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## 4. Restorative Justice Is Republican Justice

by

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### INTRODUCTION

This paper argues that restorative justice set in a context of a republican politics of non-domination can give us hope for a more decent future of juvenile justice. First, we will show how republican theory motivates a commitment to using restorative justice, and how family group conferences are one instantiation of this ideal. Second, we outline the dangers of a restorative justice that is too individualistic and insufficiently aware of the community context of power and inequality in which it occurs. Third, we argue that republican justice addresses these concerns by ensuring that specific restorative justice initiatives such as conferences are placed within the context of a wider republican politics of non-domination that weds political and face-to-face action. Finally, we show what implications this might have for doing justice to juvenile offenders and their victims, and for making their communities more just.

### 1. BASIC CONCEPTS

#### 1.1. Republicanism in Brief

In our writings, we share with Philip Pettit a commitment to a conception of republican justice as the pursuit of freedom as non-domination (Braithwaite and Pettit, 1990; Parker, 1997; Pettit, 1997). In this previous work, freedom as non-interference is seen as the core of the liberal tradition, while freedom as non-domination is seen as the common strand of the civic republican tradition from Rome, to the early modern Northern Italian republics, to the English republican writing of the seventeenth century, to Montesquieu, Madison and Jefferson (who

founded the Democratic Party in the U.S. as a republican party—with a small *ry*. The republicans wanted more than liberty in the impoverished sense favored by the liberals who increasingly dominated Western political discourse through the nineteenth century. Republican freedom required more than the accident of managing to escape interference; it required the assurance of not even being exposed to the possibility of arbitrary interference by an uncontrolled power. In practice, republicans equated being free with living under a rule of democratic law and civic norms that would make everyone secure against interference, without giving anyone cause for complaint that they were not being treated as equals.

The free individual was an equal member of a free community so that there was a solid basis for the connection the French made in 1789 among liberty, equality and fraternity (or sorority or community). Traditional republicans were excessively narrow in their conception of who could be citizens; they limited the citizenry to propertied, mainstream males. But there is no reason why we cannot exploit republican ideas under an inclusive conception of the community to which the republic has to answer. There is every reason why we should make contact with the writing of Mary Wollstonecraft (Tomaselli, 1995), who argued the case for women in essentially republican terms, and with the early socialists, who argued in republican vein that those bound to masters under contemporary contracts were nothing more or less than wage slaves. Our republicanism is an inclusive one.

Our argument, joining Pettit (1997), has been that the republican conception of freedom as non-domination is a rich and inspiring one, particularly in regard to the connection it makes between equality and community. What must a community achieve to make it possible for members to enjoy equally their freedom as non-domination? A constant struggle for greater equality is necessary for liberty as a subjective sense of assurance against domination by others, because one can never enjoy assurance against domination by others if one lives in poverty. Community is necessary for freedom as non-domination because assurance against domination must be moored in a strong community that will mobilize collective disapproval against the arbitrary exercise of power. Empirically, we argue that individualist, privatized societies do not have the capacity to mobilize community disapproval against violation of the rights that assure non-dominated freedom (Braithwaite, 1989).

### 1.2. Restorative Justice in Brief

Restorative justice, at least in the “balanced” form articulated by Bazemore and Umbreit (1995) and Bazemore and Maloney (1994), means restoring victims, offenders and community. The justice model, which reached its highwater mark around 1980, is offender-centered and oriented to proportionate punishment rather than restoration; it is the justice of liberal individualism. Its main alternative for the first 90 years of the twentieth century — the welfare model — was also offender-

centered (Walgrave and Geudens, 1996). A republican theory of criminal justice (Braithwaite and Pettit, 1990) directs our attention to victims as much as offenders, because the criminal justice system should also be designed, by republican lights, to protect the liberty as non-domination (or dominion) of victims. We have noted above the republican emphasis on strengthening community: republicanism does require a balanced concern with correcting the impacts of crime on victims, offenders and community. Restoring individual victims and offenders is not enough. If racism in a school community is an underlying cause of bullying, then republican restorative justice requires the restoration of racial harmony in the school so that freedom from bullying is guaranteed (for racial minorities).

There is an earnest debate among restorative justice scholars and advocates as to whether it should also incorporate a concern with equality (see John Wilmerding's regular stirring of this pot on the restorative justice CERJ network: [cerj@cerj.org](mailto:cerj@cerj.org)). The republican rationale for restorative justice does require it to incorporate a concern for equality. Republicanism does not value formal equality for its own sake; rather, it only values those forms of equality that will increase freedom as non-domination. The formal equality of the liberal justice model — equal punishment for equal wrongs — unfortunately creates an oppressive punitive complex in which domination is rampant. In practice, the equal justice model delivers just deserts to the poor and impunity to the rich because of the way the dominations of punishment interact with the dominations of unequal wealth and power (Braithwaite and Pettit, 1990). In Australia, for example, more than 50% of Aboriginal young people experience a punitive encounter with the justice system (Gale et al., 1990; Morgan and Gardner, 1992); that system is quite a significant part of their oppression, not just another among many more important burdens. We also know, for example, that criminal convictions are an important cause of unemployment, not just for racial minorities (Hagan, 1991). The formal equality of the just deserts model therefore engenders both excessive dominations of punishment and poverty that crushes freedom as non-domination.

However, republicanism does share with the just deserts model an equitable concern to put upper limits on permissible punishment. Indeterminate sentences destroy the subjective security of citizens against unbridled state power (Braithwaite and Pettit, 1990). Citizens cannot enjoy dominion in a society where the limits on the punitive power of the state are not clearly specified. While the republican case for upper limits on permissible punishments for all types of crime is strong, there is no republican case for lower limits. Mercy and forgiveness are important values for republicans because of a requirement to search for the least dominating form of social control possible (Braithwaite and Pettit, 1990). In most cases, the least dominating form will involve no punishment at all. It will involve no more than dialogue about how members of a community might protect and care for one another.

