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## **Reintegrative Shaming and Restorative Justice: Reconciliation or Divorce?**

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### **Introduction**

The honeymoon is over. The romantic illusion that the coupling of reintegrative shaming (the theory) and restorative justice (the practice) would be capable of producing a progressive transformation of the state-centered criminal justice system is wearing thin. Trouble and strife are arising from all quarters and even some gamekeepers are turning into poachers (Daly 2002, Roche 2003, Strang 2002). The gap between promise and performance is becoming increasingly evident and it is now becoming apparent that the hopes and aspirations of many well-meaning advocates are fading fast. A growing number of critiques have pointed to the chasm between the rhetoric and reality of restorative justice and its failure to realise its own claims and aspirations.

Significantly, some of the most powerful critiques have been directed towards the 'new generation' of restorative justice programmes that emerged in the 1990s. These include reviews of the Wagga Wagga conferences in New South Wales, family based conferences in New Zealand and the police-led cautioning conferences that have been established in the USA and the UK.

The point of departure of these critiques is a rejection of the claim that contemporary forms of restorative justice are a continuation of ancient tribal ways of dealing with disputes (Daly 2002). The claim, for example, that the Wagga Wagga model of restorative justice constitutes a reworking of long-standing Aboriginal practices is to engage in what Harry Blagg (1997) calls 'epistemological violence' and involves a serious misreading of history and social relations. Restorative justice conferences, he argues, re-legitimise new forms of domination and the extension of police powers. The

overall effect of these conferences is to compound inequalities, individualise social problems and privatize disputes. These practices are routinely justified in the name of the 'community' or 'community safety'. Paradoxically, Aborigines are marginalised from the mainstream 'community' in Australia. Thus for Blagg (2001) the treatment of minority groups such as the Australian Aborigines who represent just under half of all juvenile admissions in police lock-ups begins to look distinctly sinister.

What is significant about this critique is that it can be extended to cover the experiences of other marginalised groups – particularly ethnic minorities – who are increasingly becoming the focus of crime control strategies in most parts of Western Europe and America (Tonry 1995; Mauer 1999). The forms of restorative justice outlined by Blagg seem unlikely to provide a progressive or transformative option for these minority groups and are more likely to encourage new forms of injustice (Crawford and Clear 2001). Rather than reduce the degree of punitiveness these measures signal the replacement of welfare provision, which has in the past been awarded to these socially and economically marginalised groups. In an increasingly diverse, multicultural society restorative justice programmes serve to impose the dominant value system on groups who may adhere to different or alternative sets of values. Those who are subject to different values, patterns of socialisation, family structures and different lines of authority may feel resentful and antagonistic towards shame-based restorative justice conferences. While restorative justice programmes may be effective for those who have reputations to lose, such as white-collar criminals and members of the respectable working class, they may have little meaning for those with a low social status or those who live on the margins of society. Finally, rather than promote informal modes of dispute resolution these state-sponsored programmes may operate to undermine existing local informal control processes, and rather than empower communities they can make them more passive and more reliant on state services.

In Kathleen Daly's (2001) evaluation of family based conferences in New Zealand she found that many of the claims made in relation to these conferences such as empowering the victim while eliciting remorse from offenders, were often unfounded. She found that

just under a third of the young offenders said that the conference was not important to them, while over half said that they had not thought about what they would say to victims before the conference. Indicatively, over 40 per cent said that they were not sorry or were less sorry for the victim after the conference, while only 28 per cent of the victims interviewed believed that the offender was genuinely sorry. Some 18 per cent of victims left the conference upset and in 9 per cent of cases victims felt intimidated. It is clear from this account that in this type of conference, which mainly involves young people a significant percentage of offenders do not take it seriously while others only engage in the process in order to reduce the penalty that they might receive. Clearly, many of these encounters are ineffective or counterproductive with many victims feeling short-changed or intimidated.

Richard Young's (2001) review of three police-led restorative justice conferences in Bethlehem, Pennsylvania in the USA, Canberra, Australia and the Thames Valley initiative covering the English counties of Oxfordshire, Berkshire and Buckinghamshire echoes some of the concerns raised by Blagg and he points out that there is a danger that the police can become 'judge and jury' in these cases. In opposition to the claims that these restorative justice conferences allow victims and offenders to come together to resolve their conflicts more informally these events are largely run by powerful professionals. Indeed, Young notes that in police led conferences there is a tendency for the police to disclose their knowledge of offenders and that there is little possibility of challenging police behavior. In a number of cases the conference scripts are not followed and instead the police 'improvise' and take a lead in directing proceedings. As in other reviews Young found evidence that proceedings tended to be over-controlled by professionals and were largely offender focused while the victims acted as little more than information providers. These observations raise serious questions about procedural fairness and accountability (Roche 2003). Not surprisingly, offenders often become defensive and are reluctant to speak openly. These conferences are more directive than enabling and in some cases facilitators pursue their own individual agendas and impose their own decisions. Young suggests that decisions reached were often unrealistic and unjust. In some cases the outcomes are much more punitive than they would have been in

court, while in other relatively serious cases outcomes appeared extremely light. Thus, rather than empowering victims these conferences more often serve to empower the police. In effect these police-led conferences involve little more than a thinly disguised form of state inflicted punishment (Young and Hoyle 2003).

