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2003

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Benjamin J. Goold

Allard School of Law at the University of British Columbia, goold@allard.ubc.ca

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Citation Details

Benjamin J. Goold, "Restorative Cautioning, Theories of Reintegration, and the Influence of Japanese Notions of Shame" ([forthcoming in 2003]) 36:2 *Hosei Riron*: JLP 144.

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Restorative Cautioning, Theories of Reintegration, and the Influence of Japanese Notions of Shame

There is a natural tendency for discussions of legal advocacy to concentrate on formal, often confrontational, court procedures. It is important, however, to remember that most mature legal systems make use of informal methods of dispute resolution as well. While the phrase ‘alternative dispute resolution’ (ADR) is typically taken to refer to various forms of mediation and informal (but legally binding) arbitration, in recent years a new approach to the treatment of victims and offenders in the criminal justice system has emerged in Britain to challenge this traditional conception of ‘ADR’, as well as larger notions of punishment and the purpose of the criminal law.

Known as ‘restorative justice’, this new approach to thinking about the relationship between offenders and victims of crime has inspired many academics and practitioners to reconsider the role played by the state – and legal advocates – in the resolution of disputes and the administration of punishment. Certainly one of the most significant developments in the treatment of young offenders in Britain over the past decade has been the move away from punitive forms of cautioning towards a new type of informal disposal known as ‘restorative cautioning’. Although there is now a considerable body of academic and professional literature that examines the theory and practice of restorative cautioning, recently little has been written about the intellectual and cultural origins of this new approach to punishment and dispute resolution. This article explains some of the central notions of restorative justice, drawing particular attention to the influence of Japanese notions of shame and community on cautioning practices in Britain and elsewhere.

i. What is Restorative Justice?

Central to the philosophy of restorative justice is the belief that crimes are best seen as matters involving the individuals directly affected by an offence – typically the victim and the offender – rather than as wrongs against the state or as breaches of some abstract public interest (Young and

Goold, 1999:126). Advocates of this approach argue that instead of focusing on punishing the offender, where possible, criminal sanctions should aim at restoring the harm done to the victim and reintegrating the offender back into the community. As Hudson notes,

With restorative justice, the emphasis is not on following legal rules; it is on ‘right relationships’ rather than ‘right rules.’ The aim is the restoration (or creation) of good relationships between the offender, the victim, and the community, so that all parties feel satisfied with the outcome of the justice process, and so that the undesirable event is less likely to be repeated (Hudson, 1996: 145).

Although not strictly a theory of punishment, restorative justice offers an alternative view of the criminal process that stands in direct opposition to retributive and utilitarian notions of justice (Barnett, 1977; Braithwaite, 1990; Wright, 1982, 1991, 1995; Zedner, 1997). Under a restorative approach, compensation orders, victim-offender mediation sessions, and offender counseling – all of which stress the importance of apology, reparation, and reintegration – are preferred to traditional forms of punishment such as fines and custodial sentences, which aim at censuring or deterring offenders.

Lisa Y. Gourd

Comment: Maybe put this sentence at the beginning of the paragraph?

Restorative theories have become popular with both academics and members of the legal community in part because they provide a framework within the criminal justice system for thinking about the needs and interests of victims. It has been argued by a number of commentators – perhaps most notably by the Norwegian criminologist Nils Christie – that by ‘stealing’ disputes from victims and offenders, the criminal law in many countries has historically marginalized victims, reducing them to little more than mere repositories of police evidence (Christie, 1977; Ashworth, 1986). Denied the right to participate in either the prosecution or sentencing of offenders, victims are frequently left feeling isolated and ignored by the criminal justice system, feelings that may only serve to exacerbate their sense of victimization. By stressing the importance of the relationship between the victim and the offender, restorative theories necessarily force the criminal law to place those most directly affected by criminal offences at the center of the legal process, and to take their individual circumstances and demands more seriously.

Lisa Y. Gourd

Comment: Move this phrase after “framework”?