## 2. DIMENSIONS OF RESTORATION

In previous writing, Braithwaite and Pettit (1990), Pettit and Braithwaite (1993) and Braithwaite (1996) have outlined in republican terms why a number of different dimensions of restoration are important. Consider the following list of dimensions of victim restoration (most of which are also relevant to restoring offenders and communities) from Braithwaite (1996):

### 2.1. What Does Restoring Victims Mean?

- Restore property loss
- Restore injury
- Restore sense of security
- Restore dignity
- Restore sense of empowerment
- Restore deliberative democracy
- Restore harmony based on a feeling that justice has been done
- Restore social support

Some of these are utterly uncontroversial from the perspective of mainstream legal doctrine (e.g., restore property loss, restore injury), while others accord with recent adaptations of that doctrine to partially accommodate the needs of victims (e.g., restore a sense of security). Others, like restoring deliberative democracy, have a strong foundation in the republican tradition (Sunstein, 1988, 1993) but not much in the criminal law tradition that crushed citizen deliberation over justice in favor of professional judgment in terms of the king's formal rules.

A question often asked about restorative justice is whether there is much concern with justice embedded within the palpable concern for restoration. The aim of *restoring harmony based on a feeling that justice has been done* is the key one here. Restoring harmony alone, while leaving an underlying injustice to fester unaddressed, is not enough. "Restoring balance" is only acceptable as a restorative justice ideal if the "balance" between offender and victim that prevailed before the crime was a morally decent balance. There is no virtue in restoring the balance by having a woman pay for a loaf of bread she has stolen from a rich man to feed her children. Restoring harmony between victim and offender is only likely to be possible in such a context on the basis of a discussion of why the children are hungry, and what should be done about the underlying injustice of their hunger. As we shall see below, the practical problem of ensuring that restorative justice does restore justice in a society full of dominations is difficult and is where most restorative justice institutions are vulnerable to criticism.

### 2.2. Restorative Justice Conferences

We find the above list of dimensions of restoration not only important in republican theory, but in the popular imaginations of citizens as manifested in restorative justice processes. The particular micro-institutions of restorative justice our research group is evaluating are what in Canberra are called diversionary accountability conferences, and what elsewhere are called family group conferences or community accountability conferences, or, generically, restorative justice conferences (Alder and Wundersitz, 1994; Brown and McElrea, 1993; Burford et al., 1995; Hudson et al., 1996; LaPrairie, 1995; McDonald et al., 1995; Moore et al., 1995; O'Connell and Moore, 1992). After an admission of guilt to the police (or "declining to deny" in New Zealand), instead of going to court, a conference is convened. The victim(s) and supporters of the victim are invited, as are the offender(s) and supporters of the offender. For offenses where there is no victim, such as drunk driving, one or two community representatives attend. This group discusses what damage the crime has done and how justice might be restored. More than 90% of the time a consensus is reached about a plan of action to bring about the restoration of victims, offenders and community. The community of care and the police then monitor implementation of the plan and reconvene the conference if implementation fails. Preliminary evidence from the first 548 adult and juvenile cases to be randomly assigned to conferences versus court in Canberra suggest high levels of satisfaction among victims, offenders, supporters, police and community representatives with the justice, respect for rights and usefulness of conferences — higher levels of satisfaction than the juvenile and adult courts enjoy in Canberra (Sherman and Barnes, 1997; Sherman and Strang, 1997, Strang and Sherman, 1997).

## 3. THE DANGERS OF RESTORATIVE JUSTICE

Proponents see conferences as a way of restoring victims and communities, of giving victims and offenders a say in decision-making that intimately affects their lives (restoration of a sense of empowerment and deliberative democracy) and that ensures that popular concerns become a vital part of criminal justice. Yet restorative conferences can equally be seen as a naive, idealistic way of dealing with serious problems. They are in danger of doing too little justice with too little equity. Proponents sometimes fail to recognize the societal contexts of domination and structural inequality affecting victims and offenders (Stubbs, 1995). These criticisms have been directed at other means of informal justice, such as mediation and alternative dispute resolution (Abel 1981, 1982a, 1982b; Fitzgerald 1985; McEwen 1987, Nader, 1979, 1980).

Mediation in family law and domestic violence returns disputes to families already imbued with imbalances of power between men and women, gives unaccountable power to mediation professionals, and detours women away from enforceable

decisions of courts (Astor, 1991; Cain, 1985). Consumer complaint programs in banks or telephone companies send pacified customers away, unaware that their problem confronts thousands of others who may or may not complain, and leave exploitative company policies untouched (Nader, 1979). Internal dispute resolution in a workplace changes issues of institutional bias and discrimination into individual management problems for particular work areas to deal with (Edelman et al., 1993).

Like informalism in civil cases, the communitarianism of restorative justice in criminal matters might drag domination into the justice process without an opportunity for accountability. Offenders, particularly if they are low in power and status like juvenile members of minority groups, may not have their rights adequately protected, and will certainly not get all the protections of a fully fledged criminal trial (Bargen, 1996; Warner, 1994).<sup>1</sup> At its worst, the philosophy of empowering victims and encouraging victim advocacy can legitimate the "justice" of lynch mobs and the tyranny of the majority (Scheingold et al., 1994). Conferencing may hand even more power to police who already dominate suspects. If lawyers and the criminal process already fail adequately to supervise cultures of police violence and coercion of confessions (McConville and Mirsky, 1990), then surely they are even more likely to run rampant under a regime in which conferences appear to grant even more discretion to the police.

