Outlining the shadow of the axe

On restorative justice and the use of trial and punishment

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> 'Once it is conceded that restorative justice cannot deal with absolutely all criminal cases, the relationship between the formal system and any restorative justice processes must be crafted so as to avoid inequities.'[1]
> 'There is tremendous reluctance in the rhetoric of restorative justice to boil it all down to precise concrete remedies.'[2]

Abstract

Most proponents of restorative justice admit to the need to find a well defined place for the use of traditional trial and punishment alongside restorative justice processes. Concrete answers have, however, been wanting more often than not. John Braithwaite is arguably the one who has come the closest, and here I systematically reconstruct and critically discuss the rules or principles suggested by him for referring cases back and forth between restorative justice and traditional trial and punishment. I show that we should be sceptical about at least some of the answers provided by Braithwaite, and, thus, that the necessary use of traditional punishment continues to pose a serious challenge to restorative justice, even at its current theoretical best.

Keywords: Braithwaite, John; court trial; responsive regulation; restorative justice; state punishment

Introduction

Once it was an uncontested commonplace that criminal justice takes place between an offender and the state and that it consists in determining guilt and meting out punishment. Over the last two to three decades, however, this notion has been forced on the defensive by the old novelty (or is it novel oldie?) of restorative justice, that is, by the idea of a criminal justice process whereby, as one popular definition has it 'the parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its implications for the future.'[3]

This development has been so rapid, however, that by now restorative justice threatens to be caught up in its own success. In the early days proponents were allowed to simply tell (remarkable) stories of success, fine tune processes through research and development, and launch harsh criticism against traditional criminal justice coupled with loose sketches of a restorative

[1] Ashworth (2002: 592).
[2] Acorn (2004: 49).
[3] Marshall (2003: 28).

utopia. But as restorative justice has managed to gain serious attention from policy makers and a wider academic audience it has gradually been forced into assuming the more constructive and committing role of supplying fully fledged alternatives to the existing system. In consequence, recent years have seen several works with the express ambition to present more realistic visions of a unified restorative criminal justice system.[4]

One area that has drawn particular attention in this connection is the use of traditional trial and punishment in such a system – a question which, in turn, has occasioned a debate on how best to define restorative justice. Some advocates prefer to maintain a narrow definition in terms of voluntary deliberative stakeholder processes roughly along the lines of Marshall quoted above.[5] They tend to take the abolitionist view that all use of traditional punitive processes is morally unjustifiable. Others presume, in my view wisely, that we cannot avoid entirely the use of some sort of coercive measures. Even if given absolute powers to reconstruct the criminal justice system according to restorative wishes, there will inevitably be some cases that are unfit for voluntary deliberative processes; cases involving, for instance, openly uncooperative, hardened and dangerous offenders. If restorative justice is to qualify as a comprehensive theory of criminal justice it must encompass theoretically the possibility of such cases too.

This has led other advocates to abandon a narrow definition in terms of *process* for a wider definition in terms of *outcomes*.[6] On these terms, restorative justice becomes a theory of justice that emphasises repairing the harm caused by crime and that couples this general aim with a heavy presumption in favour of reaching it through informal deliberative stakeholder processes (i.e. victim-offender mediation, conferencing, circles); a presumption that can be abandoned, however, for more traditional measures of trial and punishment in exceptional circumstances.[7] Thus understood, restorative justice differs from traditional theories of criminal justice in that they tend to favour heavily state trial and punishment, either on the grounds that offenders inherently deserve to suffer punishment for their crimes or because punishment is considered instrumentally useful in order to reach the overall goal of crime prevention.[8] As focus here is on evaluating restorative

[4] See e.g. Braithwaite (2002a, 2002b), Dignan (2002, 2003), Van Ness (2002), Walgrave (2002). One concrete manifestation of these efforts was the development and adoption by United Nations of a set of "Basic principles on the use of restorative justice programmes in criminal matters" United Nations (2002).

[5] Cf. Boyes-Watson (2000) and McCold (2000).

[6] Cf. e.g. Dignan (2002) and Walgrave (2002).

[7] If nothing else is clear from the context, I use the word "punishment" to describe state imposed sanctions on offenders following legal proceedings in court. Some restorative justice advocates, notably Walgrave (2002), have expressed reservations about retributivist connotations of this wording. They should feel free to substitute throughout for "restorative sanction" or any alternative to the same effect. Hopefully all agree that the choice of words has no bearing on the need to clarify when criminal cases should be handled through stakeholder deliberation and when they should be handled in court.

[8] Admittedly, thus widening the definition increasingly complicates the theoretical landscape. Once the necessary connection between restorative justice and voluntary consensual processes is abandoned it arguably opens the door to new theoretical

justice as a comprehensive theory of criminal justice, I will rely on this wider definition in the following.[9]

Once this wide definition is adopted, restorative justice faces some challenging questions: When exactly should cases be handled in one forum and when in the other? How can the referral back and forth of cases be administered without violating commonly recognised procedural safeguards associated with the rule of law? Are the various referrals compatible with the values traditionally associated with restorative justice?

Given the obvious all-important nature of these questions to everyone involved in the criminal justice system, the ability of restorative justice to provide satisfactory answers to these questions could reasonably be considered a touchstone for the theory's status as a serious alternative to traditional criminal justice. All the more striking and even somewhat alarming, therefore, how little in the way of tangible principled answers is generally to be found in writings on restorative justice like the abovementioned. Ever too often it remains unclear, even after a close reading, which procedure they recommend on perfectly common types of criminal cases.

Australian criminologist John Braithwaite is, at least to some degree, an exception to this general rule. Braithwaite is widely renowned for delivering one of the most sophisticated and comprehensive defences of restorative justice. And in this particular context he stands out, partly in virtue of being refreshingly unambiguous in that we cannot be abolitionists, restorative justice processes must take place, as he puts it, 'in the shadow of the axe'[10], partly in virtue of providing the most carefully worked out systematic guidelines for referring cases back and forth between restorative justice processes and more traditional court trials and punishments.

Taking Braithwaite's theory as the focal point for discussion and evaluation of the use of punishment in restorative justice therefore has much to commend itself. Critically assessing his arguments is likely to throw light on the degree to which restorative justice does in fact provide a viable alternative to traditional criminal justice.

For all Braithwaite's merits, however, it is not all too easy to pin down in every instance where he thinks specific cases should go. Even though the shadow of the axe is undoubtedly present in his writing, the exact size and shape of it remains blurry throughout. He speaks the loudest in

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alliances, e.g. between restorative justice and retributivism. This possibility has been interestingly explored e.g. by Duff (2003) and Daly (1999).

Though I acknowledge the importance of this development, I will not go further into it here. First, because this move remains highly controversial within the restorative movement, see, e.g. Braithwaite (2003b). Secondly, because the questions treated in this article remain, even if the use of restorative justice processes in the criminal justice system is justified on retributivistic grounds. In fact, this article can in many ways be seen as providing an answer to some of the questions raised by Duff (2003: 56-58) in relation to his attempt to reconcile retributivism and restorative justice.

[9] Strictly speaking, this makes all available processes in the criminal justice system *restorative justice processes*. In accordance with traditional usage, however, I shall continue to restrict this term to the informal consensual deliberative processes among stakeholders.

[10] Braithwaite (2002b: 36).

uncontroversial cases like those mentioned above where it is clear that the system, no matter how restorative, will have to put its foot down. But he characteristically lowers his voice when he speaks of cases where the choice of trial and punishment is less intuitively convincing but nevertheless necessary for various reasons. Here remarks are made in passing and scattered around his work, and the choice of punishment is euphemistically paraphrased so that the offender 'chooses to go to court' or 'tries her chances in court'.