In a similar vein David O'Mahoney and Jonathan Doak (2004) found in their study of police-led restorative cautioning pilots in Northern Ireland evidence of net widening whereby a number of relatively minor offenders were drawn unnecessarily, in their view, into these schemes. Many of those who ended up in these programmes would not have been processed by the formal system either because they were too young, or because their transgressions were not serious enough or because existing laws did not apply. Thus on these restorative schemes very young offenders were subject to a very demanding process of adjudication. Thus:

“One of the greatest concerns arising from the pilots was that they appeared to draw in some very young and petty offenders who consequently experienced a very demanding process of accountability that in our opinion was disproportionate to the harm caused. Some 80% of cases that we examined were for offences concerning property worth less than £15. It was not uncommon to come across cases where a considerable amount of police time had been invested in arranging for a full conference for the theft of a chocolate bar or a can of soft drink“ (O'Mahoney and Doak 2004: 495).

The consequence of intervening at this level is to formalise issues, which were previously dealt with informally, and to inadvertently push offenders up the tariff. As Stanley Cohen explained in his *Visions of Social Control* (1985) these ostensibly innocuous interventions can have the effect of extending both the range and depth of social control producing a more complex, opaque and intensive system of regulation.

These, and related, evaluations of the different restorative justice programmes which have emerged over the past decade and a half amount to a major indictment of the claims

and objectives of restorative justice. Alongside these reviews are a growing number of critiques which suggest that rather than involving a more constructive and progressive option that the various forms of restorative justice involve the erosion of rights and legal safeguards, a blurring of civil and criminal proceedings, and the construction of 'cheap justice' or second class justice (Ashworth 2001). There have been various responses to this barrage of criticism by the advocates of restorative justice, however, these responses have been less than convincing (Braithwaite 1997; Morris 2002)

In this paper the aim is to contribute to the growing skepticism associated with restorative justice in its various guises. It will be argued that the failings which have been identified by critics are not so much a result of poor implementation or a consequence of technical and organizational failures; rather it will be suggested that the limitations of restorative justice programmes stem more or less directly from the weak theoretical base on which they have been constructed. The implication is that no amount of tinkering with these programmes will solve the fundamental problems which have been identified by critics. In particular, the aim is to try to trace back the perceived limitations of restorative justice programmes to John Braithwaite's influential reintegrative shaming thesis which has provided one of the central pillars on which the 'new generation' restorative justice programmes centered around conferencing and shaming, which emerged during the 1990s have been constructed. It is not, however, the intention to provide a comprehensive review of John Braithwaite's theory, although such a review is long overdue, but rather to examine certain aspects of the theory - particularly those relating to the processes of shaming, reintegration and recidivism.

## **Shaming**

Arguably, the major difference between the development of informal justice during the 1980's and its representation in the form of restorative justice in the 1990s is the wide-scale adoption of the reintegrative shaming thesis elaborated by John Braithwaite in *Crime, Shame and Reintegration* (1989). In this book he elaborated the notion of shame and provided a new theoretical rationale which revived the flagging fortunes of the

informal justice movement of the 1980s. For the most part Braithwaite's ideas and aspirations have been realised in the restorative justice conferences, which have over the last decade or so become part of the penal landscape around the world.

The two other theoretical approaches which had been influential in promoting informal justice in the 1980s – abolitionism and faith based criminology - lacked the breadth and depth of analysis to turn ideas into specific programs. Braithwaite's extensive writings made up that gap and in his work he acknowledges his debt to both abolitionism and faith based approaches. In line with abolitionism he emphasises informalism, anti-statism, bringing parties together to resolve disputes as well as recognizing the victim (Hulsman1986; Christie 1982). In conjunction with faith based criminology he places emphasis on forgiveness and remorse and consequently his approach contains a strong confessional element (Pepinsky and Quinney 1991).

The main point of departure, in Braithwaite's (1989) analysis, is the notion of reintegrative shaming. Shaming is seen as a powerful sanction, which he claims, can be more effective than the conventional forms of punishment centered around the strategies of retribution, deterrence incapacitation and rehabilitation. It is important, he argues, to avoid a potentially stigmatizing impact of shaming whereby individuals may be propelled into further offending and deviant subcultures. Therefore, he argues that it is necessary to follow the shaming of offenders with strategies of reintegration. Thus, the aim is to indicate the unacceptability of the offender's actions while encouraging him or her to repair the damage done and consequently be reintegrated into the community. In this way it is possible, he suggests, to be tough on crime but to do so in a way that encourages the offender to think about the consequences of their action and thereby reduce future offending. Consequently, crime can be reduced in the longer term. At the same time it aims to restore the dignity and security of victims by 'making good'. As Braithwaite explains:

“The basic idea of reintegrative shaming theory is that locations in space and time where shame is communicated effectively and reintegratively will be times and

places where there is less predatory crime – less crime that is a threat to freedom as non-domination. Reintegrative shaming prevents such offending; stigmatization increases the risk of crime for the stigmatized. Reintegrative shaming means communicating disapproval for the *act* with respect, with special efforts to avert outcast identities and to terminate disapproval with rituals of forgiveness and reconciliation. Stigmatisation means communicating disapproval of a *person* with disrespect, where offenders are labeled with outcast identities (like ‘criminal’, ‘junkie’), where there are no rituals to terminate disapproval” (Braithwaite and Braithwaite 2001:39)

Through a reworking of labeling theory with its emphasis on the stigmatising impact of criminal sanctions Braithwaite presents a deceptively simple distinction between stigmatising and exclusionary forms of shaming, on one hand, and inclusionary and reintegrative forms of shaming, on the other. Where the latter are applied, he argues, the result is not only to maintain respect for the offender but also to put in place a procedure that can ultimately reduce crime through the more effective resolution of conflicts. It is on the basis of this distinction that some of the leading restorative justice programmes have been developed, while Braithwaite has also used it to rework classical approaches to criminological theory and to tie this theorization into the development of a political programme: namely republicanism. There are few theorists in the post-war period who have sought to provide a synthesis of conceptual, practical and political concerns in this way and it is the ability of Braithwaite to provide such an integrated approach that accounts in no small part for the power and influence of his work (Braithwaite and Pettit 1990). Interestingly, Braithwaite has stated that he would liked to have called the term reintegrative shaming 'restorative shaming' in order to make the links between his theory and practice more transparent.

As a number of commentators have pointed out there something unusual about placing the notion of shaming at the centre of the analysis since it has been widely noted that shaming can be an extremely destructive emotion (Johnstone 1999, 2002; Whitman 1998). At the same time others, including Braithwaite, have pointed point out that

shaming as a social sanction has been in decline over the past hundred years or so, and is widely viewed as a high risk option which in certain circumstances can be extremely damaging both individually and socially (Braithwaite 1993). It therefore seems strange that an approach which is clearly committed to developing an inclusive and radical approach to crime control should place at the center of its analysis a concept which in the past has been closely associated with conservative and authoritarian regimes.

James Whitman (1998) in a thoughtful article on shaming has identified a number of objections to the adoption of state directed shaming sanctions in modern western societies. First, he argues that shaming involves an ugly and politically dangerous complicity between the state and the crowd. Second, shame sanctions are undesirable because they promote a spirit of public indecency and brutality. Third, the use of shaming sanctions have historically only been seen to apply to a strictly delimited range of offences and offenders – sexual offences, commercial offences and minor or first time offences. Fourth, in a rights-based society like our own it is important to uphold the rights of offenders and to maintain dignity and respect. Shaming carries the likelihood of taking away the dignity of the offender as a result of humiliation. In answer to the question; ‘what is wrong with shame sanctions? Whitman suggests that:

“They involve a dangerous willingness, on the part of the government, to delegate part of its enforcement power to a fickle and uncontrolled general populace. Even in their mildest American form, shame sanctions amount to a kind of posse-raising legal politics, with all the risks that implies. They are at base a form of officially sponsored lynch justice, meted out by courts that have given up on the obligation of the state both to define what is criminal and to administer criminal sanctions itself” (Whitman 1998: 1088/9).

As Whitman suggests there may be different reasons historically why certain groups should have been the object of shame sanctions. It is also the case that amongst those groups who are the object of shame sanctions the impact and effects can be considerably different. The dynamics of attempting to mobilise shame sanctions against sexual



offenders and minors for example, who may feel vulnerable and marginal is very different than mobilizing such sanctions against white collar and corporate criminals. As Mike Levi (2002) has argued there are a variety of commercial criminals who are relatively immune from such sanctions; while at the same time he suggests that there are some business people for whom stigma and exclusion may well be suitable penalties. At the same time shaming sanctions directed towards the managers or employees in certain firms may well affect everyone working for that firm. The morally neutralizing effect of money, on the other hand, may allow corporate criminals to minimize the likelihood and effects of shaming and to reinvent themselves where necessary.

At the other end of the social spectrum there are also difficulties in applying shaming sanctions. As Harry Blagg (1997) has noted in relation to Australian Aboriginal people they have a very different notion of shame than that which is promoted by the advocates of restorative justice, while the whole idea of ‘representation’ is highly contentious, particularly that contained within wholly exterior, adjudicatory structures such as courts and there is only limited scope for individuals to ‘speak for’ others. Given these different cultural, ethnic and class dimensions not only in relation to the meaning of shame but also in relation to its effects, it suggests that the mobilization of what is seen as a natural, universal and transhistorical concept of shame is both naïve and dangerous (Johnstone 2002).

