Revisiting the Relationship between Retributive and Restorative Justice

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by Kathleen Daly

In this essay, I raise a complex and contentious question: what is the role of punishment in a restorative justice process? I raise the question to invite discussion and debate in the field, not to assert a clear and unequivocal answer. The term *punishment* evokes strong images and feelings in people; it has no singular meaning. This is especially the case when it is linked to a restorative justice process, that is, an informal legal process that includes lay and legal actors, which is partly, but not entirely state punishment. I have not worked out many technical features of the argument,[1] but I am convinced that those interested in the idea of restorative justice need to grapple with the idea of punishment.[2]

I start with several caveats and definitions. I am working within the terms of what Cohen (1985: 251) calls "the liberal consensus". This means that I assume that there is individual autonomy (or personal responsibility) in committing crime and a moral legitimacy of criminal law. These assumptions can be easily challenged by critical legal scholars, who call attention to the injustices of criminal law and justice system practices as they are applied in unequal societies. For pragmatic reasons, however, we need to think about what is possible and workable today, even as a more radical critique reminds us of the limits of liberal law and legal reform.

I shall be using the terms *victim* and *offender* in a straightforward, unproblematic way. But, as Cretney and Davis (1995: 160) remind us, drawing from their analysis of violent crime, "ideal victims" ("vulnerable, respectable, not contributing to their own victimisation") and "ideal offenders" ("powerful, bad, stranger to the victim") are "in short supply".

Finally, when I discuss *restorative justice* processes, I have in mind a particular application: what are variously termed *family conferences* and *diversionary conferences* as practiced in the response to youth crime in Australia and New Zealand.[3] From time to time, I'll draw from my knowledge of observing conferences and interviewing participants.[4]

My argument addresses these points:

1. We should stop comparing *retributive justice* and *restorative justice* in oppositional terms. Such a strong, oppositional contrast cannot be sustained empirically. Moreover, seemingly contrary justice practices -- that is, of punishment and reparation -- can be accommodated in philosophical arguments.

2. There are some key differences between *restorative justice* and other *traditional* modes of justice.

3. We should embrace (not eliminate) the concept of *punishment* as the main activity of the state's response to crime. Using Duff's (1992) terms, restorative justice processes and sanctions should be seen as "alternative punishments" rather than "alternatives to punishment".

4. Philosophical argument and empirical study suggest a complex meshing of censure, symbolic reparation, and restorative or reparative processes and outcomes for victims, offenders, and their supporters. Empirical work suggests that citizens draw from a large justice vernacular, which includes ideas of punishing offenders, deterring them from future offending, and helping them to reform.

5. Some argue that the role of a criminal justice process should be to censure the offence only (von Hirsch 1993), whereas others say that more should be elicited from a wrongdoer such as "acknowledged shame" (Braithwaite 1989; Retzinger and Scheff 1996) or a "repentant understanding" (Duff 1992) for committing a wrongful act. It is believed that without such expression (or a "sign" of such expression), complete reparation is not possible. An ethical question arises in the practice of restorative justice: should symbolic reparation be coerced or would this be considered contrary to the tenets of a restorative justice process?

Point 1: The retributive-restorative justice oppositional contrast is wrong.

The oppositional contrast between retributive and restorative justice has become a permanent fixture in the field: it is made not only by restorative justice scholars, but increasingly, one finds it canonised in criminology and juvenile justice text books. During the first phase of work in the field (i.e., 1970s to mid 90s), this contrast may have served a useful purpose, but now that we have moved into a second phase of consolidation and reflection, it stymies us. The retributive-restorative contrast builds on the retributive-rehabilitative contrast, which preceded it (see Zehr 1990; Bazemore and Umbreit 1995; Walgrave 1995) and which is associated with these elements:

Table 1. Retributive and Rehabilitative Justice

Retributive	**Rehabilitative**
focuses on the offense	focuses on the offender
focuses on blame for past behaviour	focuses on changing future behaviour
aim: to punish the offence	aim: to treat the offender

Restorative justice advocates have proposed that restorative justice be viewed as a "third way" (Bazemore and Walgrave, forthcoming), as representing a break from the elements associated with retributive and rehabilitative justice. In my view, restorative justice is best characterised as a practice that flexibly incorporates "both ways" -- that is, it contains elements of retributive and rehabilitative justice -- but at the same time, it contains several new elements that give it a unique restorative stamp. Specifically, restorative justice practices do focus on the offence *and* the offender; they are concerned with censuring past behaviour *and* with changing future behaviour; they are concerned with sanctions or outcomes that are proportionate *and* that also "make things right" in individual cases.

Restorative justice practices assume mentally competent and hence morally culpable actors, who are expected to take responsibility for their actions, not only to the parties directly injured, but perhaps also to a wider community.[5] As such, restorative justice practices embrace retributive justice assumptions of individual culpability *and* they also include a wider notion of community (or, at times, familial) responsibility for those acts. Ideas of "reintegrating" offenders (Braithwaite 1989) by members of relevant communities of care tap into a stronger vision of rehabilitation, in which broader networks of people associated with a lawbreaker, not just state actors, get involved and have a role. Thus, restorative justice should not be viewed in opposition to retributive or rehabilitative justice. Instead, this recent justice practice[6] borrows and blends many elements from traditional practices of retributive and rehabilitative justice in the past century, and it introduces some new terms.