From the victim's point of view, mediators or facilitators may dominate conferences, failing to take violence or damage seriously enough (Braithwaite and Daly 1994; Maxwell and Morris, 1993; Morris and Maxwell, 1991). Thus critics argue that restorative justice might:

- fail to take violence seriously
- lack procedural accountability
- fail to deal with the unequal bargaining power of the parties
- give police or professional mediators too much unaccountable power over serious criminal problems
- empower the "victim advocacy" of the lynch mob

The underlying issue is that restorative justice is susceptible to perpetuating all the dominations of everyday community. To its critics, restorative justice "purports to restore a social peace that never existed" (Abel, 1982a:8). It neutralizes conflict by individualizing and privatizing grievances and offenses (Fitzgerald, 1985). Informal justice may stymie opportunities for conflict to be used creatively to achieve social change, to work toward a community based on equality and liberty rather than the tyranny of the majority.

It is true that restorative justice cannot resolve the deep structural injustices that cause problems like homelessness or hunger. Republicans look primarily to other institutions, especially economic institutions, for that challenge. But republicanism does require two things of restorative justice. First, it must not make structural injustice worse (in the way, for example, that the Australian criminal justice

system does by being an important cause of the unemployment and oppression of Aboriginal people). Indeed, we should hope from restorative justice for micro-measures to ameliorate macro-injustice where this is possible (for example, finding a home for the homeless offender). Second, restorative justice should restore harmony with a remedy grounded in dialogue that takes account of underlying injustices. Restorative justice does not resolve the age-old questions of what should count as unjust outcomes; it is a more modest philosophy than that. It settles for the procedural requirement that the parties talk until they feel that harmony has been restored on the basis of a discussion of all the injustices they see as relevant to the case. Within that dialogue about justice, republicans will want to make the case that justice is what secures freedom as non-domination (with respect to both procedure and outcome).

#### 4. REPUBLICAN SOLUTIONS TO THE DANGERS OF RESTORATIVE JUSTICE

In the remainder of this paper we suggest three strategies by which the justice of restorative justice can be maximized using the republican politics of non-domination. Three republican solutions are advanced to the dangers of restorative justice outlined in the last section:

- (1) Contestability under the rule of law whereby legal formalism empowers informalism while checking the excesses of informalism.
- (2) De-individualizing restorative justice, muddying imbalances of individual power by preferring community conferences over individual-on-individual mediation.
- (3) Vibrant social movement politics that percolates into the deliberation of conferences, defends minorities against tyrannies of the majority and connects private concerns to campaigns for public transformation.

##### 4.1. Contestability under Rule of Law

Critics of restorative justice sometimes implicitly put forward legalism as the only viable means of doing justice in individual cases that institutionalizes enough accountability. The proceduralism and publicity of the court system is certainly designed to protect alleged offenders against domination, although in practice only a small percentage of alleged offenders ever receive the benefit of a full criminal trial.<sup>2</sup> And, as we have seen, this does little for victims and restoration. A more practical model gives the rule of law the task of overseeing institutions of restorative justice. The proceduralism of law has a role in supervising the compromises of conferences, and functions as a last resort when restorative justice fails to do justice. Restorative justice should not replace rule-of-law considerations, but add to them



and fill them with meaning and relevance to particular situations. We will see that out of this process of mutual influence formal justice might become more restorative (e.g., community service substituting for imprisonment in many cases; see the right hand arrow of Figure 2).

Thus, the preference is to use restorative justice first to achieve healing, and to use the rule of law to ensure that minimal procedural constraints that protect people from domination have been followed. Where restorative justice is dominating, either party has the right of recourse to the rule of law. Braithwaite and Daly (1994) argue that in those circumstances, the formalism of the rule of law has the capacity to empower the informalism of restorative justice conferences because contestability by reference to legalism encourages parties to ensure the justice of communitarian justice in the first place. Formalism empowers informalism when it gives offenders the right to a conference and requires that they be informed of their right to walk out of the conference (so that the matter can be heard in court).

#### 4.2. De-Individualizing Restorative Justice

Private justice does risk rendering "the personal apolitical" in the dyadic form of offender and victim, mediated by a professional. Conferences are controversial when used for offences like domestic violence, rape, armed robbery, attempted murder and serious white-collar crime. This controversy is about the imbalance of power between offenders and victims for these kinds of offenses. There might also be an imbalance of power in the other direction, where the offender is a juvenile and the victim an adult. Yet there is no reason why Abel's (1982b: 288-289) criticism of informal justice must hold true of restorative justice conferences: "Although neighbourhood institutions constantly speak about community, what they actually require (and reproduce) is a collection of isolated individuals ... Informalism appropriates the socialist ideal of collectivity but robs it of its content. The individual grievant must appear alone before the informal institution, deprived of the support of such natural allies as family, friends, work mates, even neighbours."