Alison Morris (2001) has pointed out that shaming is not only a potentially dangerous sanction but is likely to be counter-productive. Thus instead of placing the emphasis on shaming in restorative justice conferences she sees the process itself as being educative and its effectiveness allied to eliciting expressions of remorse. Thus rather than focusing on shaming she argues for what she calls ‘reintegrative remorse’. Thus she writes:

“It is certainly possible that it is empathy which triggers remorse, and not shaming (disapproval). If this is so it would mean that the emphasis in conferencing (or in other restorative justice processes) should not be on processes of shaming (disapproval) but on processes which focus on the consequences of offending for

others (for families and communities as well as for victims). In the meantime the use of the words ‘shame’ and ‘shaming’ in the development and refinement of reintegrative shaming is best avoided. They are too readily and easily misunderstood and it is not that difficult in practice to slip from the intent of reintegrative shaming to the practice of stigmatic shaming or for intended reintegrative shaming to be perceived as stigmatic” (Morris 2001: 12).

As Alison Morris (2001) notes shaming clearly carries a strong punitive and exclusionary component. If it were not a powerful mechanism of disintegration there would be no point in spending so much time and effort in trying to reintegrate those shamed. However, it might seem a little strange to the untrained eye that these two strategies of shaming and forgiveness or stigmatisation and reintegration should be joined together and be presented as complementary strategies, particularly since the implementation of one would seem to be designed to negate the impact of the other. Thus in restorative justice conferences where the prearranged script is predictably going to strive for forgiveness and reintegration and this is known by all participants beforehand the potential power of the shaming process would seem to be largely undermined in advance.

The salvation of the notion of shaming from its potentially disastrous consequences, Braithwaite insists, is dependent upon its being followed by rituals of reintegration. Since these rituals of reintegration are aimed at overcoming the negative impact of stigmatisation the critical question is the degree to which this is possible to uncouple the processes of shaming and reintegration.

## **Reintegration**

As Ken Polk (1994) has argued the negative impact of shaming is only likely to be partially alleviated by strategies of reintegration. As we have seen above many of the participants in restorative justice conferences are either relatively impervious to the shaming process or engage in the process for pragmatic reasons. These findings have three important implications for the reintegrative shaming thesis. The first is that only

certain types of offenders are likely to be amenable to this type of sanction. The second is that there is no guarantee that those who do experience the effects of shaming will be reintegrated effectively. The third is that because reintegrative shaming is mainly directed towards minor offenders rather than for more serious and hardened offenders it is likely to work best where it is needed least and to be least effective where it is needed most.

Although it is recognised by the advocates of restorative justice that reintegration is far from certain the various dimensions of reintegration are not fully explored and many see reintegration as a single process. There are two problems with this conception. The first is that because the reintegrative shaming thesis is for the most part *offender focused* it tends to see reintegration as an issue only for the offender, but as has been suggested, because the shaming mobilised by restorative justice programmes can impact upon the victims as well as their friends and family, there are questions about how the reintegration of all the parties involved will be realised. Most of the time the advocates of restorative justice express the view that the apology or the admission of guilt is sufficient to satisfy the victim. However, in a significant number of cases no formal apology is forthcoming, the victim is not present at the hearing while some sessions end in acrimony (Daly 2001). Despite all the rhetoric of bringing the victim back in and developing a victim-centered approach the victim plays a limited role in many of the restorative justice programmes. Recent research reports that there has been a considerable degree of dissatisfaction amongst conference victims both in relation to the way in which conferences are carried out as well as its aftermath (Strang 2002).

Parents and friends who are drawn into the dispute may understandably feel upset, stigmatized and marginalised. They may be reluctant participants and not understand a great deal about what is going on (Karp et al. 2004). Reintegrative shaming has little to say about their difficulties and restorative justice programmes provide little or no support to deal with the shame or guilt experienced by participants and has no powers to facilitate their reintegration into their community.

The second and related issue is who decides that reintegration has taken place. In many of the trivial cases that appear in restorative justice programmes, particularly those involving juveniles who are living in stable households reintegration may be possible. But in more serious cases and particularly for those already subject to some degree of social exclusion it is not always clear who decides and who takes responsibility for reintegration. Is it the offender, the court, the family or the communities who facilitate reintegration and decide whether such reintegration has been successful or not?

There are issues about the degree of community interest in restorative justice programmes, both in terms of participation and outcomes. Particularly in more disorganised and transitory areas interest is likely to be particularly low, while restorative justice programmes with their emphasis on interpersonal relations tend to limit the involvement of the wider community.

In cases where reintegration in whatever form is not completed successfully the consequences are potentially disastrous. Given the powerful and destructive nature of shame and stigmatisation those offenders who are not fully reintegrated are likely to be, according to Braithwaite, propelled into future offending and driven towards criminal subcultures. As we have seen, a significant percentage of offenders who engage in restorative justice programmes exhibit cynicism or indifference and are unlikely to be affected by shaming processes, except negatively. Even in the more successful cases very few offenders are likely to become reintegrated on every level with the consequence that there will be a significant individual or social deficit in many of the cases that are processed.

### **Shame and Trust**

The reintegrative shaming thesis presented by Braithwaite is based to some extent on a family model of social relations. Braithwaite frequently alludes to family dynamics in which sanctions are issued in the context of ongoing relations of love and respect. What Braithwaite fails to recognize is that even within these 'happy families' there are points

of exclusion and rejection. It is also the case that there exist significant asymmetrical power relationships within the family and that those on the receiving end of sanctions are dependent on the care and resources of those issuing sanctions. Even in this context transgressions may be seen to be so frequent or so serious that the parents end up by rejecting and dismissing the children. By the same token children who can no longer take the abuse or neglect of parents may lose respect and be unwilling to forgive the parents for their behavior.

