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Commentary: law, morality and restorative justice

Hans Boutellier opens the last issue on restorative justice and mediation quoting James Q. Wilson: 'If society is to maintain a behavioural equilibrium, any decline in morality must be matched by a rise in law' (Wilson, 1994, p. 489). Boutellier rightly points out that western countries have transformed 'from relatively stable normative cultures into cultures of explicit moral pluralism' (p. 7) and that the prominence of criminal law enforcement in enforcing social order has risen. Boutellier's own contribution, together with the remaining essays in the issue of this journal, show a direction for responding to moral pluralism in more decent and effective ways than building more prisons.

Punitive criminal justice is hardly a credible response to moral pluralism because it is such a unicultural, univocal tradition – one judge speaks the law of one people following procedures of justice enshrined by the dominant culture in the society. An appeal of restorative justice is that it can be multicultural. Restorative justice can mediate problems of

order here according to procedures that make sense to young brown women, there by procedures that make sense to old white men. This is because the less law-like procedures of restorative justice create a space where participants can be empowered with process control. This is a key reason participants like it so much, a popular appeal discussed in the contribution of Walgrave and Aertsen to this volume.

Boutellier points out that while criminal law is less sustained by the 'self-evident social cohesion' of a national community, the west is discovering a new kind of consensus over 'protection against victimization' (p. 14). If we seem hopelessly fragmented over what constitutes 'the good society' and 'fair procedure', preventing and healing the suffering of victims of crime and holding accountable those who are responsible for it is something about which we can and do agree.

At first, Boutellier's 'victimological turn' in criminal law seemed dangerous. Progressives saw victims as angry, retributive people; victim social movements were at the vanguard of vengeance. The women's movement has complicated this stereotype as it encompasses punitive and restorative traditions which both have considerable vitality. And now the empirical experience of the kinds of mediation programmes discussed in this issue shows that even with a fairly modest dose of empowerment, victims can be remarkably forgiving, constructive in their engagement with problem solving, often actively seeking to advance their own restoration by helping with the restoration of the offender. In other words, victims and victims' organizations were at the vanguard of vengeance because of the way their voices were silenced by the white male voices of judges enforcing the unicultural legalism of the criminal law.

Tony Marshall's essay on 'The Evolution of Restorative Justice in Britain' identifies a pragmatism in the tradition that gives it more resilience than a social work ideology that young people simply 'grow out of crime'. It may be, as Marshall points out, that many grew out of crime 'precisely because they were caught and it was made evident to them that such behaviour was unacceptable' (p. 22). Marshall is right that restorative justice has grown not as a result of the persuasiveness of its theory, but because it 'offered pragmatic solutions to everyday problems' (p. 34). The best criminal justice theory is inductive, drawing out the insights of common sense practitioners. But then it gives their pragmatism a more abstract quality and puts it into a deductive structure. In the shuttling back and forwards between induction and deduction that the best theory does (Scheff, 1990), the deductive part is important, not just an afterthought.

Top-down, it shows where the bottom-up practice has a wider relevance. If restorative justice has

proved more constructive than punitive justice with problem A for reasons X and Y, and X and Y apply to problem B, the theory forces a challenge as to why restorative justice is not being used with problem B. While restorative justice programmes have proliferated at a remarkable rate during the 1990s, most of the programmes have been marginal rather than mainstream, as Marshall and Dünkel point out in their essays, because the centres of punitive power have mostly opted to refer only minor cases. Armed with strong theory and robust research that has tested it, assaults can be launched against the battlements of punitive power. Victory is far from guaranteed; yet without a credible theory and research that supports it, defeat seems certain. Pragmatism that leaves restorative justice marginal, pragmatically shying away from an attempt to supplant the mainstream punitive tradition, will leave the benefits of restorative justice moot. The mootness, well illustrated by Dullum's chapter on the history of the Norwegian Mediation Boards, arises from the risk that diversion from punishment to restoration will be exceeded by diversion from benign tolerance to excessively intrusive community control over matters best dealt with by a simple caution (see Alder and Wundersitz, 1994).

Frieder Dünkel's contribution on 'German Experiences with Mediation in a European Perspective' suggests some earnestness of thinking among criminal justice opinion leaders about extending mediation from less to more serious offenders. Expansion of restorative justice into adult offending is reported for both Austria and Germany. Dünkel's essay shows that this rests in part on German-language research indicating specific and general prevention effects, high rates of reaching settlements and of delivering the commitments made in agreements.