Point 2: There are key differences in traditional and restorative justice.

There *are* differences, some more apparent than real, between traditional and restorative justice practices, and these are shown in Table 2. In restorative justice, victims are to take a more central role in the process; the emphasis is on repairing the harm between an offender and victim; community members or organisations take a more active role in the justice process, working with state organisations; and the process involves dialogue and negotiation among the major parties with a stake in the dispute. These distinctive features of *what* should occur in a restorative justice process stem from differences in the *scope* and associated *decision-making processes* of traditional and restorative justice, together with their *stated aims*.

Table 2. Traditional and Restorative Justice

Traditional Justice (retributive & rehabilitative)	**Restorative Justice**
victims are peripheral to the process	victims are central to the the process
the focus is on punishing *or* on treating an offender	the focus is on repairing the the harm between an offender and victim, and perhaps also an offender and a wider community
the community is represented by the state	community members or organisations take a more active role
the process is characterised by adversarial relationships among the parties	the process is characterised by dialogue and negotiation among the parties

For *scope*, traditional justice practices cover a wider array of decision-making possibilities than restorative justice practices have covered, at least to date. Whereas traditional justice practices address the fact-finding and penalty phases for guilty (or admitted) offenders, restorative justice practices generally focus on the penalty phase alone. These differences in scope bear importantly on the decision-making processes that are associated with each justice form.

In traditional justice practices, fact-finding is determined by an adversarial process in which the state assumes the role of a wronged individual, and the penalty is decided by a judicial authority after hearing arguments by prosecution and defence. In almost all restorative justice practices to date, there is no fact-finding phase; consequently, the need for an adversarial process is diminished. Therefore, one apparent difference between traditional and restorative justice -- adversarial versus negotiated justice -- is an artefact of their differences in scope. The two differ, however, in how offenders learn of the consequences of their actions and how a penalty is fashioned. Taking the conferencing process as an example, there is larger, more direct role for a crime victim, who communicates the impact of an offence to a wrongdoer. Lay and legal actors, including

the victim and offender (and their supporters), are to decide on a sanction in an informal, consensually-based decision-making process.

With respect to *stated aims*, those of traditional justice (that is, both retributive and rehabilitative) are many and varied, including punishing and reforming lawbreakers; and emerging in the 1960s, providing restitution to victims. By comparison, the stated aim of restorative justice is to repair the harm or the injuries caused by a crime to the person victimised, and perhaps also, to a broader community. If we narrow the comparison to retributive and restorative justice, we find that scholars disagree on the relationship between them (for review, see Daly and Immarigeon 1998). To simplify, some see a sharp disjuncture in the two justice modes, and others do not. Differences turn on (1) the meanings of repairing the harm and retribution and (2) how the idea of punishment fits into justice practices.

For (1), some suggest that the idea of repairing the harm or the injuries caused by crime is amorphous and vague. It moves imprecisely between criminal and civil liability, it seems to ignore the state's public censuring role in responding to crime, and it overlooks the importance of serious crimes that are attempted but not completed (see Ashworth 1993: 282-86, in response to van Ness 1993). For *retribution*, some use the term to describe a *justification* for punishment (i.e., intended to be in proportion to the harm caused), whereas others use it to describe a *form* of punishment (i.e., intended to be of a type that is harsh or painful).[7] Key differences are apparent among restorative justice advocates on the place of retributivism and proportionality in the response to crime: whereas some (e.g., Braithwaite and Pettit 1990) eschew retributivism as a justification for punishment, favouring instead a free-ranging consequentialist justification and highly individualised responses, others wish to limit restorative justice responses to

a desert-based, proportionate criteria (Walgrave and Aertsen 1996; van Ness 1993).

For (2) and the concept of *punishment*, in the past three decades, there has been a blurring of boundaries between civil and criminal liability, as compensation to victims and punishment of offenders have increasingly been used, alone and together, in sentencing (Ashworth 1986). It is unclear how restorative justice practices will relate to this already modified criminal sanctioning picture, in which compensation to victims is already part of sentencing. Moreover, in light of this modified picture, we may ask, how (if at all) is restorative justice distinctive? Restorative justice advocates would likely say that in a restorative justice framework, reparation to the victim (or to the community) are the *primary* aims, and punishment is minimised. Thus, a key difference in the stated aims of retributive and restorative justice turns on the meaning and purpose of punishment.

Point 3: Restorative justice processes and outcomes are alternative punishments, not alternatives to punishment. Restorative justice advocates typically set themselves against the idea of punishment, that what they are doing is punishing an offender. Even the term itself may be unspeakable to some. Why might this be the case? I shall not endeavour to answer the question fully, but I suspect that it is part of a broader development in the history of punishment, in which justice elites have increasingly come to imagine and announce that what they *intend* to do in responding to crime is *not* to punish, but rather to *guide*, *correct*, *educate*, or *instruct* offenders. These elites -- the normative theorists and practitioners -- want to exercise their power in a different, more humane way.[8] Such intentions are fine, but they need to be mindful of the empirical world. Do those who are not justice elites or who are on the receiving end of this new penal imagination see it in the same way? Does their experience matter to the justice elites? More generally and of

utmost significance: what *is* and *should be* the place of punishment in restorative justice practices? As an interim step between the familiar world of retributive justice (or traditional justice, more generally) and the ideal world of restorative justice, I propose that punishment remain part of restorative justice (in addition to Garvey 1999, see Barton 1999 on this point). My proposal will meet some opposition, and one major point of contention will turn on a key question: what is meant by punishment? Related points of contention are whether *any* sanction imposed in a criminal legal process[9] should, by definition, be considered punitive, and whether one can argue that there are non-punitive criminal sanctions.