This scenario raises important issues about the nature of social relations and particularly the role of shaming and forgiveness. If we explore the dynamics of contemporary family relations we find that it is trust that plays a more central role than shaming (London 2003). When either party in a relationship engages in some form of wrongdoing against the other the most usual response is not the mobilization of shame but a suspension of trust. That is, the trust that exists between parties is fractured and as a result the other is held at a certain distance and treated with caution. The more the wrongdoing occurs the greater the distance and the greater the caution with which they are treated. Apologies and expressions of remorse may ameliorate the situation but words are rarely in themselves sufficient to repair the damage. What is normally required is demonstrative change in behaviour and/or attitudes in order to regain trust. At the point where trust breaks down completely the relationship is likely to be severed.

If we extrapolate the logic of this observation and apply it to the wider more impersonal social world where social bonds are looser and relations of domination and subordination are more complex we can see the centrality of trust. We give trust to others as a precondition of social interaction, but this trust is always conditional. Indeed, we may see trust as the glue of social relations. As in the family setting relations of trust underpin basic social exchanges but where transgressions occur in situations of 'lightly engaged strangers' we have less reason to be forgiving and are more likely to want to place offenders at some distance from ourselves and to view them with some caution, unless persuaded otherwise. If it is the case that trust is a more central and fundamental element of social interaction and regulation than shaming then it would have implications for

what is to be restored following a crime or a wrongdoing and by what mechanism this restoration is to be effected. If the aim is to bring the victim and offender together the reinstatement of trust may be a more appropriate objective than inflicting shaming sanctions on offenders. Even so, the likelihood of repairing a fractured relationship in a brief orchestrated encounter is slight. If the reestablishment of trust is to be the objective it is unlikely to be achieved through a 'talking cure' in which the parties express their remorse or anger.

Interestingly, in Heather Strang's assessment of the impact of restorative justice programmes on victims she notes that reference to trust recurred repeatedly in conference discussions. She notes that:

"It was particularly salient for young offenders' parents, who frequently commented that the biggest harm they had experienced was the loss of trust, the feeling of being 'let down', and how much they regretted the loss of their former confidence in their children. The young offenders themselves recognised this cost as well"(Strang 2002:104-5).

The loss of trust in some cases such as sexual assault was not only directed towards the offender but involved a more general loss of trust.

It is important to note that unlike the family model that Braithwaite likes to use as a point of reference that crime victims and offenders in a large percentage of cases have no pre-existing relationship. Not only are they strangers but in many cases the offender has little or no interest in the lives or personalities of their victims. Victims in many cases are selected fairly randomly and it is the accessibility and attractiveness of the target which motivates the offender not the personality of the victim (Sparks 1981). This has obvious implications for any approach that aims to be restorative, since in a significant percentage of cases there is no relationship to restore. Also, within the restorative justice literature there is a rather crude distinction between victims and offenders who are often presented as if they constitute two quite distinct groups. However, as criminologists are discovering

there is a significant overlap between victims and offenders with many of those who are victims today being offenders tomorrow and vice versa.

Many of those who are processed by the criminal justice system, of course, will already have a history of marginalization, rejection and stigmatisation. In some cases they will have been in care, expelled from schools, or come from broken homes. These individuals do not accord with the idealized model which Braithwaite presents that sees each transgression based on a one-off event occurring in a context of unconditional trust and love. People have biographies and reputations. To some extent these reputations are shaped by gossip which Braithwaite sees as a largely positive force since it mobilizes social shaming. But if shaming generates stigmatisation and that stigmatisation operates without attempts at reintegration it is potentially damaging and destructive according to Braithwaite's distinction between stigmatising and reintegrative shaming and, therefore, it should follow that gossip is an undesirable social practice.

By the time most offenders are processed through the criminal justice system and appear in court they already have a criminal record. Although they may still be part of a community network the levels of trust accorded to them by significant others may be relatively low. The logic of this social and interpersonal distancing has implications for Braithwaite's suggestion that we should treat each transgression as an act rather than essentialise the offender as a 'criminal' or a 'junkie'. This suggestion begs the question why we routinely move from seeing a transgression as an individual as a discreet act, or a series of acts, to seeing it as part of someone's character or personality. Clearly, in our daily lives we make rough and ready distinctions between those who offend sporadically and those cases where offending is seen as part of a master status. Interestingly those who engage in crime make similar distinctions. As Jack Katz (1991) demonstrated in his analysis of the persistent robbers there is significant difference between a person who commits one or two robberies and those that do it persistently. In these cases the internalization of violence and engagement with risk taking becomes more embedded in the personality of the offender and increasingly becomes the way in which they define themselves (Matthews 2002). Similarly, research on prostitution has shown the difference

in terms of identity between those who perform social services for money on a sporadic and temporary basis and those who identify themselves as prostitutes (Phoenix 1999). Braithwaite conveniently blurs these distinctions and overlooks the ways in which identities are shaped, biographies are interpreted and offending behaviour is categorized. Thus, to treat all transgressions as if they were one-off *acts* is myopic to say the least and as we have seen in relation to police-led conferences there is an overriding temptation to bring the offenders previous history into view (Young 2001). Similarly Kathleen Daly (2001) reports that in family based conferences one in three victims saw the offenders as a bad person rather than as a good person who had committed a bad act.