There remains, therefore, the pertinent double assignment *both* of uncovering, reconstructing and systematically representing in sufficient detail the suggested procedural "logistics" of Braithwaite's restorative system, that is, the rules or principles for referring cases back and forth between restorative justice processes and trial and punishment, *and*, simultaneously, of critically evaluating this system. And this is the double task that I undertake in this article.

As will appear, there are reasons to be sceptical about at least some of the answers provided by Braithwaite, and, thus, to maintain that the necessary use of traditional punishment continues to pose serious challenges to restorative justice, even at its current theoretical best.

The article proceeds as follows: As a preliminary concern I consider the general objection that it might be wholly misguided to ask of restorative justice to produce this kind of detailed procedural guidelines. In the following section I reconstruct and critically evaluate one by one the guidelines suggested by Braithwaite for referring various kinds of cases back and forth between restorative justice processes and court trials. In the conclusion I sum up the results of my findings, partly by providing a new improved outline of "the shadow of the axe" in Braithwaite's theory, partly by formulating three pertinent challenges that continues to face restorative justice in relation to the use of state punishment.

A question for restorative justice at all? A preliminary concern

It might be objected that while this kind of investigation might be appropriate were we developing a traditional theory of retributive justice under the rule of law, it is wholly misplaced in the case of restorative justice.

Two considerations give rise to this worry. The first relates to the preferred method of studying and developing restorative justice among many proponents. As an academic theory restorative justice is anything but arm chair penal philosophy. True to the movement's origins in the 1970's among practitioners in the penal system, proponents have maintained a strong commitment to empirical studies of actual effects of various processes. This empirical orientation is reflected in the wide-spread conception of restorative justice as a work-in-progress constantly being improved and sophisticated. In this environment of forward looking optimism any attempt to prematurely pin down exact rules of restorative justice (in the singular) for the referral of cases could be considered a hindrance to the continued search for and development of best practice.

Secondly, it could be argued that pinning down detailed guidelines would be unduly formalistic and, as such, go against the very spirit of doing

restorative justice. To many proponents of restorative justice, the central problem with traditional criminal justice is its insensitivity in principle towards the specifics of a given criminal case. This insensitivity, it is argued, is caused by the fundamental artificiality of the legal system which is accused of lumping together into arbitrary legal categories human behaviour which is essentially diverse and unique.[11] Restorative justice processes, in contrast, are praised for their context sensitivity; their ability to pay full attention to the particulars of a given case. This ability is ascribed precisely to the absence of constricting rules predefining the conflict as this or that kind of crime, leaving it to the parties to define collectively what happened and what should be done to restore the values broken.[12] Any attempt to spell out in great details rules for referring cases back and forth from restorative justice processes to criminal court, could be accused of jeopardising this alleged advantage of restorative justice over traditional penal justice. Thus, Braithwaite writes: 'Top-down legalism unreconstructed by restorative justice from below is a formula for a justice captured by the professional interests of the legal profession (the tyranny of lawyers).'[13] Instead we should aim at developing more general principles or values to guide our handling of cases: '[T]hey [the restorative values suggested by Braithwaite] are vague, but if we are to pursue contextual justice wisely, both considerable openness and revisability of our values would be well advised…'[14] Both these considerations point to important elements in the overall picture of restorative justice, and they may generally warn us against making too rigid formalistic demands of a theory of restorative justice. They do not, however, serve to disqualify the attempt to make the theory answer the specific questions posed here.

As regards the first point, there is of course always a danger of prematurely scrapping a promising hypothesis by being overly critical at an early stage. In the case of restorative justice this might have been a pertinent concern in the 1970's and 80's when the movement was still in its infancy struggling to gain foothold. But today things have changed enormously.[15] The child has come of age, and in this new setting restorative justice must learn to survive on the same fallibilistic conditions as any other scientific theory. Here, as elsewhere in Academia, we should be careful not to confuse a sound openness towards empirical investigations with a general moratorium on principled theoretical discussion.[16]

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[11] C.f., e.g. Christie (1981: 21) and Zehr (2005: 183). C.f., also Pavlich (2005) who argues that in spite of rhetoric to the opposite, restorative justice has not managed to break free from traditional legal categories.

[12] See, for instance, Braithwaite (2002b: 11): 'One answer to the "What is to be restored?" question is whatever dimensions of restoration matter to the victims, offenders, and communities affected by the crime. Stakeholder deliberation determines what restoration means in a specific context.'

[13] Braithwaite (2002b: 167).

[14] Braithwaite (2002a: 163).

[15] In the words of T. Marshall: 'Restorative Justice, let no one doubt it, is well and truly on the map. I am both amazed and gratified that this idea, after struggling to see the light for over a decade, has finally emerged as a serious issue for all parts of the criminal justice system.' Marshall quoted from Johnstone (2002: 16).

[16] A moratorium which Braithwaite comes dangerously close to imposing in several places, see for instance:

In relation to the second consideration we should keep in mind that top-down legalism is not the only pitfall for restorative justice. Many advocates acknowledge an equal threat from below. In the words of Braithwaite: 'Bottom-up community justice unconstrained by judicial oversight is a formula for the tyranny of the majority.'[17] Because of this threat most advocates realistically profess to the need for some kind of rule of law to check the excesses of restorative justice. What this admission amounts to, however, is not always clear. At the end of the day, such talk of *top-down legalism* and *bottom-up community justice* is entirely metaphorical, and proponents are not always too eager to spell out in any great detail the content of this metaphor. Instead they prefer, like Braithwaite, to speak of values and principles rather than clear-cut rules.

To the degree this reluctance is premeditated and grounded in rule-scepticism I find it misguided. First of all, our concern here is not material criminal law but the spelling out of fundamental procedural safeguards. And advocates of restorative justice usually stress the importance of fully informing parties generally and defendants in particular of their legal rights.[18] Thus, the UN-charter on "Basic Principles on the use of restorative justice programmes in criminal matters" article 13(b) writes: 'Before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision.' It is, of course, difficult to make sure that parties have been fully informed of their rights if we are not clear on what these rights are.

In addition, I must confess that (in spite of reading Dworkin) I do not know exactly where to draw the line between rules and principles.[19] But this

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> 'It is of course far too early to articulate a jurisprudence of restorative justice. Innovation in restorative practices continues apace. The best programmes today are very different from best practice a decade ago. As usual, practice is ahead of theory. The newer the ideas, the less research and development (R&D) there has been around.' Braithwaite (2002a: 150)

and:

> 'At this early stage of debate around restorative jurisprudence we must be wary against being prematurely prescriptive about the precise values we wish to maximise.' Braithwaite (2002a: 163 - values here mainly refer to fundamental procedural safeguards)

[17] Braithwaite (2002b: 167). Parallel passages are found, for instance, in Dignan (2002: 170) and Walgrave (2002: 210).

[18] Cf. also Van Ness (2002: 147). Admittedly, some advocates downplay the general importance of procedural safeguards in restorative justice arguing that the need for safeguards disappears once we make the transition from criminal justice to restorative justice. However, most advocates of restorative justice find this line of thinking highly problematic. Thus, e.g., Johnstone writes:

> '[T]he restorative justice process, no matter how benevolent the intentions behind it and no matter how different it is in its objectives from a punitive process, is still a *criminal justice* process. Hence, arguably those subject to it should be entitled to much the same level of procedural protection as defendants who are prosecuted and tried in the courts.' (2002: 30-31).