Some say that punishment practices are the "intentional" or "deliberate imposition of pain" on offenders, by which they would include incarceration and fines, but not rehabilitative or reparative measures. This is the position taken by Wright (1991: 15), who wishes to distinguish the *intentions* of legal authorities: he argues that whereas punishment is an intended deprivation, non-punishment is intended to be constructive. As an empirical matter, I am not convinced by the distinction he makes in that it overlooks decades of critique of the rehabilitative ideal, with its associated treatment-oriented intervention. Wright equates punishment with being punitive and non-punishment with being non-punitive. His argument exemplifies how elites may delude themselves into thinking that what they *intend* to do (that is, *not* to punish) is in fact experienced that way by those at the receiving end.

Cavadino and Dignan (1997: 307) make similar assumptions. They suggest that "reparative measures [could be seen to be the] normal response to offending, with punitive measures being very much the exception". Further they say, "it is possible to envisage a perfectly workable future criminal justice system which made minimal use of imprisonment". Here we find that reparative sanctions are contrasted with those considered to be

punitive, and that punitive measures are equated solely with prison. While prison would surely be experienced as punitive, can we assume that non-custodial sentences are not experienced as punitive or as punishment?

Another way to define punishment practices is anything that is unpleasant, a burden, or an imposition of some sort on an offender. Thus, compensation is a punishment, as is having to attend a counselling program, paying a fine, or having to report to a probation officer on a regular basis (see, more generally, Duff 1992, 1996; Davis 1992). This is, in my view, a better way to define punishment. If this more inclusive definition were used, it would be impossible to eliminate the idea of punishment from a restorative response to crime, even when a meaningful nexus is drawn between an offence and the ways that an offender can "make amends" to a victim.[10]

Now, of course, punishment as a social institution is considerably more than the array of sanctions or penalties imposed for crime. Garland (1990: 17) suggests that "punishment is a legal process ... where violators are condemned and sanctioned in accordance with specified legal categories ... The process is ... complex and differentiated, ... involv[ing] discursive frameworks of authority and condemnation; ritual procedures ...; a repertoire of penal sanctions, institutions, and agencies ...; and a rhetoric of symbols, figures, and images by ... which the penal process is represented to its various audiences". The variety of sites and practices of punishment lead Garland to conclude that punishment has "a whole range of possible referents" and "is likely to exhibit internal conflicts and ambiguities". Using Garland's definition, we could all agree that restorative justice is one practice in a broader conceptualisation of punishment as a social institution.

But if we shift from Garland's broad conceptualisation of punishment to the more narrow one of a "repertoire of penal

sanctions", we may wonder, why does punishment have negative connotations in people's minds? Perhaps it is associated with humiliating, harming, or degrading people? Surely, we know this is true historically and today. There is no reason to assume, however, that this must be the case, unless one argues that any sanction imposed by a legal authority on a convicted (or admitted) offender is, by definition, harmful or unjust because the criminal justice system is unjust. Restrictions and prohibitions for a range of penalties (including those associated with restorative justice) can be identified that address their potentially "degrading or intrusive character" (von Hirsch and Narayan 1993: 80-87).

There are other reasons why punishment has come to have negative connotations. Drawing from British penal history, Duff (1992: 56) suggests one historical strand: the pre-statutory emergence of probation in the 19th century. The "early police court missions, from which statutory probation then grew, sought to save offenders from imprisonment by offering to supervise" them, offering a "merciful second chance". In its pre-statutory form, probation was considered an alternative to punishment, more precisely an alternative to *imprisonment*. Duff suggests that the view of probation as an "essentially non-punitive measure" was reinforced by "the growth of the 'treatment model' that dominated the probation service's self-conception after 1945".[11] As such, whereas "'punishment' [was] conceived as bare retribution or deterrence, probation was seen as a mode of non-punitive treatment ... [and thus] ... the coercive elements of probation [e.g., reporting to a probation officer] [were] not seen ... as punishment ..". (p. 57).

Duff (1992: 71) suggests that reparative justice[12] should be seen as containing *alternative punishments* rather than as *an alternative to punishment*. Here, he is concerned to address the penal abolitionist stance that punishment should be rejected, by proposing instead that we distinguish "the very concept of

punishment itself" from "certain conceptions of punishment". Put another way, Duff wants to retain the *concept* of punishment and to see the development of alternative conceptions and modes of punishment. I find Duff's argument persuasive in characterising the *current* meaning and place of punishment in the response to crime, including responses that are termed restorative.

