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Restorative Justice, Responsive Regulation and Social Work

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Two of the dichotomies or tensions at the heart of this profession are especially important for the themes of this special issue on restorative justice and responsive regulation. These are the relation between formal and informal helping and between care and control, or empowerment and coercion. In this article, we make a case for the importance of Braithwaite's work, especially his (2002) book, Restorative Justice and Responsive Regulation, for conceptualizing the nature of social work in relation to these dualities. Since Braithwaite's writings do not have social work or social welfare scholars and professionals as their primary audience and are less familiar to much of that audience than they should be, we seek here to provide a context for reading both Braithwaite and this issue of the Journal of Sociology and Social Welfare.

Key words: restorative justice, responsive regulation, social work, child welfare, family violence

Reflecting on the essence of social work brings its duality as a profession concerned with both individual and community well-being sharply into focus (Albers, 2001; Weick, 2001). Two of the dichotomies or tensions at the heart of this profession are especially important for the themes of this special issue on restorative justice and responsive regulation. These are the relation between formal and informal helping and between care and control, or empowerment and coercion. In this article, we make a case for the importance of Braithwaite's work, especially his (2002) book,

Restorative Justice and Responsive Regulation, for conceptualizing the nature of social work in relation to these dualities. Since Braithwaite's writings do not have social work or social welfare scholars and professionals as their primary audience and are less familiar to that audience than they should be, we seek here to provide a context for reading both Braithwaite and this issue of the *Journal of Sociology and Social Welfare*.

Social Work as Social Control

When sociologists and historians look at social work, they tend to see a profession the essence of which is social control. For them the language of therapy, helping, or even empowerment disguises a coercive core (e.g., Funicello, 1993; Gordon, 1994; Margolin, 1997; Polsky, 1991; Tice, 1998). Some recent literature of the profession, on the other hand, has challenged the methodology of those researchers who rely on case records as evidence of what social workers actually do in the field (Floersch, 2002; Wakefield, 1998). Simon (1994) has emphasized empowerment in the history as well as recent theory and practice of social work. For those, including the present authors, who embrace empowerment as central to good practice, there remains, however, the challenge of reconciling these self-images of empowerment with the undeniable reality that social workers function as agents of social control, usually paid directly or indirectly by the state to do so. This is nowhere more evident than in the fields of child welfare and corrections. In child protection in particular, where social workers are the core profession, are backed by the power of the state, and have enormous power over their clients, the language of empowerment, partnership, and strengths characterizes innovative practices like family group conferences and patch (Adams, 2000). But can such practices be truly empowering in the bureaucratic, professional, and legal context of state or county child welfare agencies and family courts or even in corrections (Boyes-Watson, 1999)? Braithwaite's synthesis of his work in the areas of restorative justice and responsive regulation, developed in his recent book of that title, challenges us to reconceptualize the relation between two apparently irreconcilable yet irreducible aspects of social work—care and control, or empowerment and coercion.

Formal and Informal Helping

Social work, like the whole field of social welfare policy and services, has similar difficulties in specifying the optimal relation between *formal and informal* helping. In their 1977 monograph, *To Empower People*, Berger and Neuhaus argue for shifting the stale social policy argument about the proper role of states and markets away from a view of the state as provider, the citizen as atomized recipient, to a focus on the structures that mediate between state and individual, including family, religious community and faith-based organizations, neighbors and neighborhood organizations, and the like. Other recent literature on civil society and social capital (Putnam, 2000), rebuilding neighborhoods and communities (Schorr, 1998), and partnerships with families (Briar-Lawson, Lawson, & Hennon, 2001; Burford & Hudson, 2000) has also emphasized the importance of non-governmental organizations, social networks, trust and civic engagement for healthy families, communities and democratic societies. In social work, these influences have combined with a wider appreciation of the incapacity of state institutions, including police as well as social workers, to substitute for the care and control of families and communities. A creative ferment of community-based and family-centered practices has sought ways to interweave formal and informal care and control (Adams, 2002; Adams & Nelson, 1995; Bayley, Seyd, & Tennant, 1989). As Hadley et al. (1987) put it, formal human services represent "no more than a single strand in the complex web of relationships and services, formal and informal, statutory and nonstatutory, which together provide care and control in the community. The overall effectiveness of provision depends not on one part of this network alone but on how well the whole is woven together" (p. 95).