[19] Somewhat ironically, I find myself in agreement with Braithwaite on this point. Thus Braithwaite approvingly quotes Robert Gooding: '[R]ules and principles define opposite ends of a continuum: "Principle" is to "rule" as "plan" is to "blueprint", the latter being merely a more detailed form of the former in each case.' (2002c: 52-53).

is of minor importance. The questions discussed here arise, I maintain, from the level of details found in Braithwaite's own writing. Thus the real issue is not whether discussion should take place on one or the other side of a principled divide between rules and principles. The real issue is one of systematically reconstructing, unifying and critically evaluating what is already present in or could reasonably be inferred from the writings of Braithwaite. In consequence, potential objections should aim at the specific interpretation of Braithwaite's philosophy suggested here, not at the general relevancy of the discussion.

Going to court – when and where?

Thus, if, as Braithwaite puts it, 'we cannot be abolitionists'[20] we have to get clear on when and where the supposed default option of a restorative justice process should be replaced by a traditional criminal court trial and subsequent punishment. We must get down to detail.

Responsive regulation – targeting known repeat offenders

Braithwaite has the most elaborate considerations on this issue in his writings on responsive regulation which are found, primarily, in Braithwaite (2002a, 2002b: 29-43, 2006). Apparently responsive regulation sets up the general framework for his discussion and it is presented as the general mechanism controlling the use of punishment and the interplay between traditional criminal courts and restorative justice processes. According to Braithwaite 'what we want is a legal system where citizens learn that responsiveness is the way our legal institutions work.'[21] As we shall see, however, responsive regulation does not tell us the whole story of the use of punishment in the criminal justice system Braithwaite envisions.

More concretely the idea of responsive regulation should be manifested in a new cautioning practice directed against known repeat offenders. Braithwaite imagines that such hardened criminals should be contacted at a point in their "career" when they have no specific outstanding business with the law, all earlier cases having been dealt with in restorative justice processes, and warned that a judge has authorised that they be *targeted* by the police as a result of their prior criminal behaviour.

Being targeted means that the offender is faced with the choice either to accept an offer to enter what Braithwaite somewhat confusingly calls a restorative justice process in an attempt to mend her ways, or, if she refuses, to be kept under increased surveillance by the police. In addition, she is warned that she will be convicted and punished in a traditional criminal court if she opts for the last solution and is caught committing a crime; an outcome the likelihood of which is increased significantly as a result of the surveillance. Finally the surveillance and the threat of traditional trial and punishment are to be upheld until the offender has convinced the restorative justice circle and the judge that she is 'going straight and will stay straight'[22]. In that case she will be taken off the targeting program which means that she is moved down again one step on the escalatory ladder. If caught offending again in the

[20] Braithwaite (2002b: 42).
[21] Braithwaite (2002b: 34).
[22] Braithwaite (2002b: 37).

future the process begins all over again and she will be met with the default option of a restorative justice process.

If targeted in this manner Braithwaite concedes that traditional punishment is justified because a response to the offender's continued wrongdoing in the face of an explicit personal warning. Reoffending in these circumstances the offender has proven herself an incompetent or irrational actor against whom society is justified in taking protective measures.

Braithwaite depicts this interplay between different regulatory strategies and offender attitudes in *the regulatory pyramid*:

Figure 1 here [see end of paper]

As noticed, Braithwaite's choice of words is unfortunate. He describes the alternative presented to the targeted person as a *restorative justice process* but in my view we have, in effect, moved past this option at this point – at least temporarily. The usual setting for restorative justice discussions (and for penal philosophical discussions generally) is one of considering what should be done in response to a particular crime that has been committed. However, the situation Braithwaite describes here fits this usage poorly. Not only do we not have a victim like in many cases of victimless crime. We do not even have a crime. Accordingly, the people who meet with the repeat offender are not stakeholders in a particular offence. They are relatives to a person who seems to be heading for trouble, and together they are trying to find out how to avoid that.

Thus, the kind of process Braithwaite wants the targeted person to enter looks more like a semi-coerced rehabilitative interlude in between restorative and traditional penal processes in response to crime – unless of course we are here using the term restorative justice in its wide sense so as to include any strategy used against offenders in any part of the criminal justice system. And this is a terminology Braithwaite explicitly does not endorse in this context when he writes of the necessity of switching between different strategies only one of which is restorative justice (cf. the regulatory pyramid).[23]

Of course, this is not *per se* an objection to the theory suggested by Braithwaite but only to the words used. My reason for emphasising it is just that his move away from the restorative justice process and to traditional deterrence and incapacitation, that is, the first step up the escalatory ladder, is really made earlier in his theory than his wording would suggest. From this point onward, there is actually little to separate Braithwaite and, e.g., a traditional utilitarian penal philosopher. Thus, a traditional utilitarian would probably agree that we should offer rehabilitation to known repeat offenders

[23] A word on terminology: In fact, in this context Braithwaite uses the term restorative justice narrowly to describe what I referred to above as restorative justice *processes* and he can thus be claimed to deviate from my wide definition above. However, in contrast to most proponents who adopt the narrow definition, Braithwaite develops a comprehensive theory of criminal justice that also covers criminal cases where deliberative processes are unavailable and, on occasion, he describes this comprehensive theory as a theory of restorative justice too, cf. Braithwaite (2002a). Therefore, as long as the two meanings of the term are clearly distinguished in usage it has no bearing on the substantial discussion.

all the while maintaining the threat of punishment if they do not mend their ways. The only difference, perhaps, is that the utilitarian would uphold the threat of punishment, even if the offender completed the rehabilitation program.

Correspondingly, Braithwaite's choice of words hides that perhaps he has already at this point put himself apart from quite a few proponents of restorative justice. In effect he is telling us that in all those situations where a known repeat offender commits a crime while targeted there will be no restorative justice process afterwards because the offender will have to go directly to court. This means that the many victims of these crimes will be denied the right to a restorative justice process including all the advantages that allegedly flow from such a process, simply because "their" offender has refused to take rehabilitative measures some time in the past.

I am not sure if Braithwaite's wording conceals a substantial confusion on his part as regards these implications of his theory of responsive regulation. If so it could perhaps indicate that the announced marriage between Braithwaite the criminologist and Braithwaite the scholar of business regulation[24] is not entirely a happy one. But apart from this I do not see a principled problem with his position so far.

And all the rest…

Short of a completely offender-free utopia, the above sketch shows us the restorativist's dream scenario: By default, the vast majority of criminal cases are dealt with through restorative justice processes, and punishment is used only in a (hopefully) small minority of cases involving repeat offenders and only reluctantly after the offender has been given an urgent warning and an honest opportunity to change her ways.

Alas, we do not live in this the second best of possible worlds either. And Braithwaite knows this full well. Thus, the number of offenders he eventually suggests should undergo trial and punishment is by far exhausted by hardened criminals offending after due warning and countless restorative justice processes.

A superficial reading could otherwise leave the opposite impression. Braithwaite has the most explicit mention and admission of the necessity of using traditional punishment in the passages where he is discussing responsive regulation, and it would seem natural to read the above regulatory pyramid in such a way that the choice between the alternative strategies available – restorative justice, deterrence, incapacitation – was a function solely of the offender's behaviour – virtuous, rational, incompetent/irrational. This is also what is expressed in the above quoted claim that 'we want … a legal system where citizens learn that responsiveness is the way our legal institutions work.'[25]

This would, however, be a wrong interpretation of Braithwaite. From passages elsewhere in his work, it is clear that trial and punishment is not an option solely reserved for those with a long history of premeditated disregard for the law. As far as I can see, he speaks of the need to skip restorative

[24] See Braithwaite (2002b: ix).
[25] Braithwaite (2002b: 34).

justice processes and let the offender 'go to court' in at least four additional types of cases: i) when offenders openly refuse to participate in a restorative justice process; ii) when offenders maintain their innocence; iii) when the agreed outcome of the restorative justice process exceeds upper limits on punishment enforced by the courts for the criminal offence under consideration; and iv) when participants in a restorative justice process fail to reach an agreement. I will discuss these four types of cases in turn in the remaining part of the paper.