For restorative justice advocates, a key question is this: what is to be gained by saying that restorative justice is an alternative to punishment? In raising this question, I am concerned specifically with the sanction itself (e.g., compensation, community service, apology), not the process of deciding that sanction, which as I suggested in Point 2, can differ from traditional justice practices and in that way could modify the meaning of punishment to an offender and victim. Following the lead of some philosophers (like Duff) and several socio-legal scholars (e.g., Ashworth 1986, 1993; Campbell 1984; Davis 1992; Zedner 1994), I find it difficult to see how one can distinguish what is punishment and non-punishment in traditional or restorative justice practices, and even more so *from the point of view of those who receive those sanctions*. From the perspective of lawbreakers, the distinction will seem no different from (and just as disingenuous as) that between punishment and treatment. From the point of view of victims, it denies legitimate emotions of anger and resentment toward a lawbreaker and some sign of expiation. And from the point of view of the community, certain harms may appear to be condoned, not censured as wrong, if they are not punished.[13] The weight of philosophical and legal argument and empirical inquiry suggests to me that punishment, broadly defined to include retributive censure, should form part of what occurs in a restorative justice process. I hasten to add that I am not arguing that justice and punishment are the same or that justice is done when punishment is delivered. My point is more subtle and in a subjective sense, more complex than that. It is to say that the ability of victims to be generous and forgiving and for offenders to "make amends"

to victims -- elements that are desirable objectives in a restorative justice process -- can only come about during or after a process when punishment, broadly defined, occurs.

Point 4: Philosophical argument and empirical evidence suggest a complex meshing of censure, symbolic reparation, restorative processes, and "just-ness".

For philosophical argument, I draw from Duff's (1992, 1996) work on punishment as communication and the relationship between punishment and reparative justice. There are a variety of positions on the relationship between punishment and reparative/restorative justice, and I would place Duff on the continuum between a mainly desert-based view of censure (von Hirsch 1993; Narayan 1993) and a highly consequentialist view (Braithwaite and Pettit 1990), although he is closer to a desert-based position.

Duff (1992: 53-54) suggests that ideally punishment should be

- *communicative*, not merely "expressive" because it should be a two-way communication, not a one-way directive aimed at a passive wrongdoer and
- *retributive* in that it aims to impose on the offender "the suffering (the pain of condemnation and of recognised guilt; the burden of reparation), which s/he deserves for his/her crime".[14]

Precisely because punishment is retribution for a past offence, Duff argues that it is

- *forward-looking* in that it aims to "induce and manifest that process of repentance, reform, and reparation which will restore the offender's moral standing in the community" (Duff 1992: 54).[15]

For Duff, punishment ideally is "a penance ... that is, something which a wrongdoer imposes on [themselves], as a painful burden to

which [they] subject [themselves] because [they have] done wrong" (p. 52). Duff imagines that an offender would be involved in the determination of their own punishment, in discussion with legal authorities and, where appropriate, a victim. Although he does not have the conferencing model specifically in mind in his 1992 publication,[16] his scenario of "communicative punishment" is what ideally is supposed to occur in the conference process.

The relationship between censure, as retributive and backward looking, is connected to its forward-looking capacity in a key passage in Duff (1996). Just before this passage, he signals agreement with Braithwaite (1989) and Braithwaite and Pettit (1990) that censure ought not be exclusionary or stigmatising, and that "our condemnation or blame must ... be such as to allow and assist the process" of "enabl[ing] [an offender] to repair [their] relationship with a victim and ... community". He continues:

> That is, "don't you see what you have done" which is the central message of blame should not be our final word, the *end* of our engagement with the wrongdoer; it should, rather, be the *beginning* of a process whose final aspiration is to reconcile [the wrongdoer] with those whom [s/he] has wronged. So too with communicative punishments. ... They aim ... to induce the pain of accepted censure and recognised guilt. But the point of doing this is precisely to work toward the goals of repentance, reparation, reconciliation, and rehabilitation. Such goals are not distinct from "punishment"; rather, they are the proper goals of punishment itself, and goals that ... can be properly achieved only through a punitive, communicative process (Duff 1996: 82-83; emphasis in original).

What this means is that before it is possible to consider "repairing the damage caused by crime", the offender must give some "sign" to a group that s/he has wronged another. If that

does not happen, then initial movement toward reparation[17] may not be possible. In plain language, we might ask, did an offender "show remorse" (more precisely "genuine remorse")[18] for their wrongdoing?

Empirical studies of conferencing can show how this works in practice. Braithwaite and Mugford (1994) give examples of interactions among participants in conferences they observed in Wagga, Wagga (New South Wales, Australia) and in Auckland (New Zealand) in the early 1990s. The authors agree that wrongdoing should be censured ("denounced") in a conference, and they emphasise that the act, not the actor should be denounced. In depicting the effectiveness of a victim to describe the impact of a crime to an offender, Braithwaite and Mugford (1994: 144) consider an offender who has "developed a capacity to cut themselves off from the shame [of] exploiting other human beings":

> [These offenders] deploy a variety of barriers against feeling responsibility. But what does not affect the offender directly may affect those who have come to support [the offender]. *The shaft of shame fired by the victim* in the direction of the offender might go right over the offender's head, yet *it might pierce like a spear through the heart of the offender's mother*. ... So while the display of the victim's suffering may fail to hit its intended mark, the anguish of the offender's mother ... may succeed in bringing home to the offender the need to confront rather than deny an act of irresponsibility (emphasis added).