But what is the relation of formal to informal? On whose terms does the interweaving take place? Worries have been raised about the assumptions behind the notion of community (Pavlich, 2001) and about community-centered practice that there is a colonial character to this relation of middle class professional social workers to poor and working-class neighborhoods, a context of class, if not ethnic, subordination in the nature of the partnership of professionals and citizens (Bulmer, 1987). In FGC, among the worries and criticisms are those that it has a colonial character,

appropriating indigenous practices and placing them under state and professional control (Blagg, 1997; Love, 2000; Walker, 1996); that, on the contrary, it abdicates state responsibility for vulnerable individuals by handing control to the oppressive or pathological families that gave rise to the problems of child maltreatment in the first place (Bartholet, 1999); and that it denigrates professional expertise. Braithwaite, again, gives us a way to think about and address these issues.

Braithwaite's (2002) book *Restorative Justice and Responsive Regulation* is of great importance to social work and social welfare because it offers us a way to reconcile empowerment practice with the context of coercion in which much social work takes place. It offers an understanding of both the limits and the possibilities of a genuine, empowering partnership with service users or clients. The book appears at an important stage in the continued devolution of human services. Both the book and the devolution trend have considerable implication for social work and social work education. There is renewed interest in strengthening civil society and considerable belief that the best way to help vulnerable people is to empower them. At the same time lingering and polarizing debates challenge professional efforts to build on the capacities of families and communities. Especially in child protection, domestic violence, and corrections services, assumptions about the application of restorative justice and other community- and family-centered empowerment practices raise concerns that devolution necessarily means risky deregulation and giving the upper hand to the wrong people.

Restorative Justice

Restorative justice has emerged with considerable appeal worldwide to those who well know the limitations of over-reliance on the formal legal system to deal with injustice, especially crime, and its fallout. Advocates argue that efforts to restore the social functioning of victims, offenders, and others in the affected social networks, is at least as effective in terms of recidivism and costs, but of considerably greater value than punitive practices when it comes to promoting citizenship and community-capacity building. In the long run, it is argued, restorative justice has the capacity to transform the role of the legal system in preventing crime and

strengthening the response of those at the community level who first encounter it when it does happen (Braithwaite, 2002).

A broad definition of restorative justice is found in Strang and Braithwaite (2002): "Stakeholders affected by an injustice have an opportunity to communicate about the consequences of the injustice and what is to be done to right the wrong" (p. 4). The authors note that most advocates seem to believe that for the potential of restorative justice to be realized, some face-to-face processes are needed but point out that there is less agreement about the who, what, when, how, and where of those interactions. They further argue that safety and autonomy must trump other outcomes, including reconciliation.

Tugged as it is in different and perhaps competing directions, restorative justice is shaped by the interests of a range of state and non-government groups, professions, theories, and ideologies. Roche (2003a) argues that practices and theories that rely too heavily on a critique of the limitations of the formal legal system have tended to over-romanticize the mutual aid and communitarian support of neighbors and family members in pre-modern years by leaving out chapters of history in which oppressive forces ruled. Along with Braithwaite, Roche argues that regulatory strategies need to be reconsidered to ensure that empowerment approaches are accountable. Too, feminist critique points out that communities and families did not reliably step forward to protect women and children and that people do not want to be coerced into forgiving their abusers, even in circumstances where this may be advanced as an acceptable "cultural practice" (Burford, 2000; Busch, 2002; Coker, 1999). To the extent that a restorative justice practice or practitioner sets into procedure expectations of shaming the abuser, requiring an apology or some other outcome, the risk of colonizing the process and the outcomes with formalism are increased. Braithwaite (2002) agrees and argues that in informal justice processes, apology and forgiveness often emerge in face-to-face meetings but should not be deliberately produced. The important question becomes how is it possible to balance empowering and regulatory processes in a decision-making effort that safeguards the rights of the individuals, especially to safety, and allows for solutions to emerge from the affected parties themselves?