Refusing to participate in a restorative justice process: It is obviously always possible that the offender simply refuses to participate in a restorative justice process. In these cases, we cannot simply let her go. We need an alternative option and that option, according to Braithwaite, is a criminal trial:

> 'Very few criminal offenders who participate in a restorative justice process would be sitting in the room absent a certain amount of coercion. Without their detection and/or arrest, *without the specter of the alternative of a criminal trial*, they simply would not cooperate with a process that puts their behavior under public scrutiny. No coercion, no restorative justice (in most cases).'[26]

This seems immediately unproblematic. As Braithwaite repeatedly emphasises, the system he envisages is not lenient: '[G]ame playing to avoid legal obligations, failure to listen to persuasive arguments about the harm their actions are doing and what must be done to repair it, will inexorably lead to regulatory escalation.'[27] And regulatory escalation in this context means going from restorative justice processes to criminal trial and punishment. In other words, Braithwaite has no problems sending to court offenders who openly refuse to participate in an attempt to make things right.

Maintaining one's innocence: In addition there is the slightly different possibility of the offender maintaining her innocence which would render a restorative justice process meaningless. In these cases Braithwaite also suggests a criminal trial:

> 'Conferences should never proceed in cases where the defendant sees him, or herself as innocent or blameless; they should not become adjudicative forums. … It is critical that defendants have … a right to terminate the conference at any point that they feel moved to deny the charges being made against them. That is, at any point up to the signing of a final agreement defendants should have a right to withdraw, insisting that the matter be either adjudicated before a court or dropped.'[28]

This kind of cases, however, seems somewhat problematic to the restorativist. Generally speaking, restorative justice is an anti-paternalistic way of conceiving crime. We should not let state officials impose upon the

[26] Braithwaite (2002b: 34, my emphasis).
[27] Braithwaite (2002b: 34).
[28] Braithwaite (1994: 205).

stakeholders an objective legal truth about the crime. Instead we should look to the stakeholders' own perceptions of the conflict and to their ideas as to what should be done in response. They are the true experts. This is a line of thinking that can be traced back to Nils Christie's seminal argument in favour of giving conflicts back to the people.[29] It is also a line of thinking that is found in Braithwaite's own writing, for instance, in his celebration of 'the collective wisdom of the stakeholders in the circle that decides what is the agreement that is just'[30].

This anti-paternalism is also what makes the first kind of cases seemingly unproblematic. Here the offender refuses *as a stakeholder* in an open display of ill will to participate in the restoration of justice. Thus, metaphorically speaking, she voluntarily gives her conflict away. This is what allows the state to assume ownership *on her behalf*, and to deal with it in the state's way: trial and punishment.

But in the kind of cases now under consideration things are not that simple. The offender maintaining her innocence does not *give away her conflict* in the same way. She denies entirely that it was hers in the first place. In other words, there is no ill will here – at least not on the face of things. In order to justify trial and punishment, then, the restorativist needs, as it were, to translate the innocence claims into equally open displays of ill will on behalf of the defendant.

But if indeed the stakeholders are the true experts, then, by way of hypothesis, we have nothing to go by but the defendant's own claims of innocence in these cases. Hence, in order to justify state punishment for those who maintain their innocence the restorativist needs to reinstall paternalism to a certain degree. She needs to belief in the decisions of the courts as to the question of guilt to an extent that allows her to consider offenders' protestations of innocence insincere. This, in turn, will allow her to treat these offenders as being *de facto* on a par with those who openly refused to cooperate with the restorative justice process from the outset.

We should notice carefully that this is not a small admission on behalf of restorative justice. In the writings on restorative justice I am familiar with, rhetoric on court justice remains hard and irreconcilable.[31] In fact, the alleged empty formalism of court justice is often presented as an independent argument in favour of the informal procedures of restorative justice. As it turns out, however, this choice cannot be a simple either/or because giving back the conflict to the offender is made conditional upon her initial all-out acceptance of the court's legal categorisation and definition of the conflict as this kind of crime with that particular perpetrator.

In other words, the modification needed in order for Braithwaite to justify the practice of overruling completely the defendant's innocence pleas with court decisions, is substantial. And, as we shall see in the next section, this problem grows in cases where the judgment of the entire circle and not just that of the defendant gets overruled by the courts.

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[29] See Christie (1977).
[30] Braithwaite (2002a: 158).
[31] See above, note 11. See also Braithwaite (2002a: 158) though his argument is more complex. For a discussion, see my Holtermann (2009).

There is, however, an additional problem pertaining to the question of the offender's guilt that needs to be addressed before proceeding to the next kind of cases. So far we have concluded that a defendant who maintains her innocence throughout should have her fate decided in a criminal court and be punished accordingly if found guilty. If we add to this Braithwaite's empirical premise[32] that in the overwhelming majority of cases court trials have more punitive outcomes than do restorative justice conferences, then it is not hard to imagine that defendants honestly believing themselves innocent all the while mistrusting the judgment of the courts, will be moved to opt for the restorative justice option. In other words, we seem to introduce all the well-known procedural dangers of plea-bargaining.

Braithwaite recognises a potential problem here. Thus he mentions[33] the concern that restorative justice processes can be used as an inducement to admit guilt. He denies, however, that this problem should have any specific relevancy to restorative justice: 'In this restorative justice is in no different position than any disposition short of the prospect of execution or life imprisonment. Proffering it can induce admissions.'[34] This remark, however, seems to me to miss entirely the real issue here. No sanction, in and of itself, can be used to induce admissions – unless we are masochists. At a minimum, we need to be given a choice as between *two* sanctions, one being *comparatively* mild; the other *comparatively* hard. *And* we need to be informed that the milder option is available only at a price: the admission of guilt.

Recognising this we see why the problems pertaining to plea bargaining *do* seem especially pertinent to the sanction known as restorative justice; why they are, in a sense, intrinsic to this specific process. In contrast to almost all other known sanction forms a restorative justice process is an option which is accessible only if you openly admit to being guilty[35]. For instance, you can easily maintain your innocence all the while being fined or incarcerated. But, as already mentioned, a restorative justice process where the offender maintains her innocence does not make sense. This means that restorative justice processes cannot work alone. Once they are introduced we need, in addition, a different sanction, a fall back option for all those offenders who maintain their innocence all the way. And if this fall back option will, as a matter of empirical fact, generally be harsher than the restorative justice option, then it would seem that we have created a system which induces admissions of guilt simply by introducing the restorative justice option. In other words, restorative justice processes do seem to be a special case among criminal sanctions "short of the prospect of execution or life imprisonment".

Depending on the way the criminal justice system is constructed, however, this is not necessarily a problem for restorative justice. If plea bargains pose a problem in terms of defendant's rights it is precisely because they involve a *bargain*; i.e., the milder sanction is "bought" with a guilty plea at the post-charge/pre-trial stage (usually at arraignment) *that implies* the

[32] Braithwaite (2003a: 396).
[33] Braithwaite (2002b: 164).
[34] Braithwaite (2002b: 164-65).
[35] Or assume responsibility to make things right or any alternative to the same effect.

waiving of ones right to having the question of guilt decided at a criminal trial.[36] But restorative justice programmes do not have to work that way. If only the mild sanction in the shape of a restorative process remains available to the offender who accepts criminal responsibility at the post conviction/pre-sentencing stage *even if* she has enjoyed the benefits of a trial by pleading not-guilty at the pre-trial stage, then the restorative system will have avoided potential critique along the lines of traditional discussions of plea bargains.[37]

In sum, the procedural challenges pertaining to plea bargaining are real and constantly threatening to restorative justice. They can, however, be kept efficiently at bay if the guilty plea necessary to make the restorative justice process a real option and the right to a court trial at the pre-trial stage remain unconnected.