There is such dramatic emotional imagery here, with "shafts of shame" and "spears" flying about in the conference process! These emotional elements can be present in conferences, although not uniformly in such a heightened dramatic form. Such imagery gives us an idea of what should happen in a conference: offenders

should feel a vicarious sense of punishment via seeing the anguish of their mothers receiving a "shame of shame". I think it unfortunate that conferences are termed reintegration ceremonies because the term does not reflect the fact they contain both a "shaming phase"(as illustrated above) and a "reintegration phase" (Braithwaite and Mugford 1994: 146). The latter depends on the former, and indeed, is meaningless without it.

While censure and denunciation are terms used by both Duff and Braithwaite, they use different words to describe the *result* of that action: for Duff, it is the "pain of accepted censure" and for Braithwaite, a "shaft of shame" or "acknowledged shame". Whereas Duff wishes to separate shame and guilt, Braithwaite focuses on shame alone, perhaps assuming that it is an emotion state that incorporates guilt.[19] Retzinger and Scheff's research on the role of shame in conferences brings out more of the emotional elements involved.

Retzinger and Scheff (1996: 316-317) suggest that while material reparation (e.g., compensation or community service) may result from a conference, "symbolic reparation" is the "more ambiguous" though "vital element" that needs to occur if the conference is to be successful at all.[20] Two steps in the "core sequence" are required, they say, to achieve symbolic reparation. In the first, the offender "clearly expresses genuine shame and remorse over his or her actions". And next, "in response, the victim takes at least a first step towards forgiving the offender for the trespass". The authors suggest that this core sequence generates repair and restoration of the bond between victim and offender; it may be quite brief, "perhaps only a few seconds", but they propose, it is "the key to reconciliation, victim satisfaction, an decreasing recidivism" (p. 316).[21] The core sequence also affects the ability to reach an amicable settlement. Without it, they suggest that "the path toward settlement is strewn with impediments". Indeed, they found that

for a total of nine conferences they had observed, the core sequence did not occur in any of them during the formal part of the conference, although it did in three cases, after the formal end of the conference.

Therefore, Retzinger and Scheff propose that if an offender can "shar[e] and communicat[e] shame, instead of hiding or denying it", then it may be possible to repair the damage to "the bond" between an offender and victim (and perhaps others, as well). Retzinger and Scheff's "shame" is similar to Duff's concept of an offender's coming to have a "repentant understanding of what s/he did" and making "some apologetic expression of remorse for the harm caused to the victims" (Duff 1992: 49). The authors do not assume that shame or repentant understanding will in fact occur in mediated victim-offender encounters. However, and this point is key to the legal philosopher of punishment and the social-psychologists of emotions: it is crucial that an offender show signs of remorse or shame when admitting responsibility for a crime, and that this is a prerequisite for any subsequent reparatively (or restoratively) oriented communications between a victim and offender (and no doubt other participants such as the supporters of victims and offenders).[22]

For some time, I have pointed out that however much restorative justice advocates may wish to draw a strong contrast between retributive and restorative justice, this contrast is not borne out empirically in restorative justice practices (Daly and Immarigeon 1998). Having observed many conferences, I find that elements of censure, paying back the victim, and helping the offender can all feature in a conference discussion. Retributive, restorative, and rehabilitative principles and terms are intermingled, or they may shift in emphasis, depending on the conference phase. When I noted this empirical finding at a session at the 1998 American Society of Criminology meetings, Lode Walgrave responded with, "Yes, this is a problem". But, I wonder, what is the problem? Is there something wrong with the

idea of censure or retribution? Or is it that both retributive and restorative ideas are brought into one discussion? As Duff, Retzinger, and Scheff point out, censuring activity and subsequent (or simultaneous) signs of remorse may be a precondition for any movement between victims and offenders. In short, one cannot begin a restorative justice process by announcing "let's reconcile", "let's negotiate", or "let's reintegrate".

I would like to put the case more strongly. At present, most people have a limited range of ideas about the response to crime; among them are punishing wrongdoers, stopping them from doing it again, keeping them away from the community, teaching them a lesson, and helping them to help themselves. These are commonsense understandings of a just response to crime (or to individual offenders), and restorative justice scholars would be wise to *work with* them (or perhaps to *re-work* them) in building interest in the idea. Any putatively new justice idea -- however radical -- will contain residual bits of the old. For many critics, restorative justice already sounds like a repackaging of rehabilitation in that it seems to give wrongdoers a second chance or appears to be a soft option. When we talk about a just or an appropriate response to crime (whether toward one person or in the aggregate), we are not talking about a singular thing. As a political and policy matter, it may be mistaken to excise the idea of punishment from a restorative justice process. It may not be strategic politically nor comprehensible culturally. People's ideas and feelings about punishment cannot be censored or willed away even if restorative justice advocates may wish otherwise.