Restorative conferencing in criminal justice can turn institutions of informal justice into fora where individuals are empowered through the presence and support of their most trusted friends to confront and receive an apology and compensation from those who have wronged them, even when the offender is much more powerful than themselves. The problem with dyadic victim-offender mediation is that there is an imbalance of power if the offender is the school bully and the victim is a nerd; if the offender is a child, the victim an adult; the offender a man, the victim a woman. What is different about a conference is that it is a meeting of two communities of care, both of which contain men and women, children and adults, the "cool" and the "uncool," the organized (like an Aboriginal Community Council) and the unorganized (like a demoralized Aboriginal adolescent [see Figure 1]). The conference by no means eliminates imbalances of power; one community of care

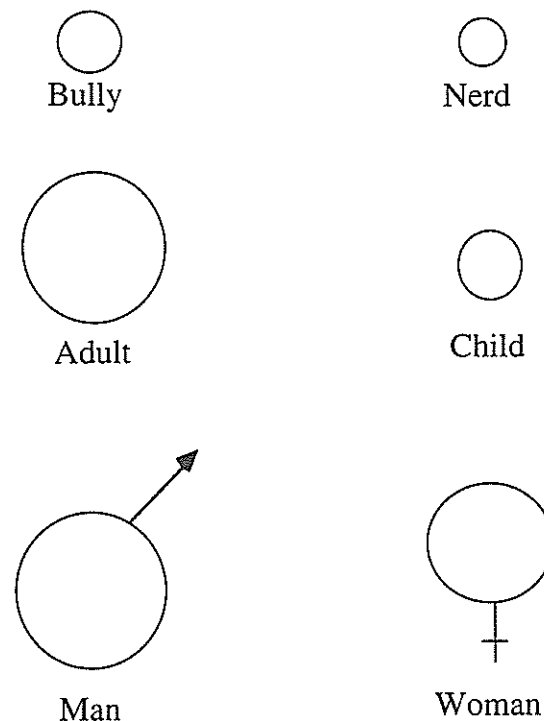
might be consistently middle class, the other lower class. Yet the muddying of power imbalance, as illustrated in Figure 1, amounts to an improvement over individualized justice. While this is one of a number of theoretically important differences between a conference and a dyadic encounter, it would be a mistake to characterize mediation as always dyadic. With traditional victim-offender mediations, other supporters on the victim, or offender, side are often present.

#### 4.3. Connecting Private Troubles to Public Issues through Republican Social Movements

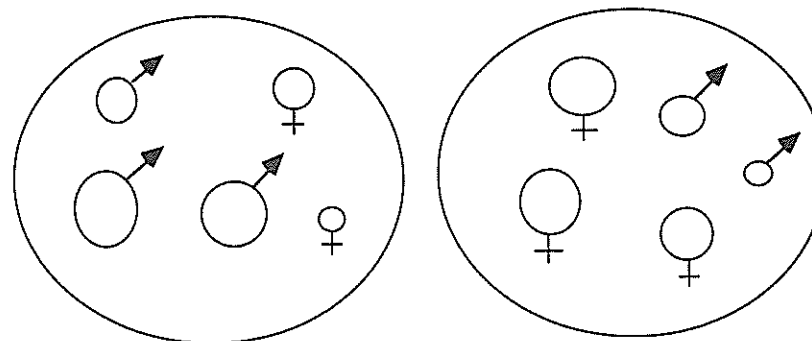
Central to civic republicanism as a political ideology is the notion that active, organized citizenship in civil society is a bulwark against abuse of state power. Equally, it is a crucial protection against abuses of community power (Pettit, 1997). In combination, there is a vital role for social movement politics in checking the tyrannies of both state law and community. How might this be accomplished in the case of juvenile justice?

We see public funding for youth justice advocates as a primary mechanism. Already such publicly funded advocacy services exist in many countries, with a mandate to check abuses of police power by taking strategic cases against the police to the courts, conducting research on abuses of police power against young people and advocating changes to policing policies to remedy the structural problems. More infrequently, youth advocacy services have checked the power of juvenile courts by taking test cases to higher courts and exposing dominating practices toward young people in the courts.

The additional role for such advocacy services under a regime of restorative justice (which would require additional public funding) would be to check abuses of power in restorative conferences or victim-offender mediation programs. Cost would obviously ration the attendance of youth advocates at actual conferences or mediations in any jurisdiction where hundreds of these were occurring every month. However, as with legal aid, strategic attendance would be required at those cases where the advocacy group judged there to be risk of a serious breach of rights. This need not imply returning the control of citizens over the conference to the more dominating expert discourse of lawyers. There is a risk here with advocates who tend to be specialists in conflict rather than in peace. Youth advocates might be present at the conference as advisors only, not as principals to the conflict. This can mean that lawyers are not normally allowed to speak unless their principal asks and special permission to do so is granted by the facilitator. In practice, what happens under such a policy is that occasionally the advocate might whisper something in their client's ear, or, more rarely, ask for a momentary adjournment of the proceeding so they can have a chat outside. Mostly the advocate just sits, listens and monitors the justice of the proceeding.<sup>3</sup>

**Figure 1: De-Individualizing Restorative Justice**ONE ON ONE  
VICTIM-OFFENDER MEDIATION

## CONFERENCE



When youth justice advocates do not attend conferences, they should nevertheless receive on-line from the criminal justice system the results of all conferences. When the youth advocate notices that there has been a case where a sanction imposed by a conference exceeds that which would likely have been imposed by a court for the same offense, he or she can then call offenders and point this out to them. It may be, of course that the offender really wants to do more than the court would require. But if the offender wants to contest the conference outcome, he or she could use the resources of the youth advocate to walk away from the conference agreement and insist that the matter be adjudicated in a court of law.

The youth advocate is not the only kind of advocacy needed for juvenile crime. In the Australian context, where Aboriginal youths are a large part of the juvenile justice system's clientele and greatly discriminated against, there is a special need for Aboriginal advocacy services to keep an eye on what is happening under restorative justice programs. When women and girls are victims of rape, sexual assault and family violence, there is a need for monitoring of restorative justice cases (and attendance in special circumstances) to protect against the domination of victims' rights, even in cases where the offender is a juvenile. In our jurisdiction in Australia, we have a Victims of Crime Assistance League, which could also reasonably be publicly funded to play the same role on the victim side as the Youth Advocate would play on the side of the juvenile offender. If this sounds unrealistic in an era of contracting legal aid budgets, bear in mind that selective attendance of advocates at conferences for purposes of monitoring rights does not require the resources involved in mounting a defense for a criminal trial.