Restorative justice exceeding upper limits: If we are leaving it entirely to 'the collective wisdom of the stakeholders in the circle [to decide] what is the agreement that is just'[38] – which is the whole idea of the restorative justice process – there is always the risk that the agreement reached confers draconian hardships on the offender completely out of proportion with the crime. As already mentioned Braithwaite emphasises that empirical evidence shows this to be a rare occurrence, but he admits that it does happen, and he acknowledges repeatedly the need for restorative justice to provide reliable safeguards against it.[39] Thus, in a typical passage, he emphatically writes:

> 'Within the social movement for restorative justice, there is and has always been absolute consensus on one jurisprudential issue. This is that restorative justice processes should never exceed upper limits on punishment enforced by the courts for the criminal offence under consideration.'[40]

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[36] This is usually considered valuable for the defendant because trials are constructed in such a way as to err systematically at the side of caution. This bias is canonically expressed in the so-called Blackstone's formulation: '[I]t is better that ten guilty persons escape than that one innocent suffer.' Blackstone et al. (1860: book 4, *358)

The ideal ratio between guilty persons escaping and innocents who suffer has been the subject of much controversy over the years. For an interesting survey, see Volokh (1997).

[37] Of course this still leaves offenders who honestly believe themselves innocent in spite of a guilty verdict, an incentive to lie and play along with the restorative justice process, thus, potentially rendering the process worthless. This, however, should be of no great concern to the restorativist who has already decided to value the credibility of the courts in this regard over that of the offender.

[38] Braithwaite (2002a: 158).

[39] To be sure, the numbers may not be enormous but we are not discussing some highly theoretical problem like when philosophers are debating whether there can ever be a real-life situation where we can save a million lives by punishing one innocent person. Thus, according to Braithwaite's source on this point more than one agreement in every 25 is overturned by the courts because they are judged to exceed upper limits on punishment. See Bonta et al. (1998: 16).

[40] Braithwaite (2002a: 150). See also Braithwaite (2002d: 567).

And in order to find out where this upper limit is, we will, of course, have to go to court.

The challenge from this kind of cases is somewhat similar to the previous one but it amplifies even further the ambivalent relationship of restorative justice toward the law. In cases like these we are not just overruling *the offender's* initial plea of innocence motivated by an understandable but ultimately dismissible act of self interest. We allow the judgment of the court, based on criminal law as it is, to overrule the outcome of a restorative justice process as *unanimously agreed upon by all parties in accordance with all the prescribed procedural rules of this process*. And in order for this move to be justified it seems an even greater modification in restorative justice rhetoric on the law is necessary.

The thrust of Braithwaite's enthusiasm for restorative justice is delivered by the promise it holds of delivering meaningful 'contextual justice' generated by the 'collective wisdom of the stakeholders'[41]. Especially when this contextual justice is contrasted, as Braithwaite does, with the barren formalism of the 'consistent justice' of the courts whose attempts to treat like cases alike he calls 'a travesty of equal justice'[42]. Given the 'absolute consensus' among restorativists on the jurisprudential issue of upper limits we realise, however, that this apparently unconditional faith in the democratic creativity of the parties is actually heavily side-constrained. In effect the commitment to consensual justice is entirely conditional upon a more basic commitment to more or less traditional consistent justice, and all that is really left to the creativity of the parties is something more akin to discretion in the Dworkinian sense: 'Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept.'[43] And in this case, the surrounding belt of restriction is the upper limits on punishment set out by criminal courts pursuing consistent justice.

This conclusion could, perhaps, be challenged on grounds of incommensurability. Courts, it seems, are generally faced with a relatively narrow range of parameters on which to measure punitive harshness: number of days sentenced to jail, amount of money fined, number of hours of community service ordered, etc. But many, if not most, restorative justice conferences end with agreements, the terms of which are not directly translatable into this punitive vernacular of the criminal courts. For instance, in a Danish restorative justice process following the assault of a bus driver the victim and the offender agreed that the offender should avoid future use of the particular bus route where the victim worked.[44] But how big a fine does this amount to? How many hours of community work? In other words, it seems that when examining if restorative justice agreements exceed upper limits on punishment we will, for the most part, be entering the dubious business of comparing oranges and apples – or, perhaps more to the point, of finding out how many oranges it takes to exceed, say, ten apples. And this, as we all know, is not an easy business.

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[41] Braithwaite (2002a: 158).
[42] Braithwaite (2003a: 395).
[43] Dworkin (1977: 31).
[44] Cf. Henriksen (2003: 48)

Thus it seems, after all, that it could actually be a fairly easy matter for restorative justice conferences not to exceed legally specific upper limits on punishment. The only thing to remember when deciding on an outcome would be to stay out of the penal currency traditionally dealt with in the courts. And as long as this is done, there are no limits to the agreements of the conference.

However, this would, in my view, be a misinterpretation of Braithwaite's assuring remarks on upper limits (though I admit that he is not entirely unambiguous on this issue). Not that the restorative justice process should not be allowed to make the move beyond traditional punitive measures. They should.[45] But it simply seems implausible that, on Braithwaite's account, this move in itself would bring the restorative process entirely beyond the reach of *some* upper limits.

First of all, subscribing to incommensurability in this strong sense of the word seems inconsistent with Braithwaite's general view on proportionality which could reasonably be said to presuppose some kind of rough and ready commensurability between otherwise apparently incommensurable entities. Thus, Braithwaite readily speaks of the existing legal limits to punishment as being somehow *proportionate* to the crimes in question[46]: 'Upper limits against the imposition of disproportionately high punishments can and should be part of a synthesis of just deserts and restorative justice.'[47] But strictly speaking it seems equally meaningful or meaningless to ask how many days in prison it would take for a punishment to become *disproportionately high* to, say, an armed robbery as it is to ask how many bus route bans it would take to exceed a certain amount of money fined. If we can presuppose the availability of a meaningful answer to the first question (and Braithwaite manifestly does that), it is hard to see why we should consider the difficulties in answering the second question insurmountable.

Secondly, if indeed Braithwaite *did* consider the incommensurability problem insurmountable it would, as already indicated, for all practical purposes render his guarantees against draconic punishments in restorative justice vacuous. And this provides a strong argument against such an interpretation. It simply seems absurd to claim that more than, say, 200 hours of community service would exceed upper limits on punishment while it would be okay, for instance, to ban an offender completely from any future use of public transportation. Thus, Braithwaite needs his bulwark against disproportionately hard punishments to work *also* when conferences stay out of the penal currency dealt with in courts. It may generally be impossible –

[45] And as one anonymous reviewer noted, it has become more and more prevalent in recent years that even courts move beyond the classical punitive parameters and grant e.g. injunctive relief that has some resemblance to the Danish case.

[46] Whether this assumption is tenable in itself is a question that I leave untouched in this article. For an interesting critique of the general notion of proportionality between crime and punishment, see Ryberg (2004).