One feature of conferences is that they permit *time* to discuss things that matter to people: time for anger and forgiveness, and time for several justice principles -- not just one -- to be expressed. As reported by Strang et al (1999: 62-65) from the RISE project, punishment is aired as a principle in deciding

outcomes in youth justice conference cases *as often or more often than in court cases* (see also Sherman et al. 1998: 87-99). Although principles of repaying the victim and community were expressed more often in conferences than in court, the most frequently aired principle in both settings was preventing future offences, not restoration or punishment. What explains these findings? In part, they suggest that conference participants want to talk about multiple justice principles, not just one, and in part, there is time to do so.

Compared to courtroom interactions, there is greater potential for an offender at a conference to explain what happened, for an offender's parent or supporter to say how the offence affected them, and for a victim to speak directly to an offender about the impact of the offence and any lingering fears. Some critics may be concerned that this wide latitude of discussion is too open-ended, and they would want to curtail it. For example, they would argue that a legal authority should not be permitted to coerce an offender into accepting an outcome, and participants should not engage in "stigmatising shaming" that puts down any person. Such problems are easily addressed. But what if it is an offender's *parent* who puts down their child? And what if, in witnessing this, the victim begins to feel more sympathetic to the young person's situation? These interactions occur in conferences, not infrequently, and they set up the possibility for alliances to form between victims (or their supporters) and young people.

The restorative justice *process*, involving as it does mediation, direct exchanges between victims, offenders, and their supporters, permits the potential for honesty and humanity to emerge in ways foreclosed in a courtroom process (or one dominated by formal legality). It is the *process*, not the sanctions *per se* that most distinguishes informal (and restorative justice) from formal (and retributive or rehabilitative) justice. It is *within this process* where the

meaning and purpose of a restorative sanction can be forged, agreed upon, and taken on by an offender for a victim (or, where relevant, others). It is the understanding between an offender and victim (and often others present) of *how* a sanction connects meaningfully with a harm that can make a process and outcome in part "restorative", at least ideally.[23]

Point 5: Ethical problems in the practice of restorative justice.

Duff terms his "communicative account of punishment" an "ambitious" one, which is a good way to distinguish it from that of von Hirsch (1993). (For an exchange of views, see von Hirsch 1993, chapter 8; Duff 1996: 53-67).[24] While working with a desert-based notion of censure, von Hirsch wants to limit the "censure conveyed through punishment ... [to the] person externally" (von Hirsch 1993: 72), and not attempt to "elicit certain internal states" from the actor, "whether those be shame, repentance or whatever". Should these behaviours occur spontaneously, that is all right in von Hirsch's view; his concern is that state censure should not attempt to elicit them. Rather, state censure should adopt the role of "judges" not "abbots".

Although it may be appropriate for a monk's superior to impose a penance and not simply to censure a monk's wrongdoing, von Hirsch asks, "why should the state be entitled to use its coercive powers to seek to induce moral sentiments of repentance?" Not surprisingly, von Hirsch is also concerned with the effect that "personalised penances" would have on proportionality; ultimately, though, his concern is that "it should not be the business of the state to try to engineer [an appropriate moral response]" (von Hirsch 1993: 77).

Several points can be offered. In defence of von Hirsch's position, we should be concerned that conference participants will look for signs or clues that an offender is genuinely

remorseful for their actions. If the desired signs are not seen, then for how long will conference participants continue to try to elicit them? Or if the desired signs are not seen, does the sanction become more severe? Of greater concern is a misreading of the signs themselves. Some offenders may show external states of "hardness", but are deeply distressed internally.[25] Others may withdraw from the conference process because it is a "shame job" that they, as a minority group person, cannot accept.

Upon reflection, we can see that signs of an offender's guilt and remorse have been a longstanding element in the ways in which legal officials and lay actors respond to wrongdoing. When police officers say an adolescent has an "attitude problem", they are referring, in part, to an "unrepentant" attitude. When judges discuss the role of a defendant's demeanour in court, they are referring, in part, to the degree of "respect for the law" that the defendant appears to display. A good deal of a formal-legal reaction to crime is bound up, then, in eliciting internal states of remorse.[26]

If we apply von Hirsch's critique to the conference context, there are other things to consider. Because the sanction in a conference is decided by (ideally) the victim, offender, and their supporters, there is no clear judicial role as such. Apart from a conference coordinator and police officer, the conference participants are not members of particular legal or religious communities. They have other kinds of affiliations with offenders and victims, most frequently via familial, marital, household, friendship, or community ties. These personal relationships may convey a moralising influence that is closer to the role of an abbot than a judge; but the better relational metaphor may be parent or teacher or respected community authority.

Whereas for von Hirsch the idea of eliciting particular emotion states (like remorse or contrition) should not be the aim of a

sanctioning process, for others, this is the raison d'etre of reparative or restorative justice. Davis (1992: 205) encapsulates the idea well when he says that the harm from crime is "not just material [but involves] damage to a social and moral relationship". Thus, if reparation "is to be complete, [it] must make some to make amends for the victim's loss of the presumptions of security ... [for example] by some effort to reassure the victim that his or her rights are now respected". Davis suggests that while it is straightforward to see the retributive (desert-based) logic to material reparation, "one component in reparation cannot be coerced" by a court order, and that is the victim's "trust that the appropriate moral standards are shared by the offender". For a victim to be reassured, "s/he must believe that the attitude in question is *freely expressed* ... [which] can only be achieved by the victim and offender themselves" (Davis 1992: 205, emphasis added). Again we see that commentators are concerned that offenders come to recognise the moral wrong of crime, not just its material harm.