This is a general republican strategy. With corporate crimes against consumers, republicans want consumer advocacy groups to monitor the protection of consumer interests in restorative corporate justice; trade unions, to monitor occupational health and safety crimes against workers; and environmental advocacy groups to monitor environmental crimes (Ayres and Braithwaite, 1992; Fisse and Braithwaite, 1993). If these advocacy groups are doing their job, they will not be so lacking in strategic sense to allow all disputes to be privatized. Advocates for Aboriginal victims of a consumer fraud that raises the need for regulatory reform of an industry may ask that a press conference be held to communicate to the public and its political leaders the problem revealed by the crime, as happened in the Colonial Mutual insurance frauds against Aboriginal Australians (Fisse and Braithwaite, 1993).

With juvenile offenses, it is exceptionally rare for the communities of care around offenders and victims to decide that it is wise to go public with a conference outcome, though it has happened. That is not to say that well-resourced youth advocacy groups would not seek to connect narrow disputes over juvenile crime into wider advocacy campaigns. In the early 1990s, youth advocacy groups in Australia, networked with other community groups, lobbied for what became known

as "the Job Compact." The Job Compact, which became government policy for a brief moment in Australian history, obligated the state to find a job, even if only temporary employment, for all long-term unemployed people, young or old. It also imposed obligations with respect to access to labor market training. Given that unemployment is so concentrated among the young, one might hope that the kinds of state obligations in the Job Compact would continue to be structural priorities for youth advocacy groups. Therefore, one would hope that in restorative justice conferences for young offenders who have been denied job opportunities or labor market training opportunities, youth advocates would seek to persuade participants to put demands on the table in conferences for state-funded training and job opportunities. If these demands were persistently denied, then youth advocates might want to persuade participants to go public with strategically selected cases to demonstrate the failures of the state to respond to its responsibilities for employment and training as solutions to crime, or simply to write as a group to members of parliament.

A similar situation concerns some of the appalling educational policies that have been major contributors to juvenile crime in Australia. We refer to educational policies that stigmatize children who perform badly, and then expel them from the school as soon as they misbehave in some serious way, or even in a less serious way such as smoking marijuana. We have already seen some wonderful conferences in Australia, where even without the support of youth advocacy groups, citizens from both the victim and offender sides have decided to join together to confront a school on the destructiveness of its policy of suspending the young offender involved in the case. We have seen conferences where citizens decided, following a sexual assault, to confront the culture of dominating masculinity in a school (see Braithwaite and Daly, 1994). We have seen conferences where Aboriginal peoples have asked that their traditions of how to transact justice in the future be more respected by the white justice system, a most important structural change for Aboriginal people. On the victim side, advocacy groups can watch for structural injustices for which there are large classes of additional victims whom the advocates should apprise of their access to a remedy. Publicly funded monitoring of restorative justice by advocacy groups is actually a potentially more efficient way of publicizing access to remedies than the haphazard publicity of the court.

Under a republican conception of restorative justice, advocacy groups thus have two crucial roles. First, they check abuses of power by community majorities in a conference by ganging up on the client group represented by their organization, serving in effect as a check on the tyranny of community. Second, advocacy groups connect individual grievances to structural ones, taking strategic actions to draw out the public dimensions of private disputes. They are a check on the tyranny of individualized privatism that is blind to underlying structural problems.

Yet advocacy groups themselves can be dominating. The Ku Klux Klan is an advocacy group of sorts. Some victims of crime advocacy groups in some parts of

the world are closer to the Ku Klux Klan than to our republican ideal of freedom as non-domination (Scheingold et al., 1994). A world with stronger advocacy groups in civil society will be a stronger republic even though many of the advocacy groups will be anti-republican. Republicans believe in the theory of checks and balances, including checks and balances between citizen groups. When the Ku Klux Klan has reared its ugly head, it stirred up competing forces in civil society, such as black Christian churches in the South and white college students in the North, who succeeded in getting the U.S. to check its abuse of communitarian power. Moreover, the more deeply we can embed restorative justice institutions that deliver superior remedies only on condition that protagonists sit and listen to each others' point of view, then the more we nurture a civility that leaves less space for groups that endorse advocacy by dominating speech and action rather than by dialogue and persuasion. Republican institutions make political life less rewarding for anti-republican forces who support the politics of domination. At the same time, republican institutions leave a seat at the table for those very anti-republican voices. That is the paradox of democracy no less than the paradox of republicanism.

## 5. CHECKING AND BALANCING LAW AND COMMUNITY

Our solutions to the problem of unjust restorative justice would institutionalize a republican interplay among community concerns about restoration, the proceduralism of the rule of law and social movements motivated to check domination. The three strategies proposed for ensuring that restorative justice restores victims, offenders and communities on the basis of justice — ensuring the contestability of restorative justice under the rule of law, de-individualizing mediation and propagating social movements that transform private troubles raised in individual conferences into public issues — together comprise a republican theory of justice. Because the republican conception of freedom is a rich one, republican strategies for doing justice (i.e., for restoring freedom/non-domination where it has been damaged) are also rich and multi-dimensional. They rely on the rule of law and on the communitarianism of social bonds and the active citizenship of social movement politics. We argue that institutions of restorative justice, such as family group conferences, form a crucial axis for this republican interplay of mechanisms of justice in criminal cases, as illustrated in Figure 2.