Responsive Regulation

To ameliorate the dangers associated with restorative justice, and a wide variety of other empowerment-driven phenomena, Braithwaite (2002) proposes a regulatory pyramid as “a framework for checking the abuses and limitations” (p. vii) of the use of restorative justice while simultaneously counterbalancing the formalized means of achieving justice (punishment proportional to the offense). A basic premise of the regulatory framework is that “Governments should be responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist response is needed” (p. 29). Braithwaite (2000) offers the following (see figure 1), from Ayres and Braithwaite’s (1992) *Responsive Regulation: Transcending the Deregulation Debate* as an example of a regulatory pyramid in the context of regulating a business such as a nursing home or nuclear power station.

The application of this pyramid to restorative justice, especially in the context of child protection, domestic violence, and youth justice, is illustrated and discussed throughout this issue (see Adams & Chandler; Crampton; Kelly; Neff; and Pennell, in this issue). In all these cases, restorative justice practices form the base of the pyramid, with increasingly coercive, deterrent, or incapacitating regulatory actions higher up as later and more seldom used regulatory responses follow failure of restorative approaches at the base. Braithwaite (2002) has shown that this approach has a wide array of applications, from corrections to school bullying to international peacemaking. Its application in some areas of social work and social welfare in which restorative justice has made some headway is the subject of this issue. At the same time, the issue raises, implicitly at least, the question of its significance and applicability to all areas of social work and social welfare, at least where some kind of regulatory mandate is involved. Roche (2003b) argues persuasively that “the very hallmarks of restorative justice—informal stakeholder deliberation, a focus on harm reparation and offender reintegration—should be the presumptive regulatory strategy in all regulatory fields.”

Braithwaite’s (2002) regulatory pyramid combines the possibilities of restorative, dialogue-based, empowering approaches at the base of the pyramid where regulation starts, with ineluctable

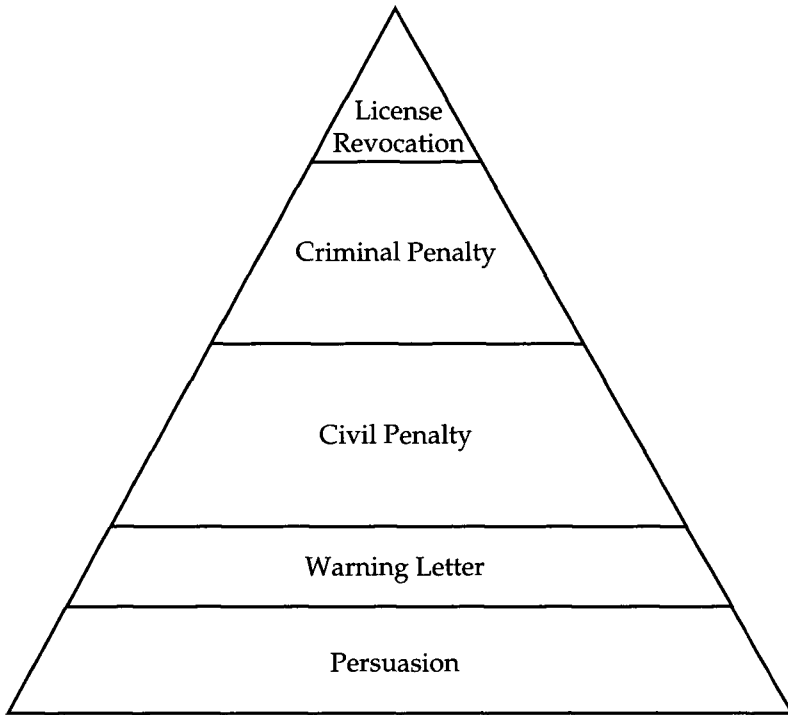


Figure 1

An example of a Regulatory Pyramid (Ayres and Braithwaite, 1992; Braithwaite, 2002).

