make them less punitive; instead, it is usually to increase punishment (Maxwell and Morris, 1993). So it seems that while people have the opportunity to pursue punitiveness and passive responsibility, they choose to do so far less than we might expect.

A conference convened by one of the authors of this chapter provides an example. A middle-aged married couple came to the conference to meet the young person who had stolen and damaged beyond repair the car the husband had spent three years and thousands of dollars restoring. In the conference, it was explained to the offender that he had done great damage to the car, probably without realizing it. After the man explained that, his wife shared that her stoic husband had been privately shattered about the loss of the car that he had hoped to display at car shows—and that since the offense, he did not have the heart to start over. She also explained that their daughter was in the advanced stages of a difficult pregnancy and the loss of the car made it difficult to help with tasks such as collecting their grandchildren from school and doing grocery shopping. Yet, despite the harm, the couple

declined offers of physical labor from the offender, insisting that the only outcome that would help them was one that helped him (in this case, taking small steps to resume his education). In Boven's terms, the couple was concerned that the young person exercise his active responsibility in respect to this incident in a way that nurtured the virtue of active responsibility in him for the future.

A process that allows victims to meet the offender and his or her family often generates compassion for the offender and a better understanding of his or her actions. Compassion contributes to the pursuit of restoration and active responsibility more than it does to the pursuit of punishment. However, there is not always compassion in conferences and there often is retribution. How can this be an alternative model of justice if citizens often choose to deter or seek revenge? One response is to draw an analogy to democracy. If you set up a democracy, citizens often vote for candidates with anti-democratic values. What is happening there is that we honor the institution (democracy) that conduces to a shift to democratic values rather than honoring the values themselves. To take democracy away from people as soon as they chose to manifest anti-democratic values would be not only perverse but a prescription for historically unsustainable democracy. What we do instead is write constitutions that put limits on anti-democratic action.

Likewise, restorative justice must be constitutionalized so that limits are placed on the pursuit of deterrence. Thus, people can (if they insist) pursue anti-democratic or anti-restorative aims to the extent to which those systems allow.⁴ We think these limits should constrain restorative justice conferences against any incarcerative or corporal punishment, any punishment that is degrading or humiliating,⁵ and any punishment in excess of that which would be imposed by a court for the same wrongdoing.⁶

Active and Passive Rehabilitation

"Support without accountability leads to moral weakness.
Accountability without support is a form of cruelty."

—Harriet Jane Olsen, *The Book of Discipline of the
United Methodist Church* (1996)

Having outlined in some detail the story of active and passive deterrence, we hope we can briefly state how to apply the same principles to active and passive rehabilitation (for more detail, see Braithwaite, 1998, 1999). There is much evidence that the least effective way of delivering rehabilitation programs is for the state to decide what is best and to require criminals to be passive recipients of that benevolence. In the most empowering restorative justice programs, such as one described by Burford and Pennell (1996), which is designed to deal with

family violence, the victims, offenders, and their communities of care are not subjected to rehabilitative prescription but are empowered with knowledge. Experts come into the conference to explain the range of rehabilitative options available. State monopolies of provision of rehabilitative services are replaced by a plurality of service providers from civil society, private enterprise, and the state. More radically, resourcing can be available for professional help for communities of care to craft and operate their own rehabilitative interventions.

The two variables in play here that we know are associated with superior rehabilitative outcomes are: (1) active choice as opposed to passive receipt, and (2) embedding of that choice in networks of social support (Cullen, 1994) rather than choice by isolated individuals. We suspect that the reason for active rehabilitation being superior to passive rehabilitation goes beyond the documented effects of commitment and social support. We also suspect that communities of care empowered with good professional advice will actually make technically superior choices from among a smorgasbord of rehabilitative options, because of the richer contextual knowledge they have of the case (Bazemore, 1999; Bazemore and Dooley, this volume). This is particularly plausible in a world in which, for example, psychotherapy often seems to work but in which there is no consistent evidence showing that one school of psychotherapy works better than another. The hope is that contextually informed community-of-care choices (assisted by professional choice brokers) will be better on average than individual or state choices (Braithwaite, 1998).

Active and Passive Incapacitation

In Braithwaite and Daly's (1994) family violence enforcement pyramid, most of the options for escalation are in fact more incapacitative than deterrent. They include options like "a relative or other supporter of the woman moving into the household," "the man moving to a friend's household," and imprisonment. Once we move beyond a passive conception of incapacitation, which is statically linked to confinement in state prisons, we can see that *capacitation of victims* can be theoretically equivalent to *incapacitation of offenders*. Hence, in a family violence enforcement pyramid, giving a victim the capacity to leave by putting a bank account or funding for alternative accommodation at her disposal (victim capacitation) can be functionally equivalent to removing the offender from the home (offender incapacitation).