[47] Braithwaite (2003a: 391). To be sure, Braithwaite rejects any idea of strong proportionality in the traditional retributivist sense of upper *and* lower limits on punishment. Thus he writes immediately afterwards: 'But lower limits are a roadblock to victims being able to get the grace of mercy when this is what they see as important to their own healing.' (2003a: 391)

once the spectre of outcomes is opened by the introduction of restorative justice – to codify exhaustively beforehand the exact upper limits on all possible sanction forms.[48] And it may generally be *difficult* for the courts to determine whether any given agreement in fact does impose disproportionately high punishments on the offender. But in the system Braithwaite envisages it will nevertheless be their job to do exactly that – to make sure that outcomes of restorative justice processes do not transgress upper limits on punishment, even if the account is made up in extralegal currency.[49]

Summing up, paternalism undoubtedly prevails in Braithwaite's vision of a restorative criminal justice system, even when consensus between the stakeholders is obtainable – in spite of his anti-legal rhetoric leaving the opposite impression. But as long as this is clear, as long as Braithwaite stands ready to moderate his rhetoric accordingly, I do not see a principled problem in his position on this issue. If he stands ready to admit that occasionally we find nothing but collective stupidity among the stakeholders while wisdom is entirely on the side of the courts, it is perfectly possible for him to rely thus on the sound judgment of the criminal courts on the issue of upper limits.

When consensus does not show: The final type of cases where the offender's fate must ultimately be decided in court is those cases where the parties never do reach an agreement on an appropriate outcome. But in restorative

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[48] However, it does seem to leave restorative justice at odds with the principle of legality. Handing the power to punish over to the state is usually considered acceptable only if citizens gain in return security from being arbitrarily subjected to this power. This is part of what makes the rule of law preferable to the state of nature. In the words of John Locke (1988: § 136): 'To this end it is that Men give up all their Natural Power to the Society which they enter into, and the Community put the Legislative Power into such hands as they think fit, with this trust, that they shall be govern'd by *declared Laws*, or else their Peace, Quiet, and Property will still be at the same uncertainty, as it was in the state of Nature.' Braithwaite disputes the unconditional value of such predictability, arguing that we should only protect citizens from being *adversely affected* by any lack of predictability: 'Who wants the reliance of knowing that you are prevented from getting less than this, or much less?' Braithwaite (2003a: 394-5) I shall not get further into this discussion here. Suffice to say that it obviously has a bearing on the general evaluation of restorative justice.

[49] Or, more to the point: this will be the job of the courts once cases of possible punitive excess end up on their desk. How Braithwaite intends to make sure that they actually do that remains, however, unclear. Thus he writes: 'When appropriate funding is available for legal advocacy, advocates can monitor lists of conference outcomes and use other means to find cases where they should tap offenders or victims on the shoulder to advise them to appeal the conference agreement because they could get a better outcome in the courts.' Braithwaite (2002b: 166)

This would seem, however, to leave the entire decision of going to court in cases of punitive excess to those same case parties who have already showed themselves collectively unwise by signing the excess agreement in the first place. Thus, instead of courts actively controlling things when consensus has gone haywire, they only decide cases where consensus *eventually* did not show because one party regained her senses. And if this is the case, it is unclear how Braithwaite's assuring remarks of absolute restorative justice consensus on the jurisprudential issue of upper limits translates into criminal justice practice.

justice processes consensus is king. Hence, no one should be forced to sign a deal that they find unjust. In Braithwaite's words:

> '[If a stakeholder in a crime can not agree to] the agreement proposed in a restorative justice conference, what she should do, and all she should do, after failing to persuade others that the agreement is unjust, is argue that *there is no consensus on the agreement and, this being so, the matter should be sent to court*.'[50]

And again, going to court means that the offender will be punished according to the letter of the law.

This last category poses the most serious challenge for Braithwaite's vision of restorative justice. It may seem small and unimportant on the face of it. But the size of it will arguably depend heavily on the exact guidelines which are proposed in order to handle these cases, and potentially it threatens the foundations of restorative justice.

The first thing to notice is that, as I have argued elsewhere[51], going to court implies, other things being equal, proportionate punishment in the strong sense of the word, that is, between upper *and lower* limits. The entire innovative force of restorative justice lies in the process whereby the parties meet each other and in the guidelines developed for referring cases back and forth between criminal court and restorative justice processes. How the traditional legal system should treat cases *in* court, is a question to which Braithwaite provides no new answers. And it is exactly cases of this sort we are considering here.

But the traditional system honours consistency. It treats like cases alike and it imposes proportionate punishments between upper and lower limits. How could we possibly defend treating offenders differently when meting out punishment, if the trial has shown that there is no relevant difference with regard to the legal fact; that is, if we are dealing, legally speaking, with *like cases*? Removing the lower limits on punishment made sense from the perspective of restorative justice, only when the varying attitude of the victim still had a role to play. But in the group of cases considered here the victim no longer plays a part because, ex hypothesis, the parties never reached an agreement. Besides the offender the state is now the only party to the criminal trial and it simply makes no sense to grant the judge or the prosecutor the same opportunity as the victim to forgive every now and then; to let them 'get, occasionally, the grace of mercy'[52].

Once this is clear it appears, however, to open a leeway of abuse which threatens the entire restorative justice system. This is so because it seems to confer absolute powers to the victim as regards the outcome settlement leaving it a dictate rather than the hoped for agreement 'that all in the circle can sign off on as contextually just'[53]. Everything the victim wants up to the limits of the law she will get, simply because she can refuse to sign any agreement placing milder burdens on the offender. If the offender knows fully

[50] Braithwaite (2002a: 163, my emphasis).
[51] Holtermann (2009).
[52] Cf. Braithwaite (2003a: 391).
[53] Braithwaite (2002a).

well that lack of consensus puts the case back into the courts where, all other things being equal, she will get the legally proportionate punishment, she might as well get it over and done with and "voluntarily" sign the proposed deal right away.

This should be unacceptable to the restorativist for two reasons. First, conferring such *de facto* dictatorial powers to the victim is at odds with the fundamental restorative ideal of justice for all stakeholders. Thus Braithwaite explicitly wrights:

> '... of course restorativists must reject a radical vision of victim empowerment that says any result the victim wants she should get so long as it does not breach upper constraints on punishment. Restorativists ... must seek to craft a superior fidelity to the goal of equal concern and respect for all those affected by the crime.'[54]

Secondly, this seems to jeopardise the incentive necessary to channel offenders into restorative justice processes in the first place. As earlier noted Braithwaite is well aware that 'without the specter of the alternative of a criminal trial, [most offenders] simply would not cooperate with a process that puts their behavior under public scrutiny.'[55] But if the likelihood increases that the sanction decided upon in the restorative justice process equals that in court, this mechanism gets suspended. Especially considering that the offender going directly to court will not have to go through the potentially unpleasant experience of meeting the victim face to face.

So what could be done in order to avoid this predicament? How else could the restorative justice system be designed? One possibility would be to decide that in the absence of an agreement the offender should go free because the failure was somehow "the fault" of the victim, thus leaving the offender's participation in the conference the only criminal sanction. However, this does not look like a viable solution because it would seem to confer, instead, the same dictatorial powers to the offender. If it were to become common knowledge that any lack of agreement has no consequences for the offender whatsoever[56], it is not difficult to imagine non-cooperative offenders attending conferences according to the rules but refusing to sign any agreement posing the slightest burden on their shoulders. But as already mentioned Braithwaite is looking for a solution that shows equal concern and respect for all those affected by the crime. Thus, if we should reject, on these grounds, any idea of victim empowerment that says what the victim wants the victim should get, the same idea applied to the offender is surely equally unacceptable.