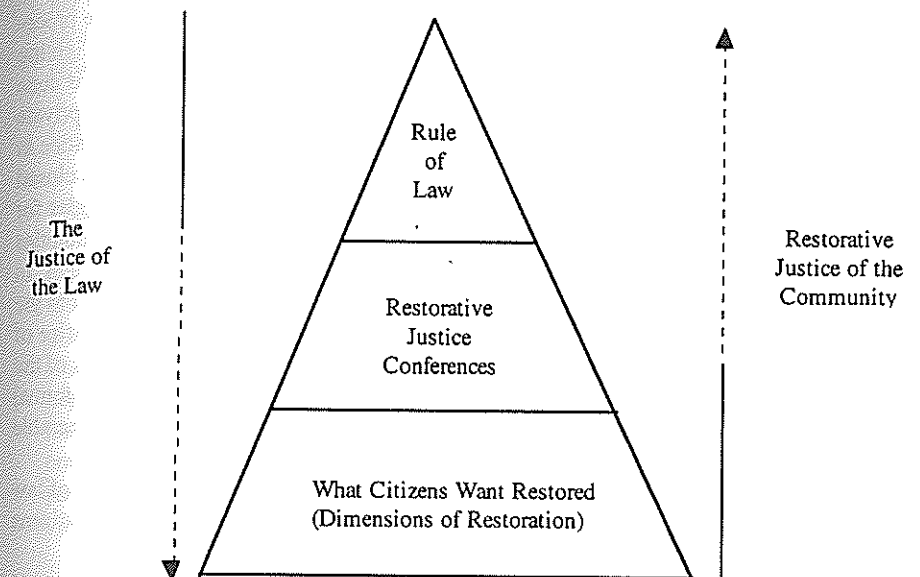
At the base of the pyramid are the subjective and contextual justice concerns of individuals and communities with restoration and healing. Restorative justice conferences are attempts to empower and institutionalize these concerns through communitarian processes that restore social bonds. Yet we have also seen that micro-institutions of restorative justice can be criticized for being dominating. The need for restorative justice conferences to be made accountable to the procedural concerns of the rule of law is represented by the apex of the pyramid — the fact that

victims and offenders should always have a right to walk out of a conference and go to court. As a result of the possibility and actuality (in some cases) of court intervention to strike down conference injustices, a rights/procedural justice discourse percolates down into restorative justice conferences and, eventually, even into the popular concerns that people bring to conferences at the base of the pyramid. Thus, the restorative justice of the people is shaped by the justice of a law that creates space for justice under the control of affected citizens. The informalism of restorative justice is also empowered by the formalism of state law, which gives everyone assurance that if a tyrannous family, tribal patriarch or police officer takes over, the state can step in to check that tyranny. Restorative justice theory, research and praxis show that justice needs many ante-rooms before one reaches the courtroom if he or she is to be given a chance to heal (Cragg, 1992; Galaway and Hudson, 1990; Marshall, 1985; Messmer and Otto, 1992; Van Ness, 1986). The pyramid leaves plenty of space for healing because it also makes a prudent space for the judge's hammer.

Yet the rule of law may also dominate conferences by ignoring the full dimensions of restoration and healing required in each particular situation. This does not mean law should be abandoned in favor of the domination of a community that fails to respect rights and procedural safeguards. We advocate a model for restorative justice conferences in which the justice of law and the restorative justice of the community interact and interplay. Indeed, in this model the prevalence of restorative justice conferences that institutionalize community concerns with restoration and healing institutionalize a critique of and alternative to traditional trial processes, which helps make the whole criminal justice system more responsive. Citizens' concerns have an avenue for bubbling up the pyramid into legal discourses and procedures through legal supervision of conferences, just as the discourse of the justice of law has a way of percolating down.

Habermas (1996) comes close to the model we propose in Figure 2. He speaks of the way rationality potential can be "set aflow" (Habermas, 1996:98) by both law affecting lifeworld from above and lifeworld affecting law from below. In this, he admittedly does have an overblown regard for the democratic potential and centrality of law: "...in complex societies, morality can become effective beyond the local level only by being translated into the legal code" (p.110). Nevertheless, Habermas (1996:176) is undoubtedly right that law can be a "power transformer" under conditions of high complexity, spreading local moral concerns more widely along the transmission lines of legal regulation. The public sphere generates the democratic impulses that the law both transmits and constitutionalizes through guaranteeing rights and fair procedures. Public reason is an emergent property set aflow by these impulses moving up and down Figure 2.

Figure 2: Checking of Law and Community to Make Restorative Justice Just



Individual encounters between victims and offenders (either in court or conferences) do not occur in a vacuum. Because crime is set in a context of structural problems and social inequalities, the pyramid is set in a context of political and social action to confront the realities of domination. The second and third strategies proposed earlier address this problem by changing conferences from dyadic, individualistic encounters into dialogues between communities of care (de-individualizing mediation), and by connecting private troubles in individual conferences to public issues and patterns of inequality through the involvement of social movement advocacy groups.

The involvement of advocacy/community groups in the conference process also helps solve the potential problem of legalism percolating down the pyramid in such a way that it overwhelms restorative justice and citizen concerns. Lawyers who



are themselves captive to advocacy groups are less likely to capture restorative justice with legalism. Thus Parker (1994) suggested that a youth advocacy center was better at empowering clients than other community legal centers because the lawyer was just one worker among many.