Lode Walgrave and Ivo Aertsen concur that 'As empirical evidence and theoretical reflection on restorative justice increase, confidence in it is growing' (p. 68). This is something of a reversal of the usual pattern in criminology, where confidence declines as data accumulate and theory becomes more sophisticated. Walgrave and Aertsen find a tension between shaming and restoration. They think that shaming the crime is important to restoring the victim, signifying to the victim who is degraded by a crime that it is the crime that must be shamed not the victim. However, Walgrave and Aertsen see it as difficult to shame the crime without stigmatizing the criminal.

Picking up a theme in *Crime, Shame and Reintegration*, they think reintegrative shaming is only possible in communitarian societies. It is more possible in communitarian societies; but there is a lot of reintegrative shaming in individualistic societies (for example, in the families and schools in the US that can be shown

empirically to do the best job of preventing crime) and a lot of stigmatization in communitarian societies. Walgrave and Aertsen see restorative justice conferences as keeping stigmatization within reasonable bounds because the shaming is kept right away from the view of members of the public not directly involved in the incident. This semi-private character of conferences is a worry given the importance of having a publicly accountable criminal justice system. My own inclination is to believe that we can design restorative justice institutions that enable greater effective public accountability than criminal courts. They can do this while remaining confidential proceedings until such time as the participants agree that it is better that they be public proceedings which issue public decisions (which they occasionally do in Australia). The greater effective accountability might come from:

— having a greater average number of citizens engage with the details of a case for a longer average period of time with great process control in conferences than in the average court case;
— automatic reporting of the outcomes of conferences to a publicly funded advocacy service whose job is to be proactive in advising defendants of their right to appeal to a court when a conference outcome seems disproportionately severe.

Audio tapes could be kept of all conferences and made available to the advocates who had permission from the defendant to listen to them. Such advocacy could be a more reliable check on abuse of power than the haphazard publicity of criminal trials held in public. Victim advocacy services also have an important role to play in a well designed system of public accountability. At the moment in Australia and New Zealand, I suspect the strongest check is the right of the defendant to walk out of the conference at any point, demanding his or her right to have the matter tried in a court of law. Research is under way to assess whether this suspicion is right or wrong. Questions about which institutions deliver more effective public accountability are ultimately empirical. In advance of the outcome evaluations, they are also matters for research and development that innovates with new accountability mechanisms. It is simply too early to pronounce on whether conferences do or will outperform court in terms of public accountability. It does seem implausible that dyadic mediation between individual victims and individual offenders could do so, given the small number of citizens involved.

What is especially interesting in Jane Dullum's analysis of 'The Norwegian Mediation Boards' is the consideration of the dilemma of whether to aspire to having restorative justice transform the mainstream criminal

justice system or to functioning independently of it. My own suspicion is that unless the social movement for restorative justice commits to the former transformative agenda, taking on the mainstream of the criminal justice system, it will be forever marginal in its impact. The Norwegian Mediation Boards Act is an interesting case because (boldly) it mandated all municipalities in the country to put Mediation Boards in place, effectively in parallel to the criminal justice system. In 1995, the Boards mediated only 4387 cases (many not criminal), which can only be a tiny proportion of the cases processed by the Norwegian criminal justice system.

Anke Zandbergen rejoins some of the themes in the Walgrave and Aertsen article. While Walgrave and Aertsen asks whether my ideal should be restorative shaming rather than reintegrative shaming, Zandbergen asks whether it should be reintegrative 'guilting'! At this stage, when so much research is under way but incomplete around the world, I would prefer not to answer this question at a theoretical level. It seems too near to the day when empirical evidence will enable useful refinement (rather than abandonment, I hope) of the concept of reintegrative shaming. Zandbergen's evaluation of the Halt programme in the Netherlands is one of those projects. It finds that in a programme with substantial elements of reintegrative shaming, feelings of guilt are more common outcomes than feelings of shame among offenders, though shame is also a common outcome.

In conclusion, the work in this issue shows what a vital tradition restorative justice is in Europe. There is a healthy absence of anyone claiming they have got any model 'right' or that what seems to work in one place will work well in another. There is curiosity about the effects of revising frameworks and a commitment to serious research and development. In time, this will bring us a richer understanding of how justice is done 'in many rooms' (Galanter, 1981). A way of framing the challenge of restorative justice here is to develop practical strategies that transcend tendencies for 'declines in morality' to be matched by rises in punitive law. The aspiration is for formal law that checks the injustice and nurtures the justice of indigenous ordering in the restorative tradition of mooring morality; institutions of restorative ordering that check the injustice and enliven the morality of law (Parker, 1997).

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