Here then is problem of process, which is also an ethical problem, for restorative justice. Commentators suggest that for a restorative/reparative process to work effectively, there needs to be a genuine admission of responsibility, remorse, or guilt for a wrong. Unless that symbolic reparation occurs, the rest will not follow easily, and as Retzinger and Scheff suggest, there will be many impediments to settlement. To date, restorative justice processes have been used mainly in cases where an offender admits or has "not denied" the offence to a police officer (and at times, to a magistrate). But that does not tell us what an offender (and their supporters) may say in a conference when they meet "their" victim and others associated with an offence. An interrelated set of ethical questions arises. Should an apology (or other reparative-like gesture or movement) be coerced, if only gently from an offender? What if a victim cannot "hear" or "see" an offender's remorse and offer of apology, but other participants can? What should be the role of

laypersons and legal officials in coaxing or persuading the symbolic reparation elements of the restorative justice process?

The symbolic reparation sequence is at the heart of a restorative justice process. It may be induced by (or occur simultaneously with) retributive-based censure or denunciation of the act. Signs of remorse, contrition, or shame may be difficult to read, and that may pose a problem for the ethical practice of restorative justice. Although it may seem paradoxical to some restorative justice advocates, the conclusion I draw is that punishment, defined broadly to include retributive censure, should not be excised from a restorative justice process. Rather, punishment can be seen to make restorative justice possible.

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[1] I am grateful John Braithwaite, Antony Duff, and Lode Walgrave for their comments on an early version of this paper in February 1999. They raised many key questions about the meaning of punishment and its relationship to restorative justice, which I only partly address here.

[2] In revising the paper since the February 1999 conference, I have become aware of a similar argument made by Stephen Garvey (1999). He too proposes that punishment (as "penance" and as "atonement") is required for restorativism, and I shall note the similarities in our positions, together with clarifications he

offers. While his argument draws from a wider reading of the legal and philosophical literature than mine does, I draw selectively from this literature and from empirical research.

[3] I have observed over 50 such conferences since coming to Australia in 1995; and as part of my research project on conferencing in South Australia, members of my research team and I have observed 89 youth justice conferences and interviewed over 170 young people and victims associated with those conferences, both in 1998 and in 1999. See Daly et al. (1998) for the project design and rationale.

[4] There is great variety in conference practices and their organisational placement in Australia and New Zealand. In Australia, conferencing is now routinely used in statutory-based schemes in four jurisdictions (South Australia, Western Australia, Queensland, and New South Wales). Statutory-based schemes were legislated in Tasmania in 1997 (although not resourced and thus not implemented as of 1999), and in the Northern Territory in 1999 (although used only in selected cases). Australian conferencing began in the early 1990s with non-statutory schemes trialed by police departments and with police officers running the conferences; today there are two jurisdictions (the ACT and Victoria) without a statutory basis for conferencing. ACT conferencing is police-facilitated and based in police departments; Victorian conferencing is used only as pre-sentencing option and for a relatively small number of cases. Throughout Australia, conferencing is used mainly for admitted offenders in youth justice cases (it is also legislatively established and used in care and protection matters in South Australia). In New Zealand, conferencing is legislatively established for the entire country, and it is used in both juvenile cases and care and protection matters. In the ACT, conferences were used in handling adult drink driving cases from 1995-97, and conferences continue to be used, in selected instances, in disposing adults.

While there is jurisdictional variation in the expected composition of conference participants and their conference roles, the general idea is that an offender, their supporters, the victim, and their supporters meet to discuss the offence and its impact; they jointly discuss the sanction, with at least one legal actor (a police officer) present. In most jurisdictions, conferences are a diversion from a juvenile court disposition (and potential court conviction), although they are also used as a pre-sentencing option in New South Wales, Queensland, and Victoria. Conferences normally last from one to two hours. For overviews of jurisdictional variation, see Bargen (1996, 2000), Daly (2000), Daly and Kitcher (1999), and Hudson et al. (1996). In Australia, restorative justice practices, using the conference model, have also been applied to disputes in schools and workplace organisations.

[5] I use the term *community* here and elsewhere with great reservation; it is deployed by so many to mean so many things (Crawford 1997; Lacey 1996; Pavlich 1999); it is more likely to be discursively present when it is empirically absent (Lacey and Zedner 1995).

[6] Some advocates like to chronicle a 2000-year history of restorative justice, but such presentist and ethnocentric histories gloss over an extraordinarily diverse and complex story of justice practices around the world; and worse, such histories wrongly attempt to authenticate a modern western justice practice by citing its origins in pre-modern indigenous societies (for elaboration, see Blagg 1997). I use the term to refer to a modern, post World War II conception of justice, largely emerging in first-world industrialised societies, but also having resonance for nation-building in some countries (such as South Africa).

[7] Drawing from Cottingham's (1979) summary of the many meanings of retribution, it is likely that restorative justice advocates use retributivism to mean "repayment" (to which they add a punitive kick) whereas desert theorists, such as von Hirsch, use retributivism to mean "deserved" and would argue for decoupling retribution from punitiveness.