Court-ordered incapacitation is notoriously less effective than it would seem. Violent men continue to perpetrate assault and rape in prison. Drug dealers continue to entice vulnerable young people.

Judges incapacitate drunk drivers by canceling their licenses only to find that a majority of them continue to drive (Barnes, 1999).

By contrast, the active intervention of communities of care evokes alternative modalities of incapacitation. If the problem is that it is only on Friday and Saturday nights that the offender gets out on the town, Uncle Harry can take responsibility for holding the keys to the car on Friday and Saturday nights and ensuring that the car stays in the garage. Alternatively, the girlfriend can volunteer to call a taxi every time. Or the drinking mates can sign a designated driver agreement at the conference. Or the owner of the pub or club where the offender drinks can agree to train the staff to intervene so that someone else in the bar drives the offender home. We have seen all these forms of active incapacitation negotiated at restorative drunk driving conferences. All of them require cultivation of the virtue of active responsibility. We never see them in drunk driving court cases, which last an average of seven minutes in Canberra, compared with 90 minutes for conferences (Barnes, 1999).

Active Crime Prevention, Active Grace

Braithwaite (1998, 1999) has argued that crime prevention programs mostly fail for four reasons: (1) lack of motivation, (2) lack of resources, (3) insufficiently plural deliberation, and (4) lack of follow through. He argued that making restorative justice conferences a site of crime prevention deliberation in the community can help remedy those four reasons for the failure of crime prevention programs. Motivation, resources, and follow-through on crime prevention have more momentum when coupled to the mainstream processing of criminal cases than when ghettoized into specialized crime prevention units. We will not reiterate the four sets of arguments here, but one way of summarizing them is that they are concerned with the way restorative justice deliberation nurtures the virtue of active responsibility. Active responsibility does not come naturally in response to a plea to attend a Neighborhood Watch meeting. It comes more naturally in reply to a plea from a neighbor who has been a victim of crime to support them in a conference/circle. Similarly, an occupational health and safety poster in the workplace proclaiming "Reporting (accidents) is everyone's responsibility" does not foster a sense of active responsibility in the way that conferences held to discuss specific workplace injuries do.

Serious crime is an opportunity to confront evil with a grace that transforms human lives to paths of love and care. Desmond Tutu would want us to evaluate his Truth and Reconciliation Commission less in terms of how it prevents crimes of violence and more in terms of how its healing lays the foundation of a more humane South Africa.

While we can never expect restorative justice institutions to be the most important institutions of community building, they can play their part in the nurturing of active responsibility that is the indispensable ingredient of community development.

If we believe that reintegrative shaming is what is required to deal with the wrongdoing of a Winnie Madikizela-Mandela and a P.W. Botha alike,⁷ no one is required to take active responsibility for saying "shame on you" for the killings and the racism under an evil regime. The testimony of the victims and the apologies (when they occur, as they often enough do) are sufficient to accomplish the necessary shaming of the evil of violence. However, there can never be enough citizens active in the reintegration part of reintegrative shaming. If it is true that reintegrative shaming prevents crime, and if it is true that it is the reintegration part that is always in short supply, then the particular, if limited, kind of integration into communities of care that is transacted in restorative justice rituals has a special humanitarian significance.

Toward a Jurisprudence of Active Responsibility

So far, we have conceived of active responsibility as the essential element for securing restoration. At the same time, we have argued that without passive responsibility there is risk of injustice. For example, a minimum requirement for punishing an offender for doing wrong would be an inquiry to demonstrate causal responsibility for the wrong.

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

We turn to Brent Fisse's (1983) theory of reactive fault (further developed in Fisse and Braithwaite, 1993) for key insights here. All criminal justice systems incorporate notions of causal fault and reactive fault. Causal fault is about being causally responsible, while reactive fault is about how responsibly one reacts after the harm is done. The balance between the two varies enormously from system to system. Western criminal justice systems (such as that of the United States) are at the causal end of the continuum; Asian systems (such as that of Japan) tend to be at the reactive end. Yet, even in the West, reactive fault sometimes dominates causal fault, as evidenced in our intuition that with hit-and-run driving, the running is the greater evil than the hitting. Early guilty pleas in court and "remorse" also result in sentence reductions. In *Crime, Shame and Reintegration*, Braithwaite