escalation up the pyramid to more coercive, deterrent, and ultimately incapacitating (e.g., license revocation in the case of business regulation) responses if the regulated body proves unwilling or unable to put things right. No less important, the pyramid offers the hope and possibility of de-escalation down the pyramid to less coercive responses as those regulated show evidence of their will and capacity to come into compliance.

Braithwaite (2002) asserts that the preponderance of evidence supports the notion that if people who are willing to acknowledge the existence of a problem come together and offer suggestions about what needs to be done about it, and participate in shaping the plan, they are then considerably more likely to comply with that plan, even when its design is to regulate their own behavior.

While restorative justice moves in the direction of setting things right with those who have been injured directly and to restore the impact that an injustice has had on the wider community, carrying it out within a responsive regulatory framework makes visible the multiple accountabilities that typically go unrecognized in instances of injustice but which are thought to be vitally important in organizing to keep bad behavior from happening again and setting out a plan for concrete repair when that is possible or symbolic reparation and healing. The power of the state, Braithwaite (2002) argues, must loom, not as a brickbat but as a firm hand that gives legitimacy to the values being expressed in the informal processes.

Some restorative justice advocates, including Braithwaite, claim that conferencing creates space in matters of settling injustice for “emotional intelligence”. (See also Moore, this issue.)

This does not mean that it is neutral. Braithwaite argues that a responsive regulatory approach must begin with a clear statement of values and principles and need not be *laissez faire*. Being clear with an offender that her behavior is unacceptable needs to be done in a respectful way in a responsive regulatory approach. Especially the emissaries of the state need to avoid going head-to-head with any of the persons who will be part of a regulatory plan.

Empowerment approaches necessarily focus on the mediating structures through which formal and informal helping systems can complement and balance one another. Berger & Neuhaus (1977) define as mediating structures those institutions “that stand between the private world of individuals and the large impersonal structures of modern society . . . [and protect] the individual from alienation while giving legitimacy to large institutions, including the state, as being related to values that govern the lives of ordinary people” (p. 148). Braithwaite and Strang (2002) include in civil society all those institutions that are intermediate between the individual and the state—families, schools, churches, private workplaces, indigenous organizations, social movements, etc.

While Braithwaite acknowledges that responsible devolution of services depends on the evolution of cooperation among agencies, he is also concerned that policies are at risk of what he calls

'capture and corruption'. To offset these processes, he argues for the use of tripartite arrangements involving empowering citizen associations as a solution to these dilemmas. In his view, the regulatory model calls for empowering citizen associations that foster "welfare-enhancing" capture through leadership without forfeiting the agency's role in enforcing the rights of those involved. In this way the model works to facilitate the attainment of the goals mutually specified but counterbalances both the corruption of process by informal dominance and the harmful capture by any of the parties. The model promotes democracy and a wider civic engagement and certain forms of capture, or influence, that are considered beneficial.