In many ways the initial plausibility of the reintegrative shaming thesis rests on a number of false dichotomies. One further dichotomy which Braithwaite mobilizes in order to make the thesis appear more credible and to provide a justification for the development of restorative justice is to counterpoise restorative justice to what he calls retributive justice. The characterisation of the existing criminal justice system as essentially 'retributive' is used by Braithwaite and others to depict it as unnecessarily punitive, while restorative justice is seen as relatively benign. This unrealistic dichotomy not only overlooks the ways in which restorative justice can be more punitive than court processes but also how restorative, reparative and compensation strategies are a regular feature of the existing criminal justice system. At the same time it is worth remembering that within the formal criminal justice system there already exists a number of ways in which forgiveness plays a role in the process. The demeanor and attitude of the defendant towards the victim, the willingness to admit guilt and claims that the transgression was out of character are routinely rewarded in courts with lighter sentences. Mitigation, the deferral and suspension of sentences and the offer of a 'second chance' are also regularly applied in the criminal justice system. Moreover, a significant percentage of cases do not make it to court and are dealt with informally by warnings, 'no further action' and the like. The attrition rate in the criminal justice system is such that only a very small percentage of cases that come to the attention of the police ever make it to court and even fewer are sent to prison. In England and Wales, for example, it is estimated that only 2 per cent of known offences result in a conviction while only one in 300 result in a prison sentence



(Barclay and Tavaras 1999). Interestingly, Braithwaite in his revision of the reintegrative shaming thesis portrays the criminal justice and prison system not so much as opposites to be overcome, but rather as a necessary backup to restorative justice programmes, which he suggests, should be mainly used for minor and first time offenders (Braithwaite and Braithwaite 2001).

Looking at attrition rates reminds us not only that very few of those who commit crime are actually convicted and that most are dealt with informally, but also reminds us that the relation between formalism and informalism is rarely a zero sum option but a matter of degree. To a large extent the role of the criminal justice system is to provide a backdrop against which conflicts can be negotiated and resolved. Arguably, the importance of the criminal justice system is not so much a function of the cases which it actually processes, but its role in providing a point of reference for the informal resolution of disputes. Indicatively, the majority of divorce and fraud cases are settled out of court and the formal system of adjudication creates a form of 'shadow justice' (Mnookin and Kornhouser 1979; Harrington 1985). Thus comparing restorative justice only to the formal dimensions of the criminal justice system is to present a one-sided and distorted account of the processes involved.

### **Guilt and Shame.**

The concerns, which have been, expressed about the value of shaming in relation to wrongdoing, raises the question of the relation between shame and guilt. Social historians tend to make a distinction between shame-based societies such as Japan and guilt-based societies such as those of Western Europe and America. The debate therefore about guilt and shame operates on at least two levels. On one level, it is tied to notions of interdependency and communitarianism and, on another level, to the emotional dynamics of conferences. Japan is repeatedly cited in *Crime, Shame and Reintegration* (1989) as an exemplar of how shaming can operate in a communitarian culture to produce an effective system of regulation. Thus:

“ It is argued that societies that have low rates of common types of crime (such as Japan) rely more on this type of social control, working hard at reforming the deviant through reconstructing his or her social ties. Conversely, high crime societies (such as the US) rely upon stigmatisation, thus doing little to prevent cycles of re-offending” (Braithwaite and Mugford 1993:140).

The Japanese Braithwaite informs us, maintain shaming rituals and the main mechanisms of social control remains in the hands of significant others. Its unique historical development has meant that regulation is more informal and more pervasive than in the more individualistic western societies. (Komiya 1999)). The attractiveness of Japan for Braithwaite is that he sees it as providing confirmation of his belief that more communitarian societies with high levels of interdependency will have lower crime rates. While this was the case in the 1980s, during the 1990s when crime rates have been plummeting in many individualistic western societies, the crime rate in Japan has been steadily increasing (Blumstein and Wallman 2000). In his defence Braithwaite would no doubt argue that the reason for the increase in crime in Japan is a result of the breakdown of the traditional family and community structures and the growing number of outsiders, particularly in expanding urban centres. However, this does not account for the surprising downturn of crime in the UK and USA. There are considerable problems about uncritically comparing crime rates in Japan and elsewhere because of differences of classification and accounting. When assessing the role of communitarianism and interdependency in Japan, some commentators have pointed out that the Mafia in Japan act as an alternative enforcement agency alongside the police contributing to security and insecurity while some acts which would be counted as crimes in other countries are seen as expressions of ‘mental illness’ in Japan. (Leonardson 2001). Interestingly, Braithwaite after extolling the virtues of Japanese society admits that: “as much as I admire the crime control achievements in Japan I would not want to live there because I would find the informal pressures of conformity oppressive”(Braithwaite 1989:158). The majority of the population in most advanced western societies would probably share Braithwaite’s view.