(1989:165) told two stories to illustrate the extremes in the cultural balancing of causal and reactive fault, the first from Haley (1982:272), the second from Wagatsuma and Rosett (1986:486):

The first is of two American servicemen accused of raping a Japanese woman. On Japanese legal advice, private reconciliation with the victim was secured; a letter from the victim was tabled in the court stating that she had been fully compensated and that she absolved the Americans completely. After hearing the evidence, the judge leaned forward and asked the soldiers if they had anything to say. "We are not guilty, your honor," they replied. Their Japanese lawyer cringed; it had not even occurred to him that they might not adopt the repentant role. They were sentenced to the maximum term of imprisonment, not suspended.

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

These are stories about how the United States justice system creates disincentives for reactive fault, while the Japanese justice system requires it. Fisse (1983) advocates "reactive fault" as the core criterion of criminal fault. In its most radical version, this would mean in a case of assault, the alleged assailant would go into a restorative justice conference not on the basis of an admission of criminal guilt but on the basis of admitting responsibility for the *actus reus* of an assault ("I was the one who punched her").⁸ Whether the mental element required for crime was present would be decided reactively, on the basis of the constructiveness and restorativeness of his or her reaction to the problem caused by the act (Braithwaite, 1998). If the reaction were restorative, the risk of criminal liability would be removed; only civil liability would remain. However, if reactive criminal fault were found by a court to be present,⁹ that would be insufficient for a conviction; the mental element for the crime would also have to be demonstrated before or

during its commission.¹⁰ However, reactive fault would be a more important determinant of penalty than causal fault.

This gives us an answer to the retributivist who says: "Where is the justice with two offenders who commit exactly the same offense: one apologizes and heals a victim who grants him mercy; the other refuses to participate in a circle and is punished severely by a court." The answer is that while the two offenders are equal in causal fault, they are quite unequal in reactive fault. Viewed in terms of passive responsibility, they might be equal; in terms of active responsibility, though, they are not.¹¹

The Major Worry about Active Responsibility

In restorative justice conferences, sometimes victims say they are responsible for their own victimization or others blame them for it. This is not a worry when victims blame themselves for leaving open the window through which the burglar entered; indeed, it can be a good thing if it motivates victims to invest in target hardening to protect them from a repeat victimization.¹² Similarly, a victim of a schoolyard fight may reflect on the provocation of the offender that led to the assault. It is a different matter, though, if a girl who is a victim of sexual assault is blamed for wearing a short skirt. What is the difference? It is that this type of victim-blaming is connected to a history of subordination of young women, and the denial of their freedom, which has been much exacerbated by victim-blaming.

Restorative justice implies a grave risk of the occurrence of oppressive victim-blaming. The hope is that when it occurs, participants in the circle will speak up in defense and support of the victim—that there will be reintegrative shaming of victim-blaming. The fact that we cannot guarantee that this will occur is deeply troubling.

Defenders of formal legal processes might further protest that criminal trials do incorporate formal guarantees against victim-blaming. Most of these, however, come into play at the level of proving that sexual assault occurred—guarantees not relevant to normal restorative justice processes that are not concerned with the adjudication of guilt. In any case, it is hard to argue that victim-vilification does not occur in criminal trials.¹³ As Hogg and Brown put it, "Police, lawyers and judges have often been derisory in their treatment of complainants who have acted in . . . 'sexually provocative' ways" (1998:65). Indeed, restorative justice advocates argue that the problem with the criminal trial is that it creates incentives for the prosecution to vilify defence witnesses, and vice versa. This is what puts the vulnerable most at risk of stigmatization. The problems that formal legal guarantees against victim-blaming seek to redress are in part problems created by the formal adversarial process.

In terms of the impact of victim-blaming on traditional adversarial justice, we should not confine our examination to trials and sentencing. Ngaire Naffine suggests that in light of the statistics on the extent of unreported rapes, rapes without active resistance (and we would suggest, rapes involving other types of victim-blaming) are "much less likely to find their way into a court of law . . . (and) are more likely to be filtered out of the criminal justice system" (Naffine, 1992:761). Hence, it is clear that victim-blaming is a problem at every level.

What can be said in favor of restorative justice is that while the criminal trial assembles in one room those capable of inflicting maximum damage on the other side, the restorative justice conference assembles in the room those capable of offering maximum support to their own side—be it the victim or the offender side. It is in this structural difference, and in the ethic of care and active responsibility that it engenders, that restorative justice places its hope against victim vilification.