For republicans, restorative justice institutions are a crucial link between desirable features of a criminal justice system. In our model, restorative justice institutions join the concerns and needs of citizens and community with the procedural safeguards of the rule of law and the social/political action of groups fighting the politics of non-domination in a way that transforms how criminal justice is done (to make it more just). There is no room for clear-cut distinctions between private and public justice, individual and community. Institutions of restorative justice in this model, far from segregating individual crimes to be dealt with behind closed doors as individualized problems of healing, become links to public struggles for justice. At the same time, they give enough space to individuals and communities to make their own justice in terms and under procedures meaningful to them. In both these respects courtroom justice generally fails. Justice is not confined to the procedural justice of lawyers that dominates criminal trials and the non-justice of pretrial plea negotiations. Nor is it defined purely according to the feelings of the individuals involved or the norms of a potentially tyrannous community. The formal justice of lawyers and the contextual justice of a community are rendered vulnerable to the struggle for social justice of social movements.

Perhaps this has all been too abstract. So let us illustrate how the rule of law might cascade down into restorative justice, and then how the restoration citizens want might bubble up into the rule of law.

### 5.1. Imagining a Rule of Law that Percolates Down into Restorative Justice

#### Case 1.

A young first offender admits putting graffiti on a shop window. A conference agrees to a demand from the shopkeeper for 200 hours of work at the shop by the offender. When the youth advocacy service sees the printout of the previous week's conference outcomes, this demand jumps out as a disproportionately onerous agreement for the young first offender. It contacts the offender and advises that should he or she choose to walk away from the agreement and have the offense adjudicated by a court, the penalty would probably be substantially reduced. The offender decides to go to court with the youth advocate, and the court strikes down the conference agreement, imposing a penalty of 40 hours of community work.

#### Case 2.

An adolescent female goes to a conference for a burglary she admits. At the conference, the police and victim seek to hold her responsible for another, more serious, burglary at the same house for which she denies responsibility. She walks out of the conference. The initial burglary goes to court. When the magistrate asks her why she walked out of the conference, she explains the attempt by the police to clear the second burglary. The magistrate reprimands the police sternly for the injustice of this action, a reprimand that is reported in the local newspaper.

#### Case 3.

A young First Nations woman in Canada takes to a healing circle (LaPrairie, 1995; Ross, 1996) a complaint of sexual abuse against her by the son of a powerful elder. The elders abuse this restorative justice process by closing ranks around the man. The upshot is that the young victim is vilified in her community for making the complaint.<sup>4</sup> A women's rights advocacy service takes up her case in the Canadian criminal and juvenile courts, which convict and punish the elder's son. The Canadian government sends in a First Nations lawyer from another community to negotiate with the local people on how procedures for healing circles in this community might be reformed. The new healing circle procedures are enthusiastically embraced by the community. Under them, the whole community participates in a series of healing circles in which they seek forgiveness as a community from the victim of the sexual assault.

### 5.2. Imagining a Restorative Justice that Percolates Up Into the Rule of Law

#### Case 1.

We do not really have to imagine how restorative justice can percolate up into the law because we can see how the Maori restorative justice ideas in the family group conference have penetrated New Zealand statute and case law. In a seminar on youth justice held in Australia six years ago, a New Zealand participant described a conference where a young first offender had agreed to give his own car to the victim of his joyriding offense. An Australian lawyer objected at the seminar that this was a breach of proportionality constraints on sentencing: a juvenile court would never impose something as heavy as what amounted to a \$15,000 fine on a first offender for joyriding. But the circumstances of the case were such that the offender was from a wealthy family that had given him the car; the victim was unemployed and uninsured and desperately needed a car that was beyond repair as a result of the joyride. Handing over the offender's car fitted the sense of equity of

all participants in the conference, including the offender. It was simply a different sense of equity than one finds in the proportionality metrics of criminal sentencing. Interestingly, however, the restorative equity of the conference was hardly at odds with the conception of equity in tort law.

Let us imagine a conference in Australia deciding a case in this way. The youth advocacy service advises the young offender to go to court to contest the disproportionality of the agreement. In a moment of weakness when he is missing the car, the offender agrees to the challenge. The Juvenile Court strikes down the agreement as a disproportionately severe sentence and orders return of the car. On appeal, the Juvenile Court decision is found to be an excessively narrow construction of the proportionality of criminal sentencing that leaves insufficient space for the sense of equity that emerges from participatory justice.

#### Case 2.

Another juvenile goes to a conference for stealing a car. At the conference, the offender's mother complains that the police used excessive force at the time of her son's arrest. Further, she complains that the police have branded her son as "a little crim." Whenever anything happens in the neighborhood, he is their automatic suspect. In this particular case, other children were involved in planning the car theft, but action was being taken only against her son. Of greater concern to the youth advocate present at the conference was that no action was being taken against a major car dealing and repairing company who provided the offender with a list of car models that it wanted young people to steal (largely for parts). It is decided that participants will assist the youth advocacy service to produce a report and call a press conference on police responses to the car theft problem in the city. The young offender puts in 150 hours of community work helping the youth advocacy service with photocopying and other work associated with the project. The report is critical of the police for its use of excessive force against young people, and for the discriminatory way in which it targets its vehicle theft enforcement efforts on young people in areas with high unemployment, totally neglecting the white collar criminals who are supplying these unemployed young people with illicit work. The report exposes the practice of motor vehicle traders in the city supplying desperate young people with lists of cars they would like to be stolen. The press conference shocks the community. In response, the police arrest two motor traders and a police officer who has taken bribes from them. It also initiates discussions with car manufacturers about the possibility of marking certain strategic parts with numerical identification at the point of manufacture, and initiates other preventive measures with insurers. Motor vehicle theft in the city drops by a third over the next two years.