By contrast to responsive regulation, regulatory formalism is reactive, and directed at extracting compliance divorced from the influence of the persons harmed. The outcomes of adversarial interventions are typically seen as heavy-handed, uninformed and unfair and thereby promote reactivity even from people whose interests may be harmed by their own refusal to comply. Responsive regulation grows out of a relationship between the people who are being regulated through the state's exercise of its simultaneous duties to protect and to safeguard and citizens' rights both to privacy and protection. Its presumption is to start with the most dialogue-based approach that can be crafted for securing compliance with the law in situations where there has been harm or trauma and aims to support compliance in a context built on the paramountcy of protection from further harm, healing, and repair or restoration. Hence, restorative justice advocates' preference for conferencing and related face-to-face group and family approaches to dealing with injustice. Escalation to control or punishment is made only if other approaches fail or there is no indication of willingness or ability to comply on the part of the person who has caused the injury. Despite expressing preferred values, neither restorative justice nor responsive regulation seek to establish who is to blame. People participate only if they acknowledge the existence of a problem—or if that has been established by the courts. In New Zealand, for example, a young offender might go to court but in the case of conviction the matter may be referred back to a conference at which the offender's family, the victim and their supporters and the offender

are offered input into shaping a restorative plan as opposed to one that is exclusively punitive.

The pyramid offers a useful framework to re-examine stalemated discussions of such tensions as those between coercion and empowerment, formal and informal helping, responsiveness and formalism, public and private, individual autonomy and community well-being. Its implications are profoundly radical. It has the potential, in Braithwaite's (2002) view, to "contribute not only to the creation of a more crime-free society but also to a society where our whole legal system works more efficiently and fairly, to a society where we do better at developing the human and social capital of our young and to a more peaceful world" (p. xi).

Restorative justice involves the opportunity for everyone involved in the situation to have an unfettered but safeguarded opportunity to tell their story of what happened, to say what the effect has been on them, and to say what they want to see happen (Moore & McDonald, 2000). The plan that emanates by consensus forms the basis for regulation. This allows the offender to exercise a degree of choice about coming into compliance, and sets the needs of the injured persons, as defined by them, in the foreground of regulation. It also assumes that unless permanent banishment of the offender and all influence from significant members of the offender's close social network is to occur, or if it is unsafe to meet with them present, that the offender will be involved or represented.

If things go according to plan, further formalism is seen as unnecessary but is always available and possible. In situations where the regulator has a legal mandate to be involved there is no assumption that the monitoring should be done on neutral or impartial grounds. In situations that have involved violence, the opposite is the case; judgments need to be made.

As Braithwaite (2002) points out, few offenders would participate in restorative justice without some coercion, brought on by at least detection and/or disclosure. The problem for Braithwaite "seems not the question of how to avoid coercion, but how to avoid the escalation of coercion and how to avoid threats" (p. 34). Threats and counter-threats are steps to juried and other third-party resolutions in situations where the guilt is in dispute. In

these approaches, prosecution and defense are impelled to harden up the differences between their views in order to establish guilt or innocence; a dance in which both sides seek to maximize the problem for the others and minimize the responsibility for themselves. Seeking to understand the others' arguments and positions has only one aim: to find the flaws, i.e., not to promote empathy.

When there is *no* threat of consequence, however, backed up by certainty and immediacy when it becomes necessary, offenders, and in particular it would seem, young offenders, will, and frequently do, walk over the top of limits. But offenders, it is argued, are more likely to take responsibility when their conduct and its impact are reviewed in a non-adversarial context in the presence of people whose opinion matters and there are consequences for not subordinating one's self-interest to the interest of the group.

In the sense that offenders have the option of non-participation and of taking their chances before a court, or of refusing cooperation at the lower, less coercive levels of the pyramid, the process is voluntary. At any point, things can move up the pyramid into a new level of deliberation and coercion. Braithwaite's (2002) research supports the view that this process is a more active and effective form of deterrence to criminal behavior than is sentencing in courts itself. The attempt to "send a message" through tough and inflexible sentencing, without also offering the person the invitation to take responsibility, has the same effect as punishment alone; that is, it does not work unless it is applied quickly and is perceived by at least the offender if not others in the offender's social network, as being fair. Neither of these conditions characterizes the workings of the justice system, especially the courts.