It will be a hope that will continue to be disappointed from time to time, we fear. There are few higher priorities for research and development than to improve the micro-design of conferences/circles. Videos shown to participants before they go into their first conference could not only show how conferences work and how participants can be actively responsible citizens within them, but perhaps they could also warn against victim-blaming and urge a responsibility to speak out against victim-blaming should it occur. Training for convenors should also address this risk. For both court and conference processes, research should be able to test a variety of innovations in order to discover which procedures best protect victims from stigmatization.

Restorative Justice—Beyond Responsibilization

In its traditional criminological forms, utilitarianism tended to objectify and infantilize offenders. In contrast, many writers see newer crime prevention and community policing as involving a new form of subjectification and responsabilization (Crawford, 1997; Garland, 1997; O'Malley, 1992). Garland, for example, identifies a new mode of governing crime, which he characterizes as a "responsibilization strategy": "This involves the central government seeking to act upon crime not in a direct fashion through state agencies (police, courts, prisons, social work, etc.) but instead by acting indirectly, seeking to activate action on the part of non-state agencies and organizations" (Garland, 1996:452). Garland says that this is a response to the predicament that "having taken over control functions and responsibilities which once belonged to the institutions of civil society, the state is now faced with its own inability to deliver the expected levels of control over

criminal conduct" (Garland, 1996:449). The recurring message of this approach, as Garland puts it, "is that the state alone is not, and cannot effectively be, responsible for preventing and controlling crime" (Garland, 1996). Clearly, it is possible to read our account of restorative justice in this frame.

There are some distinctions that must be drawn, however. Responsibilization strategies vary in their approaches to achieving responsibility. Foucault's work is the theoretical influence underlying the responsibilization literature. Subjects are "taught to become 'responsible'" (Garland, 1997:191) by "techniques of the self" for cultivating a security-conscious *homo prudens*. This Foucauldian interpretation is contrasted with one in which individuals are assumed to be "'naturally' capable" of responsible action (Garland, 1997:191). Our conception of restorative responsibility is closer to the end of the continuum that assumes a natural capability for responsibility. At least we assume that the simple process of human beings talking through the consequences that have been suffered as a result of wrongdoing is all that is needed to elicit spontaneous proffering of active responsibility. At the same time, though, however natural and unforced the dialogue within it, we must concede that the creation of the institution of a restorative justice conference is itself a regulatory move designed to cultivate this "natural capability" for responsibility.

There are many unattractive features of responsibilization trends from which restorative justice must keep its distance. We see the worst manifestation of responsibilization in laws that hold parents legally liable for the delinquencies of their children. The normative theory of restorative justice should make it clear that only individual actors who are passively responsible (causally responsible) for crime should be held legally or morally responsible for it. Active responsibility of all kinds, including offers of help and support, forgiveness, care, compassion, love, and participation—all the things on which restorative justice most depends for success, should be conceived as gifts rather than moral duties, and certainly not as legal duties. They are supererogatory,¹⁴ to put the claim formally. The legal system rightly recognizes parents as having duties of care to their children. In the context of a restorative justice conference for a criminal offense, though, a decision by parents to refuse to attend (or do anything the conference asks) should not be viewed as a breach of any duty.¹⁵ No one, including the offender, has a duty even to attend.¹⁶

Restorative justice works because people are prepared to assume an active responsibility (particularly when they have a personal involvement) beyond any allocated passive legal or moral responsibility. Active responsibility often involves an assumed collective responsibility that can provide restoration and crime prevention in ways that courts restricted to allocating passive responsibility (enforced responsibility)

cannot. A more structural worry about responsibilization is that it passes gender-related burdens of care down to individuals. This worry is that what is going on is a move by the state to slough off some of its social welfare obligations. A comparable concern arises with using restorative justice to deal with regulatory offenses; it may be part of a state's strategy to walk away from its obligations to regulate in areas such as environment (where it has clear responsibilities) by delegating them to civil society.