Then what should we do in order to secure that all parties has an incentive to actually work towards an agreement 'that all in the circle can sign

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[54] Braithwaite (2003a: 395). In addition he writes: 'The challenge is to have the Sword of Damocles always threatening in the background but never threatened in the foreground.' (2002b: 119) If in fact the procedural rules confer dictatorial powers to the victim restorative justice would seem to have failed to meet this challenge.

[55] Braithwaite (2002b: 34).

[56] And we remember that according to most restorativists rights and rules on these issues *should* become common knowledge for the offender. See United Nations (2002).

off on as contextually just'[57]? Perhaps we could introduce surrogate restorative sessions where the offender negotiated with a surrogate partner if agreement never showed. However, this also leaves several problems. First, why should it be the victim and not the offender who would be replaced by a surrogate if the idea of restorative justice is equal concern for all parties? And second, this would only postpone the problem because the offender (/the victim) could refuse to sign any agreement proposed by the surrogate partner too. In other words, we would need a procedure in the case of lack of agreement in surrogate conferences too. And here two equally unacceptable options present themselves. The offender could either be referred to court in which case the problem remains, or the proposed agreement terms could be dictated on her in which case it would be difficult to tell the difference between this surrogate process and a traditional trial.

One final possibility would be to ask the courts to take into account the offender's behaviour in the restorative justice process when ultimately adjudicating the case. This would allow for an evaluation of her good will or lack thereof and thus leave her with an incentive to play along with the restorative justice process. But as we all know, it takes two to tango. Being good contextualists restorative justice proponents can surely appreciate that behaviour does not exist in and of itself – negotiating behaviour least of all. In a restorative justice conference the offender's behaviour is at least partly a response to the victim's behaviour. Thus, this "solution" would in turn necessitate an evaluation of the victim's behaviour as well. Was the victim fair and forgiving or vindictive and draconian?

Answering this sort of questions would first of all create a huge challenge for the existing legal system. It would necessitate an entirely new jurisprudence, thus adding to the job of convicting and sentencing the ungrateful job of evaluating restorative justice behaviour. And even if this challenge could be met, it is highly doubtful if the restorative justice process itself would survive being subjected to this kind of evaluation. First of all it would introduce an even heavier paternalistic element than the ones already considered. It is hard to see how parties to the conflict would seriously be considered "owners of their own conflict" if each step in the process were to be heavily monitored and their behaviour was to be evaluated by legal experts. As we know from Bentham[58] and Foucault[59], and as restorativists would readily agree, supervision is the first step towards internalisation of norms. In other words, it is hard to see how the much celebrated creativity of the parties could be sustained in such a system. Secondly, the privacy of the process is generally considered a key element by most proponents because it is regarded as a necessary means in order for the conference to be as truthful as possible. It is difficult to see how this privacy should be preserved if the entire process would ultimately be evaluated in a court of law.

Summing up it is hard to see any attractive alternative to Braithwaite's solution of simply sending cases to court in the absence of an agreement. This means that, as it stands, Braithwaite unintentionally proposes a theory that confers virtually absolute power to the victim as regards the outcome

[57] Braithwaite (2002a: 158).
[58] Bentham (1995 (orig. 1787)).
[59] Foucault (1977).

agreement, and that has, in addition, severe difficulties providing the incentive necessary to channel a sufficient number of offenders into restorative justice processes in the first place.

Conclusion

I have investigated the use of traditional trial and punishment in restorative justice. In particular, I have reconstructed and critically examined the rules and principles suggested by John Braithwaite for referring cases back and forth between restorative justice processes and court trials. And this was all done in order to determine the degree to which restorative justice provides a serious alternative to traditional criminal justice.

The general result of the investigation has been negative in a twofold manner. On the one hand I have shown that Braithwaite tends to misrepresent his own theory rather gravely. As stated he prefers to illustrate his position on this issue by the regulatory pyramid (cf. figure 1 above). However, the above close reading has shown this to be an ill-chosen illustration. First, it is not exhaustive. The regulatory pyramid has no place for a large fraction of the criminal cases that would actually end up in court in Braithwaite's system. And secondly, the triangular shape suggests metaphorically a certain ratio between cases handled in restorative justice processes and cases handled in court, the former constituting the vast majority. No such relationship can however be taken for granted. Predicting how stakeholders would respond in a fully restorative justice system where the hitherto largely hidden "systemic mechanics" were common knowledge is of course a difficult empirical question involving countless unknown factors. The inherent incentive problem brought to light here suggests, however, a pull towards a wholly different distribution from the one Braithwaite predicts. For these reasons I suggest the following table as a more apt illustration of his theory:

Table 1 here [see end of paper]

By spelling out, thus, in greater detail the implications of Braithwaite's theory, I have, on the other hand, shown why the inevitable use of traditional trial and punishment continues to pose serious challenges to the theory of restorative justice:

- First, compromises with traditional criminal justice (in the shape of a general approval of the crucial role of criminal law, state paternalism and state justice) must be much more widespread than is coherent with the harsh anti-legal rhetoric of restorative justice proponents, including Braithwaite.[60]

[60] Other theorists have noticed (without paying quite the same attention to details) much the same discrepancy between restorative rhetoric and the widespread dependency of most current restorative programs on the traditional criminal justice system. The thrust of this critique tend, however, to take the opposite direction. Thus, e.g., Pavlich (2005) argue that restorative justice should try harder to honour the revolutionary promise of its anti-legal rhetoric. For a critique which aims directly at

- Second, in spite of an express ideal of creating a system that is responsive to the offender's behaviour the choice of traditional trial and punishment will often depend on factors wholly outside the reach of the offender, thus rendering the system arbitrary to a degree where it almost becomes unjust.[61]
- Third, the envisioned system faces severe difficulties creating an incentive structure that makes it possible to push sufficiently large portions of criminal cases through restorative justice processes.

Together these challenges show that restorative justice at its current theoretical best has serious problems providing clear principled guidelines for some of the most basic operations of the criminal justice system. This may not be a devastating blow to the theory of restorative justice. But in order for proponents to take up this challenge they should take good care not to copy the old strategy of dodging the question by pointing to the informal and/or provisional character of restorative justice. As I have argued, a general moratorium on discussion of these principled issues cannot be granted. The challenges raised are real and not to be ignored. If restorative justice is to make the crucial step from the margins of the criminal justice system and into the centre, proponents have to reconsider carefully how the shadow of the axe falls on restorative justice processes.

Acknowledgments:
[Omitted]

References

Acorn, A. E. (2004). *Compulsory compassion : a critique of restorative justice.* Vancouver: UBC Press.

Ashworth, A. (2002). Responsibilities, Rights and Restorative Justice. *British Journal of Criminology* 42/3, 578-95.

Bentham, J. (1995 (orig. 1787)) Panopticon: Or, The Inspection House. In M. Bozovic, ed., *The Panopticon Writings* (pp. 29-95). London: Verso.

Blackstone, W., Sharswood, G. & Field, B. (1860). *Commentaries on the laws of England : in four books.* Philadelphia: Childs & Peterson.

Bonta, J., Wallace-Capretta, S. & Rooney, J. (1998). Restorative Justice: An Evaluation of the Restorative Resolutions Project: Solicitor General Canada.

Boyes-Watson, C. (2000). Reflections on the Purist and Maximalist Models of Restorative Justice. *Contemporary Justice Review* 3/4, 441-50.

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such radical rejections of traditional legal categories of the criminal justice system, see Holtermann (2009), particularly section 2.