[8] One can see this development as part of the "civilising" process of modern penal practices, which included new ways for elites to talk about punishment (see Pratt 1998).

[9] This may include sanctions that are not fashioned or imposed solely by a state authority, as is the case for conferencing in the Antipodes and circle sentencing in Canada.

[10] Garvey (1999) argues this point in a different and more convincing way than I do. Drawing on Hampton's (1992) distinction of crime as both a *material harm* and a *moral wrong*, Garvey proposes that the harm (or material loss) may be addressed through reparative measures, but that the wrong ("the morally false message ... of disrespect" to a victim) is addressed by punishment" (p. 1821). He suggests that restorative justice "promise[s] ... atonement without punishment, ... but can't really deliver on that promise" (p. 1830). "Restorativism -- gentle and inspiring as it may be -- is ultimately self-defeating. [It] cannot achieve the victim's restoration if it refuses to vindicate the victim's worth through punishment ... nor can it restore the offender, who can only atone for his wrong if he willingly submits to punishment" (p. 1844).

[11] One would want to add to this history the emergence of the juvenile court in the late 19th and early 20th centuries, with its emphasis on helping and reforming youthful lawbreakers. This

institutional innovation played importantly into punishment ideologies, which were subsequently applied to adult offenders.

[12] Duff and other British commentators tend to use the term reparative justice whereas USA and Australian commentators more often use restorative justice.

[13] Thus, by retaining the concept of punishment and by not equating restorative justice with a non-punitive response, there may in fact be no dilemma in applying a restorative justice response to cases of rape and racial harassment (see Hudson 1998).

[14] I interpret Duff to define punishment as censure for wrongdoing, which may also include an added sanction (e.g., community service), but need not.

[15] Garvey (1999:1806) terms his (and Duff's) understanding of punishment as a "fused" theory, neither purely teleological nor purely deontological, but containing elements of both.

[16] When he wrote the article, conferencing has just begun in New Zealand, and it was only being used in one town in New South Wales (Wagga Wagga).

[17] I am less inclined to assume that victim-offender reconciliation is possible or desirable unless the offender is doing most of the emotional work. A good deal depends on the precise content and context of an offence, including victim-offender relations. Garvey (1999: 1804) suggests that "reconciliation lies not with the wrongdoer, ... [but] instead with the victim, since reconciliation requires the victim's forgiveness". Such forgiveness is dependent, however, on the offender's having completed the four steps "leading to expiation ... repentance, apology, reparation, and penance" (p. 1804-5).

[18] The remorse versus genuine remorse distinction is made by laypersons and legal authorities alike to refer, respectively, to offenders who *were sorry that they were caught* and those who *really were sorry for what they did*.

[19] They emphasise different things in the censuring process. Duff seems to be saying that after (or simultaneously with) censuring an act, the offender expresses the "pain of accepted censure". Braithwaite seems to assume that shame will occur after the offender's act is denounced, and he gives more attention to modes of reintegration. Whereas Duff highlights the censuring of an act and the associated "pain" (but is less precise about what happens next), Braithwaite passes over censure, but highlights "shame" and "reintegration". As we shall see in the discussion of Retzinger and Scheff (1996), their emphasis is closer to Braithwaite's in that they pass over censure and move directly to the "core sequence".

[20] Retzinger and Scheff's identification of *material* and *symbolic reparation* is analagous to Garvey's identification of the methods of addressing the *harm* and *wrong* of crime (see note 17), although Garvey would argue that victim movement toward forgiveness can only be expected to occur after the offender has completed the steps toward expiation, among them secular penance (or punishment).

[21] This is a major claim, which they do not support with empirical evidence. Recent work by Maxwell (1999: xx) suggests that the following conference-based measures were "significant predictors of persistent reconviction" for young people in New Zealand: "not agreeing with the conference outcome; not remembering the conference, not completing tasks, not feeling sorry and showing it, and not feeling they had repaired the damage; and shame [which was defined as] being made to feel a bad person". Thus, there appears to be a variety of indicators of "persistent reconviction" of which stigmatising shame and unacknowledged shame are a part (Braithwaite 1989).

[22] There are, of course, many ways to achieve movement between a victim and offender; many sequences are possible not one. Moreover, a conference process may engage the potential for movement, which may only come after an offender completes an undertaking (such as community service). Thus, a restorative justice process (or outcome) is not limited to what occurs in a conference alone, but could take some time.

[23] If later in time, an offender fails to fulfil the agreed upon outcome, then for the victim, there is little or no restorative justice.

[24] I cannot do justice to the many important points raised in Duff (1996). Among the most relevant to the comparison of his ambitious account and von Hirsch's more restricted one is whether one has a communitarian or liberal theory of society (p. 88).

[25] This may be a good example of what Retzinger and Scheff (1996: 318) refer to as "being ashamed of being ashamed". Emotions are kept in check and offenders appear "not to be sorry", but after they leave the conference, they "uncheck" the emotions.

[26] Whether legal authorities *should be* eliciting such internal states is, of course, another matter. It would be difficult to imagine enforcing proscriptions against the behaviour, although it is possible to announce what is legal and illegal in questioning witnesses, suspects, defendants, or those under state supervision or custody.