The difference it is claimed between shame and guilt is that: 'guilt is felt as an action one has undertaken or omitted, whereas shame is felt about the self as a whole' (Harris et al 2004:193). If it is the case that one is seeking to develop a mode of adjudication in which the aim is to respond to the act rather than the whole self it would seem that eliciting guilt would be more appropriate than mobilizing shame. Others depict guilt as a mainly internal process, while shaming is seen to be generated externally (Harris 2003). Braithwaite sees guilt and shame as overlapping processes but fails to examine the powerful mechanisms at work in the manufacture of guilt and how this is linked historically to religious doctrines, particularly Christianity, and how it has, in turn, been incorporated within the criminal justice system.

The importance of guilt in the criminal justice system is that it has both a subjective and objective dimension. Guilt can be proven whereas shame can only be mobilized. It is obviously important in cases where offenders deny the charges brought against them that some agreement about the guilt and culpability can be established, while the subjective experience of guilt is able to work whether formal guilt is established or not. The effects of guilt can come to the fore whether the case is proven or not, or indeed if anyone else knows whether a wrongdoing has occurred and therefore it is arguably a more pervasive and powerful emotion than shaming. It has also been suggested that whereas guilt is more frequently linked to empathy and reparation which are both amongst the main objectives of restorative justice programs, shame can often provoke feelings of defensiveness anger and rejection. (van Stokkem 2004).

Social psychologists claim that when shame is not counterbalanced by pride or social support the person experiencing shame 'feels weak, inattentive, defective, lacking in control, degraded and exposed' (van Stokkem 2004; 342). This is not the ideal state for anyone being sanctioned while the forms of reintegration, which are offered to offenders, is unlikely to undo these emotions. Shaming can also generate anger and resentment and whatever the formalities of the restorative justice hearing these emotions are likely to carry on some time after the event (Scheff and Retzinger 1991).

It is not difficult to mobilise shaming sanctions in late modern societies and in recent years we have seen evidence of such developments (Pratt 2000). The question which arises, however, is what is the effect of mobilizing a range of shaming sanctions in western guilt based cultures. The most likely result, according to Tangney, 'interminable rumination and self-castigation' (Tangney 1995) As van Stokkem (2004; 348) concludes in his review of the literature on guilt and shame that: "while guilt induction triggers responsibility, shame induction is destructive. This suggests that it might be far better for offenders to feel guilt rather than shame'.

When we begin to explore the emotional dynamics of both interpersonal relations and the emotions of court processes and conference programmes we find that we begin to encounter a series of familiar everyday terms such as guilt, trust, respect, dignity and embarrassment, which while critical to the analysis remain under-theorised. These meta-concepts provide the conceptual scaffold on which our understanding of interpersonal dynamics takes place and are clearly pertinent to any understanding of the likely effects of those forms of adjudication, which are designed to be restorative. While there has been some useful discussion of guilt and shame in the restorative justice literature, it remains the case that many of the other key terms are poorly understood.

### **Recidivism.**

There is a growing chorus of liberal humanists who believe that society is becoming increasingly punitive and that part of the mission of restorative justice is to promote a more moderate and more compassionate response to offending (Matthews 2005). In this climate there is a serious danger that the justifications for restorative justice rest on these liberal humanistic concerns and that this in turn descends into a form of moralizing. Braithwaite, himself, although occasionally joining in with the calls for lighter sentences avoids descending into pure moralizing by linking the reintegrative thesis to a crime reduction strategy. His argument is that the educational effect of restorative justice programmes with their emphasis on forgiveness and inclusion avoids the danger of

propelling offenders into more serious crime. Consequently, one of the strengths of the reintegrative shaming thesis lies with its claim to reform offenders. A standard measure for the process of reform is recidivism.

While the measures of recidivism are lacking in conceptual or empirical certainty, they remain important social yardsticks since they aim to measure the effectiveness of different sanctions. A number of critics have noted that in relation to recidivism the results of restorative justice programmes are at best mixed and at worst disappointing. Lawrence Sherman (2000), for example, compared re-offending rates for four separate samples of offenders – young violent offenders under the age of thirty years, drink driving offenders, juvenile property offenders where there was personal victim and juvenile shoplifters. He found that while there were significantly lower rates for the young violent offenders than the court sample, differences were slight or insignificant for the other three groups. A recent study in Iceland which is organized along communitarian lines and which relies heavily on informal shaming as a means of social control found that while the crime rate is relatively low, the rates of recidivism are not significantly different than those found in other countries. The implication of this finding is that the social forces which govern crime rates are not the same ones that drive recidivism rates (Baumer et al. 2002).