Christine Parker's (1999) work is a useful corrective here (see also Braithwaite and Parker, 1999). Parker sees a need for two-way communication. She wants institutions in which the justice of the law filters down into the justice of the people as manifest in restorative justice processes (so that, for example, respect for fundamental human rights constrains informal justice). Obversely, Parker wants a restorative justice that gives the justice of the people an opportunity to percolate up to influence the justice of the law. In terms of active and passive responsibility, we want the active responsibility to have an influence on the passive responsibility. The same theme is apparent in recent writings of Clifford Shearing (1995) and Jurgen Habermas (1996) on how the state can open itself up to "the input of free-floating issues, contributions, information, and arguments circulating in a civil society set apart from the state" (Habermas, 1996:183-184). According to Habermas (1996:442), the theory is clear:

[T]he public sphere is not conceived simply as the back room of the parliamentary complex, but as the impulse-generating periphery that *surrounds* the political center: in cultivating normative reasons, it affects all parts of the political system without intending to conquer it. Passing through the channels of general elections and various forms of participation, public opinions are converted into a communicative power that authorizes the legislature and legitimates regulatory agencies, while a publicly mobilized critique of judicial decisions imposes more-intense justificatory obligations on a judiciary engaged in further developing the law.

The theory sounds fine, but it all seems rather romantic to imagine the day-to-day work of conferences bubbling up to influence the law. Cumulatively and potentially, though, this is not necessarily romantic. In communities in which conferencing is widespread, justice dilemmas that arise in conferences are discussed in civil society (at dinner parties, for example, including those attended by judges.)¹⁷

We can already cite specific conferences in New Zealand that have had an impact, albeit small, on the law. In the Clotworthy case, the decision of a conference for community service and victim compensation

to fund cosmetic surgery needed as a result of a vicious knife attack was overruled by the Court of Appeal.¹⁸ To the disappointment of restorative justice advocates, the Court of Appeal ordered a custodial sentence. However, the sentence was reduced in response to the wishes of the victim as articulated in the conference. Moreover, the Court did recognize the principle that the demands of restorative justice can affect sentences in very serious cases. Put another way, conferencing is in a position not dissimilar to the routine processing of cases in the lowest courts. Although what happens in the lowest courts might be the bulk of the law in action (and therefore "is" the law), rarely does it have any impact on the law in the books, or formal law. In rare strategic cases, though, the Magistrates "bubble up" the Clotworthy case.

One can imagine how restorative justice processes might achieve this task in a variety of contexts. A conference for schoolgirls caught smoking marijuana could communicate to school principals that passive responsibility such as expulsion is excessive and inappropriate. Conferences can and do also "bubble up" community disapproval of certain investigative techniques by the police, which tend to be suppressed in court. This capacity can be reinforced by making an inquiry of how fairly participants have been treated by the police in this formal part of the restorative justice process. Where there is a concern, the police, as a signatory of the conference agreement, can commit to report back to the participants about the results of an internal or ombudsman investigation of their conduct.

Fisse and Braithwaite (1993:232-237) have documented how a series of conferences exposed the victimization of Australian Aboriginal people in remote communities through fraudulent practices by major insurance companies. One of the decisions of the meetings between offending companies, regulators, victims, and Aboriginal Community Councils was to call a press conference. The abuses exposed were so systemic and shocking that the Prime Minister asked to be briefed by the regulatory agency. Significant change to regulatory law and practice ensued.

While it would be overly optimistic to hope that conferences would often be the transmission vehicle to percolate the justice of the people into the justice of the law, such cases show this is a possibility that can be realized. The Aboriginal insurance cases show that just as restorative justice can serve to responsabilize individuals in a way that relieves the state of burdens, so is it possible for powerless individuals to use restorative justice to responsabilize the state when the state is failing in its regulatory or welfare obligations.

Restorative justice is empowering in that it takes a ball away from the feet of a judge and puts it at the feet of a group of citizens. The type of responsabilizing that then goes on depends on how those citizens

decide to exercise their political imagination in the use of that little piece of power. To use a soccer analogy, many will kick their own goals by taking responsibility for awesome burdens of care for which the state should be giving them more help. Others will learn from the example of those Aboriginal Community Councils from far North Queensland and kick the goals of state responsabilization.

Conclusion

A neglected part of the restorative justice research agenda has been the development of a restorative conception of responsibility—the kind of responsibility that will maximise restoration of victims, offenders, and communities. We have seen that restorative responsibility will be very different from traditional conceptions of criminal responsibility. It will involve a balance between passive and active responsibility with a substantial shift toward the latter.

We have seen that restorative responsibility has:

1. An important political rationale;
2. A strong philosophical foundation in responsibility for action and responsibility as a virtue;
3. A promising jurisprudential future through development of Fisse's notion of reactive fault; and
4. Practical promise in its links to theories of crime prevention.

At the same time, there remain unsolved worries about responsabilization, such as the risks of blaming victims of sexual assault and foisting unreasonable expectations on single parents who already are expected to do too much with too little support.