Like the previous case, this one is imagined from some foundation in fact. The New South Wales Police dealt with escalating motor vehicle theft rates in Sydney in the early 1990s through the dialogic method of setting up a Motor Vehicle Theft

forum with the Motor Traders Association, insurers, and manufacturers, among others. They found that one factor in the increase was white collar criminals in the car trade supplying juveniles with computerized lists of parts (or whole cars) that had been ordered by customers. The motor vehicle theft rate in Sydney dropped by a third in the two years following the work of the Motor Vehicle Theft Forum (Braithwaite, 1993:386).

#### Case 3.

A police officer in a remote part of Australia has strong grounds to suspect that a young Aboriginal person has committed a criminal offense. When the police officer questions him, he does not reply, staring angrily back at the officer. Being new to the area, the officer is puzzled by this response until an Aboriginal elder explains that direct interrogation is rude by the standards of their culture. The elder, who has had training in conferencing, offers to convene a meeting of appropriate indigenous people to discuss the matter with the young person. The elder starts the conference, not by asking questions, nor by making any statements about the young person's case. He starts by telling a story about how he got into trouble as a young person and what he did to put it right. Some other old people do the same. Eventually the young offender adds his story, expresses regret and seeks advice from the elders on how to put things right. The convening elder writes this out as a conference agreement that will have status under "white fella law" so that the matter might not go to court. While the police officer accepts this, the local prosecutor does not. He thinks the agreement is oppressive and was procedurally oppressive because the offender was not asked at the outset whether he admitted guilt. When he takes it to court, it becomes a *cause célèbre* for the Aboriginal Legal Service. The upshot is the government accepting a Law Reform Commission Report that concedes that indigenous justice based on truth-finding by sharing stories can be accommodated. The Australian test of an admission of guilt before a conference can proceed is abolished in favor of a New Zealand "declining to deny" test.

### CONCLUSION

Nowhere in the world does the practice of restorative justice approach the imagined world of the preceding six cases. Nowhere does restorative justice satisfy the republican prescriptions of: (1) contestability under the rule of law, (2) de-individualizing restorative justice in a way that counterbalances the imbalances of power, and (3) vibrant social movement politics that connect private troubles to public issues, publicly deliberated and structurally reformed. Strategic steps suggested by our analysis might include: (1) Engaging restorative judges with the challenge of intervening to check abuses of power in restorative justice processes by developing a restorative justice case law. (2) Conducting empirical research on

the effect on injustice and power imbalance of the size and plurality of conferences, and the development of strategies for a plurality that empowers what Nancy Fraser calls "subaltern publics."<sup>5</sup> (3) Evaluating innovations that publicly fund advocacy groups to connect conferenced private troubles to public issues and deliberation of structural change.

We do not despair in the least at the failure of any currently working model of restorative justice to live up to our republican ideals. Rome was not built in a day, nor has its Republic totally crumbled. Thanks to Emperor Justinian, the Roman Empire bequeathed to us the rule of law; it also bequeathed to us the ideas of freedom as non-domination, deliberative justice and the separation of powers. We are hopeful that restorative justice is being built one brick at a time. Like Rome, it will be deeply flawed, but perhaps better than what went before. Our objective in this paper is to inspire reformers to lay restorative justice bricks with a vision of how many rooms must be built, how much better we can make the structure through a process of progressive extension. Without the vision of a possible future, however, we risk building rooms that are sealed off from other rooms.

Many bricks are already in place in many nations. Most restorative justice programs already enable contestability by the rule of law by advising juvenile offenders of a right to walk out of the conference room and into the courtroom. Many countries are engaged in research and development with conferences, healing circles and restorative probation which might improve our capacities to counterbalance power imbalances by de-individualizing mediation (see, for example, the work of Pennell and Burford, 1995). Social movements — from youth advocacy, to the women's shelter movement, to civil liberties, worker, environment, consumer and Aboriginal rights groups — are all increasingly engaged with the possibilities of restorative justice. They are also increasingly vigilant about the possibilities for their constituents to be seduced into domination by its velvet glove. Most importantly, within the social movement for restorative justice itself, we can be important checks on one another through the self-critical discussion of our restorative innovations at meetings such as this in Leuven. Let us build an optimistic social movement, oblivious to despair at how pitifully small are the steps we take toward a more just society. But at the same time, let us be committed to a process of learning from where we have put our foot wrong, so that we might take bigger strides in the future.

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### NOTES

1. However, most alleged offenders never see a fully fledged trial. Most plead guilty due to the insistence or domination of lawyers and other court personnel (Roach Anleu and Mack, 1995; Baldwin and McConville, 1977; McConville and Mirsky, 1990).
2. See footnote 1.
3. One of the authors has experience of such a policy with a rather restorative regime of regulating corporate crime under the *Trade Practices Act* (Cth) 1974. As a part-time commissioner of the Trade Practices Commission for a decade, Braithwaite would chair conferences of conflicting parties concerning alleged breaches of the act. Lawyers were allowed to attend (and normally did) but were not generally allowed to speak, a regime that engendered much more effective negotiated justice than other business regulatory regimes in Australia, where the lawyers were either excluded or allowed to take over.
4. Case 3 is based up to this point on a real Canadian restorative justice disaster somewhat like this.
5. "Until quite recently, feminists were in the minority in thinking that domestic violence against women was a matter of common concern and thus a legitimate topic of public discussion. The great majority of people considered this issue to be a private matter between what was assumed to be a fairly small number of heterosexual couples.... Then feminists formed a subaltern counterpublic from which we disseminated a view of domestic violence as a widespread systematic feature of male-dominated societies. Eventually, after sustained discursive contestation, we succeeded in *making* it a common concern" (Nancy Fraser cited in Habermas, 1996: 312).

## PART TWO: PROCESS, PROGRAMS AND PRACTICES