Despite the claims that restorative justice based on the reintegrative shaming techniques would reduce reoffending, the results, to date, are far from convincing. Where restorative justice programmes have targeted young minor offenders one would expect a relatively low level of recidivism but the contention that more serious offenders are going to be ‘reformed’ in a two or three-hour conference is unrealistic. The only aspect of offending which is addressed in these sessions is empathy for others but this in itself is unlikely to have much effect even amongst minor offenders. Thus:

“As currently implemented, most restorative justice programs fail to incorporate the principles of effective intervention, particularly as they relate to risk, need and responsivity principles. In restorative justice the primary criterion for matching

sanctions to offenders is the nature and extent of the harm caused by crime. The seriousness of the offence, however, is not consistently related to the offender's risk of recidivism. Thus restorative justice programs run the dual risks of producing an interaction effect in low-risk offenders and of underservicing high-risk offenders” (Levrant et al. 1999:19).

The inability to develop effective programmes which will significantly reduce levels of reoffending amongst different groups of offenders, stems in part from a rejection of rehabilitative measures, on one hand, and of identifying offenders primarily in relation to the offence for which they have been caught, on the other. As an object of reintegrative shaming the impact and experience of offenders will invariably be mixed and uncertain. Consequently, behaviour will be changed in relatively few cases and individuals and communities will continue to suffer from the effects of the criminal behaviour of repeat offenders. Thus restorative justice is unlikely to make much impact on the level of crime or the rates of reoffending, particularly amongst more experienced and persistent offenders.

Although there are significant methodological issues about comparing the populations dealt with by courts and those dealt with by conferences it would seem that the educational and shaming effect of conferences is much less effective in changing behaviour than Braithwaite predicted. This may be for a number of reasons. Either the external conditions that are conducive to recidivism are relatively impervious to different modes of adjudication. Another less welcome explanation may be that restorative justice programmes do not have the educational and shaming effects which Braithwaite outlines. Indeed, they may not affect offenders in the ways expected. They may in fact create more cynicism, more alienation, or more commitment to offending as a result of what might be perceived as receiving little more than a ‘telling off’ for engaging in crime .

## **Conclusion.**

It has been argued that the problems currently confronting restorative justice programmes are not so much a function of problems of implementation or organisation but stem more or less directly from the theoretical base on which they rest. Abolitionism and faith based criminology are largely removed from *Realpolitik* and do not possess the type of reflexivity and awareness of the changing nature of the state and governmentality to allow a full appreciation of the role and significance of restorative justice in late modernity (Rose 2000). As largely oppositional and anti-statist approaches developing an understanding of the changing nature of the state and modes of adjudication is largely beyond their remit. The reintegrative shaming thesis by providing a rationale for focusing on shaming and reintegration, provided an important rationale for the development of the new modes of informal justice which emerged in the 1990s and centered around different forms of conferencing. This new generation of informal justice, however, has run into similar problems as its predecessors experienced during the previous decade (Matthews 1988). The promise of the development of an alternative and competing mode of adjudication is fading as restorative justice practices are become increasingly absorbed within a more pluralistic criminal justice system whose range and depth has expanded (Santos 1987).

If we look at the evidence of various evaluations of restorative justice in its various forms, the most benign reading that we could put on it is that the results are mixed. Given that much of the earlier research on restorative justice was carried out by those who were generally sympathetic to this approach, the research has suffered from significant selection bias. There are also major methodological problems in comparing the courts and conferences given the individualised nature of law and justice in contemporary society. But even if advocates can take some comfort from some of these studies there remains a dark side to restorative justice programs and it is apparent that beneath the veneer of benign humanism there are other more sinister and disturbing processes at work. Besides the erosion of rights and welfare, the blurring of criminal and civil process, the responsabilisation of citizens, the re-mobilisation of risky shaming sanctions there are also tendencies to provide a form of 'cheap justice' which fails to properly protect the weaker and poorer victims, on one hand, while giving some of the

more powerful and serious offenders little more than a 'slap on the wrist'. The production of what appear to many observers as chaotic and arbitrary sanctions are allowed to stand partly because of the relatively low level of public involvement and accountability.

John Braithwaite provides an imaginative attempt to place restorative justice on a solid theoretical and political foundation. However, rather than distancing himself from abolitionism, faith based criminology and versions of liberal humanism, he manages in his attempt to incorporate these positions into his grand scheme to produce a rather disjointed theory which, while carrying the trappings of these other theories, attempts to build his position on the notion of reintegrative shaming. The distinction, however, between stigmatising and reintegrative shaming proves on closer inspection to be untenable and consequently it drifts towards a moralizing approach which falls back on pleas for more ostensibly benign and humane forms of punishment. Without convincing evidence that such strategies will reduce the level of recidivism he joins hands with the faith based approaches which call for more forgiveness and compassion. But unlike them he does not seem to fully realise that the effective exercise of absolution is premised upon the mobilization of the threat or implementation of the most severe, exclusionary and draconian forms of punishment in a context of absolute power.

The marriage of the reintegrative shaming thesis and restorative justice practices is on the rocks. This is not the time and place, however, to apportion blame or to make judgments about whether the failure of the marriage has mainly been a function of the conceptual inadequacies of the reintegrative shaming thesis or the deficiencies in the implementation of restorative justice programmes. Both parties must carry a degree of responsibility. However, it is clear that no amount of mediation and counseling is going to overcome these problems. It might be time to start thinking about negotiating a divorce.

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