Discussion Questions

1. Why is responsibility an important concept in restorative community justice? How does this model conceive of responsibility differently than traditional justice models?
2. Distinguish between passive responsibility and active responsibility. How does restorative community justice engage active responsibility? Can you identify occasions when restorative justice might not do this?
3. How could the restorative community justice concept of responsibility change the focus of deterrence, incapacitation, and rehabilitation?
4. What is active deterrence? Compare and contrast active incapacitation and passive incapacitation.

Endnotes

- ¹ The recent Canadian Supreme Court decision *R v. Glaude* (1999) provides an example of such a comparison: "Central to the (restorative justice) process is the need for offenders to *take* responsibility for their actions. By comparison, incarceration obviates the need to *accept* responsibility" (emphasis added) (at 72)
- ² Some readers might question whether an approach that aims to prevent future events can be characterised as passive responsibility. After all, active responsibility is about the prevention of unwanted events. But it is our contention that one can seek to avoid future events using passive responsibility or active responsibility. At the heart of the difference between the active and passive forms of these theories is the distinction between people taking responsibility (the active form) and risking being held accountable (the passive form).
- ³ The normative force of Pranis's assertion arises in our view from the normative claim that respectfulness (Braithwaite, 1989) ranks beside non-domination (Braithwaite and Pettit, 1990; Pettit, 1997) and empowerment (Braithwaite, 1999b) as central restorative values.
- ⁴ Some critics might argue that punitiveness on one hand, and active responsibility and restorative justice on the other, are not mutually exclusive: that is, if active responsibility is the taking of responsibility to restore harm, and a punitive outcome is what is required to restore some victims' harm (by satisfying their desire to punish), then punitive outcomes can involve active responsibility. However we would say if a punitive outcome is imposed on an offender without their consent it in no way involves active responsibility. If an offender does seek or actively consent to a punitive outcome, then it may involve active responsibility, but we would nevertheless seek to impose limits on such outcomes.
- ⁵ For instance, the International Covenant on Civil and Political Rights prohibits inhuman or degrading treatment or punishment (Article 7).

- ⁶ For example, under the legislation governing one conferencing scheme in Australia, the outcome must "not (be) more severe than those that might have been imposed in court proceedings for the offence" (Section 52(6)(a) Young Offenders Act 1997 (NSW)).
- ⁷ The allegations against Winnie Madikizela-Mandela included the murder of a child in her pursuit of political objectives on behalf of the African National Congress. P.W. Botha was the South African head of state during a period when his Cabinet is alleged to have authorized murder and other atrocities against those opposed to Apartheid.
- ⁸ Functionally, New Zealand law already accomplishes this result by putting cases into family group conferences not on the basis of an admission of criminal guilt, but on the basis of formally "declining to deny" criminal allegations.
- ⁹ An example of this would be if a report from a conference said that the offender simply cursed the victim and refused to discuss restitution.
- ¹⁰ Brent Fisse takes the more radical view that if criminal liability is about punishing conduct known to be harmful and if failure to respond responsibly is harmful, then such reactive fault can be sufficient to establish criminal liability.
- ¹¹ This is not the whole answer, however. The other part of it is that the just deserts theorist is seen as morally wrong to consider equal justice for offenders a higher value than equal justice for victims (Braithwaite, 1999).
- ¹² Having just been a victim of burglary is the single biggest predictor of burglary victimisation (Pease)
- ¹³ In Victoria, Australia, a man who raped a woman received a sentence that took into account that the woman's experience as a prostitute meant it was reasonable to assume that she suffered less psychological harm than would have been suffered by other victims of sexual assaults [Hakopian, 1991, unreported, Victorian County Court (see Cass 1992 for case summary and comment)].
- ¹⁴ See Mellema, 1991; Heyd, 1982.
- ¹⁵ Of course, this would not be the position with care and protection as opposed to a criminal justice conference, where the legal subject of the conference is whether parents are meeting their legal duty to care for and protect their child.
- ¹⁶ The only duty here rests with the police and prosecutor, who have a duty to take sufficiently serious cases to court when the opportunity for voluntary acts of responsibility in a restorative framework are spurned.
- ¹⁷ Indeed judges will attend conferences during their lifetimes as supporters of victims or of their own children who get into trouble as offenders.
- ¹⁸ *The Queen v. Clotworthy* (CA 114/98, 29 June 1998, NZ Court of Appeal) allowing appeal from sentence of District Court Judge Thorburn, 24 April 1998

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Part III

The Context of Restorative Community Justice: Stakeholder and Organizational Roles