Braithwaite (2002) builds a convincing case that responsive regulation at the level of citizen involvement is worth using, repeatedly, both for its potential to empower those who have been injured and also to deter the offenders from further harm. In the case of offenders, restorative justice invites persons from the offender's social network who might be able to exert social influence or—in Braithwaite's (2002) term—who have preventive capabilities. In particular, he points to people who themselves might be

ashamed if others found out they knew about the injustice and did nothing about it, i.e., people who might be sub-criminally responsible. In restorative justice, these people would typically be invited to a face-to-face meeting with the offender with a view toward their becoming involved in forming a plan to head off further offending which then provides the basis of regulation. In this way, restorative justice or conferencing is thought actually to increase the deterrent power of the threat of arrest or re-arrest. The challenge is to keep the threat in the background but seen at the same time as legitimate and fair. The role of the state is to constrain the self-regulatory excesses of the community (e.g., in the form of harsher punishment than courts would impose) and safeguard the process.

The Fault Lines Between Public and Private Life

Trends to increasing state intervention in family life, as represented by mandatory reporting of child abuse or mandatory arrest and prosecution of intimate partner abusers, have been challenged in recent years by concerns over limits to the state's capacity either to deliver justice or to substitute for the care and control functions of social networks including extended families and communities.

In the case of abuse within the family, while abused persons do not want to be put in a position where they must forgive their abusers or be pressured to stay with them, neither do they like feeling coerced to separate from their partners when other people think that is the best thing for them, and while women generally welcome the involvement of police and legal authorities when they feel they need protection (Martin, 1997; Miller & Krull, 1997), they also do not like to suffer the considerable loss of influence that can go with exercising their rights to invoke protection and help from the authorities (Coker, 1999; Grauwiler & Mills, this issue; Kelly, this issue; Pence, 1999; Pence & Shepard, 1999; Pennell & Burford, 2002). The interventions of authorities into the lives of women to protect them (Miller & Krull, 1997) and their children (Callahan, 1993; Pennell & Burford, 2000) have had varying and sometimes contradictory results. In part, as will be discussed elsewhere in this issue, that is invariably a consequence of

getting help in situations where the state is vowed to protect. The question becomes under what conditions can decision-strategies work cooperatively both to promote a woman's, child's or young person's rights to autonomy and non-domination [as befits their legal status] and the family's right to privacy?

In restorative justice, the family group conference brings together extended family members with professionals and others involved in the situation who can provide information to assist the family in developing a plan to keep all its members safe. It opens up a space where members who want to support vulnerable members can talk in safety and build connections across branches of the family and across generations in a context of safeguards for the process, and protection from abuse (Burford & Pennell, 1997; Pennell & Burford; 2002). By partnering with the state at the level of culturally appropriate leadership, the private space of the family is honored and the role of the state to protect and safeguard is undiminished.

From the perspective of responsive regulation, the family group conference may be understood as a form of state-managed family self-regulation, akin to the opportunities provided by business regulators for management to come into compliance through developing and implementing their own plans in consultation with the regulators. Only if this process of supported self-regulation fails, does the regulatory process become more coercive, as families lose to professionals and courts more of their own control over decision-making about their futures (see in this issue Adams & Chandler; Neff).

Restorative Justice, Responsive Regulation, and Social Work

If social work is the core profession in child welfare, in corrections it has been marginalized. Whether social work abandoned the field of corrections (Young & LoMonaco, 2001) or was exiled, the outcomes need reconciling, not only for the sake of those caught up in that system, but also in terms of our understanding of the nature of social work itself. To be sure, victims were often ignored in the era of rehabilitation in corrections and considerable antipathy was aimed at social work educators who were seen to have undermined the role of the state in protecting vulnerable

people in favor of promoting either social activism or isolation in clinical encounters.