[61] Woolford & Ratner (2008) have warned against the related danger of restorative justice inadvertently participating in a second and perhaps even more effective round of "stealing conflicts from the people". This possibility occurs when the ideal of informal justice gets co-opted by the criminal justice system into an informal-formal justice complex through increased professionalization, institutionalisation, etc.: "Police officers, lawyers and judges have become necessary players in most restorative programmes, acting as gatekeepers, administrators and facilitators of their operations. With them, they bring the dominant rationalities of criminal justice." (2008: 118-19)

Braithwaite, J. (1994) Thinking Harder About Democratising Social Control. In J. Alder & J. Wundersitz, eds., *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism* (pp. 199-216). Canberra: Australian Institute of Criminology.

Braithwaite, J. (2002a) In search of restorative jurisprudence. In L. Walgrave, ed., *Restorative Justice and the Law* (pp. 150-67). Devon, UK: Willan Publishing.

Braithwaite, J. (2002b). *Restorative justice & responsive regulation.* Oxford; New York: Oxford University Press.

Braithwaite, J. (2002c). Rules and Principles: A Theory of Legal Certainty. *Australian Journal of Legal Philosophy* 27, 47-82.

Braithwaite, J. (2002d). Setting standards for restorative justice. *British Journal of Criminology* 42/3, 563-77.

Braithwaite, J. (2003a). Holism, Justice, and Atonement. *Utah Law Review* 2003/1, 389-412.

Braithwaite, J. (2003b) Principles of Restorative Justice. In A. R. Von Hirsch, Julian; Bottoms, Anthony E.; Roach, Kent; Schiff, Mara, ed., *Restorative Justice and Criminal Justice : Competing or Reconcilable Paradigms?* (pp. 1-20). Oxford; Portland, Oregon: Hart Publishing.

Braithwaite, J. (2006). Narrative and "Compulsory Compassion". *Law and Social Inquiry-Journal of the American Bar Foundation* 31/2, 425-46.

Christie, N. (1977). Conflicts as Property. *The British Journal of Criminology* 17/1, 1-15.

Christie, N. (1981). *Limits to pain.* Oslo, Irvington-on-Hudson, N.Y.: Universitetsforlaget; Distributed by Columbia University Press.

Daly, K. (1999). Revisiting the Relationship between Retributive and Restorative Justice, *Restorative Justice and Civil Society Conference*. Australian National University, Canberra,.

Dignan, J. (2002) Restorative Justice and the Law: the case for an integrated, systemic approach. In L. Walgrave, ed., *Restorative Justice and the Law* (pp. 168-90). Devon, UK: Willan Publishing.

Dignan, J. (2003) Towards a systemic model of restorative justice. In A. Von Hirsch, J. Roberts, A. E. Bottoms, K. Roach & M. Schiff, eds., *Restorative justice and criminal justice : competing or reconcilable paradigms?* (pp. 135-56). Oxford; Portland, Or.: Hart.

Duff, A. (2003) Restoration and Retribution. In A. R. Von Hirsch, Julian; Bottoms, Anthony E.; Roach, Kent; Schiff, Mara, ed., *Restorative Justice and Criminal Justice : Competing or Reconcilable Paradigms?* (pp. 43-59). Oxford; Portland, Oregon: Hart Publishing.

Dworkin, R. (1977) The Model of Rules I, *Taking rights seriously* (pp. 14-45). Cambridge: Harvard University Press.

Foucault, M. (1977). *Discipline and punish : the birth of the prison.* New York: Pantheon Books.

Henriksen, C. S. (2003). Evaluering af konfliktråd. København: Center for Alternativ Samfundsanalyse.

Holtermann, J. V. H. (2009). The Hobgoblin of Little Minds – Restorative Justice and the Law; (undergoing peer review).

Johnstone, G. (2002). *Restorative justice : ideas, values, debates.* Cullompton, Devon, UK; Portland, Or.: Willan Pub.

Locke, J. & Laslett, P. (1988). *Two treatises of government.* Cambridge: Cambridge University Press.

Marshall, T. F. (2003) Restorative justice: an overview. In G. Johnstone, ed., *A restorative justice reader : texts, sources, context* (pp. 28-45). Cullompton, UK ; Portland, Or.: Willan Publishing.

Mccold, P. (2000). Toward a Holistic Vision of Restorative Juvenile Justice: A Reply to the Maximalist Model. *Contemporary Justice Review* 3/4, 357-414.

Pavlich, G. C. (2005). *Governing paradoxes of restorative justice.* London: GlassHouse.

Ryberg, J. (2004). *The ethics of proportionate punishment : a critical investigation.* Dordrecht ; Boston: Kluwer Academic Publishers.

United Nations (2002). Basic principles on the use of restorative justice programmes in criminal matters, United Nations, The Economic and Social Council, , 2002/12, 37th plenary meeting.

Van Ness, D. W. (2002) Creating restorative systems. In L. Walgrave, ed., *Restorative Justice and the Law* (pp. 130-49). Devon, UK: Willan Publishing.

Volokh, A. (1997). n Guilty Men. *University of Pennsylvania Law Review* 146/1, 173-216.

Walgrave, L. (2002) Restorative justice and the law: socio-ethical and juridical foundations for a systemic approach. In L. Walgrave, ed., *Restorative Justice and the Law* (pp. 191-218). Devon, UK: Willan Publishing.

Woolford, A. J. & Ratner, R. (2008). *Informal reckonings : conflict resolution in mediation, restorative justice and reparations.* Abingdon: Routledge-Cavendish.

Zehr, H. (2005). *Changing lenses : a new focus for crime and justice.* Scottdale, Pa.: Herald Press.

Figure 1 – Regulatory pyramid according to Braithwaite (2002b: 32):

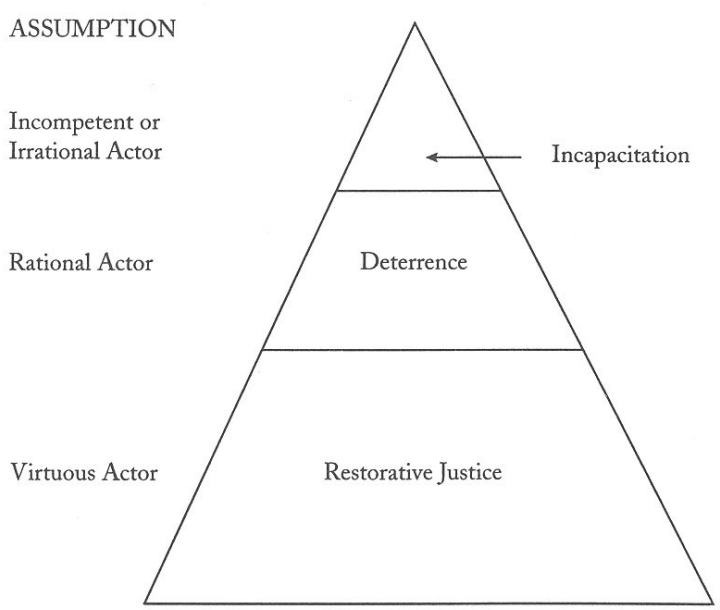

Table 1 – Procedural logistics à la Braithwaite:

	Forum conveniens:	Sanction:	Offender:
Crime committed	Court trial	Proportionate punishment in the strong sense, i.e., between upper and lower limits (including incapacitation – if sufficiently serious crime)	- Irrational/incompetent actor (committing an offence in spite of being warned) - Uncooperative actor - Actor maintaining innocence - Actor agreeing with victim on disproportionately harsh punishment - Actor not reaching an agreement with the victim (for any reason)
	Restorative justice process	Restorative outcome agreement not exceeding proportionate upper limits	- Virtuous actor (and lucky, i.e., with a virtuous victim)
No crime committed	Court ordered warning "in between crimes"	Surveillance	- Hardened repeat offender