These worries about social work may be seen as having arisen in part through the profession's inadequate theorizing and state of denial about the context of coercion framing much of its practice. In discussing the limitations of critical social theory's application to statutory social work, Healy (2000) argues the need for social workers to "situate their theorizing within the unavoidable obligation faced by statutory workers to use legal force if necessary to ensure minimum standards of well-being for the most vulnerable members" (p. 75). She goes on to argue that "Practice insights can be drawn from critical social theory to recognize the impact of social and economic systems on service users' lives and to demand sensitivity to the cultural differences in the formation of assessments. However, this is very different to suggesting, as critical social work theorists have done, that judgments should not be made" (p. 75). Some social activists, Healy points out, in advocating for the liberation of their clients, have minimized the differences in power between themselves and their clients and this has contributed to "exploitation and confusion for service users about the nature of their relationship with the service worker" (p. 126). Workers can promote the values of respect, transparency, honesty and non-tyranny without abdicating their statutory responsibilities and desire to assure safety.

Although highly valued in the academic community, empowerment practice in social work remains largely at the margins of practice and has met mixed results with the most concern about the ideas of consumer-led or driven services remaining in statutory areas of practice (Burford & Pennell, 2004). The prevailing response during the past 25 years is concerned with the legalistic determination of guilt or innocence and the management of risk all carrying the taint of "undeserving" that lingers when one is constituted a "neglectful mother", an "abusing father", a "perpetrator" and other categories. In particular, the dominance of practice by legal and administrative procedures and oversight is regarded by many as having isolated child protection work from the wider system of services regarded as making up the child welfare system (Davies et al, 2002; Parton, 1997; Parton, Thorpe, & Wattam, 1997). Rightly or wrongly, dissatisfaction with

the increased formalism in child protective services is high and child protection workers and departments find themselves in the position of lacking the resources and decision processes to engage their clients flexibly and with support while simultaneously fulfilling their mandated responsibilities to look out for the best interests of the child. The imposition of legalistic, administrative, and expert-dominated solutions in child protection undermines empowerment principles and practice.

At the same time, social workers often seek to partner with members of affected constituencies, including service user or citizen interest groups, in assessing needs, designing, implementing and evaluating plans. This latter activity includes overseeing progress, including compliance with plans when services are mandated. The social worker plays a key role in creating a culture of participation and activism in planning so that plans reflect the real needs of persons affected and participants are prepared to carry out important roles in achieving the plan including taking initiative when things are not going well.

Social work and social workers have long been concerned with finding ways to make bureaucracies, policies, and procedures responsive to the simultaneous promotion of the autonomy of individuals and the well-being of communities. Staking out this dual focus for the profession has meant that workers have considerable experience working along the fault lines between what formal organizations require through their policies and procedures, including the ways they organize the use of workers' time and allocated resources, and the needs of the people they work with. Social workers well know the dilemmas for families of trying to maintain control over the definition of their situation, especially when faced with multiple, categorical, and frequently conflicting avenues to get the help they need. Despite social work's historical embracing of the notion that human behavior is largely determined by meaning-making in social context, practices have followed quite different paths determined largely by the organizational and ideological umbrella under which practice takes place and the multiple demands made on families that require services from—or are required to be involved with—more than one institution or organization. This is especially true in situations where the justice system has become involved.

Nevertheless, the idea that an acknowledged offender, including someone who has abused a child, or their partner, might be a key player to be enlisted, along with other members of the formal and informal social influence network around them in developing, implementing, and evaluating a plan that aims to halt their own future re-offending causes some advocates of empowerment to take pause. Social workers themselves, even in a state like Hawaii that has a statewide system of family group conferencing with official support, may by professional ideology and habit, be an obstacle to restorative justice practices (see Adams & Chandler, this issue).

If sociological critics of social work one-sidedly emphasize the social control aspects of social work, social workers and social work educators may mislead themselves by equally one-sidedly stressing, at least in their rhetoric, the profession's empowerment-oriented side, and denying its coercive aspects. Braithwaite provides us a way to understand the central dualities of the profession, not only as a theoretical matter, but also in light of those practices like conferencing where responsive regulation and restorative justice, formal and informal problem-, conflict-, and injustice-resolving mechanisms, support and constrain each other.

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