In terms of legal advocacy, any movement towards a greater commitment to principles of restorative justice is interesting because it is likely to be accompanied by a shift away from the use of lawyers, mediators, and professional arbitrators in the settlement of disputes. By demanding that conflicts be returned to those most directly affected by an offence, a restorative approach would in many cases emphasize and encourage personal rather than professional representation. For some victims, having the opportunity to make their own case and to 'tell their own story' is an essential part of the process of reparation and restoration. Equally, in certain circumstances, offenders may be allowed to address their victims directly, either to offer an apology or to provide an explanation of their behavior. Professional advocates and mediators, insofar as they have any role to play in restorative processes, are necessarily relegated to a secondary position, present to help provide structure to proceedings and to help maintain an atmosphere of healing rather than confrontation.

While most restorative theories can trace their origins back to developments in criminal justice thinking during the early 1970s, over the past ten years they have had a marked effect on criminal justice practices in a range of different countries and legal systems. In Australia and New Zealand, 'community' and 'family group' conferencing techniques – both of which place an emphasis on directly involving an offender's immediate family and community in the process of reparation – have been used by the police as an alternative to more traditional methods of dealing with young offenders (Moore and Forsythe, 1995; Young and Goold, 1999: 129-130). Similarly, a number of Scandinavian countries and US states have also experimented with various forms of ADR based on the principles of restorative justice (Hudson, 1996: 145).

As Zedner has observed, however, reform based on the principles of restorative justice has for the most part been haphazard and has taken place within the context of existing, predominantly retributive approaches to punishment:

In practice, pure restitution has nowhere overthrown the paradigm of punishment, and instead reparative principles are incorporated somewhat awkwardly into the existing punitive framework. The stigmatizing and deterrent qualities of

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Comment: Replace with commas.

punishment are retained, but alongside traditional punishments provision is made for compensating identifiable victims (Zedner, 1997: 603).

The basic principles of restorative justice – and the implications of a move towards a greater commitment to reparation – have also been questioned by both academics and policymakers in recent years (Ashworth, 1993; Duff, 1988; Miers, 1992). On a practical level, some commentators have argued that any move towards a greater commitment to reparation – and a consequent shift away from punitive approaches to punishment – may inadvertently undermine the deterrent value of the criminal law, while at the same time effectively decriminalizing many so-called ‘victimless crimes’ (Zedner, 1997: 607). Equally, it is not altogether clear to what extent victims actually benefit from the use of restorative techniques, particularly given that for many victims, their primary concern is receiving some form of monetary compensation as opposed to less tangible reparations (Davis et al., 1988; Dignan, 1992; Marshall and Merry; 1990; Haines and Drakeford, 1998). Finally, critics of restorative justice have observed that by focusing on repairing the harm caused to victims and the reintegration of offenders, restorative approaches run the risk of understating the extent of offenders’ culpability and the harm done to society as a whole (Ashworth, 1986: 97).

These legitimate concerns aside, interest in restorative justice has continued to grow in recent years, particularly in Britain. In England and Wales, this interest has been most apparent in the area of juvenile justice, where there has been a concerted effort on the part of the police to move away from what is now referred to as ‘old style’ police cautioning towards the use of restorative techniques when dealing with young and first-time offenders. Although similar to other forms of ADR insofar as it avoids unnecessary formalities and places participants – rather than professional advocates – at the center of the resolution process, restorative cautioning represents a marked practical and theoretical departure from more traditional forms of mediation and arbitration, not least because of its reliance on the positive evocation of shame.

ii. Theory in Practice: Restorative Cautioning in Britain

Under the existing law in Britain, upon arrest the police have the choice of either charging a suspect with an offence, or administering a caution. Typically delivered by a senior police officer and available only once the suspect has admitted to the offence, a caution is an official warning given in place of a formal punishment or prosecution. As the Home Office National Cautioning Standards note, however, a record of the caution is kept and may be referred to by the police and the courts in the event of future offending:

The significance of the caution must be explained: that is, that a record will be kept of the caution, that the fact of a previous caution may influence the decision whether or not to prosecute if the person should offend again, and that it may be cited if the person should subsequently be found guilty of an offence by a court (Note 2D, Home Office Circular 18/1994).

Over the past ten years, cautions have been increasingly used in Britain as a means of diverting offenders – particularly juveniles and young adults – away from court. As Ashworth has observed, a succession of Home Office Circulars released during the 1980s and 1990s helped to establish a presumption in favor of cautioning juveniles, with the result that by 1992 approximately 78% of male offenders and 92% of female offenders between the ages of 10 and 17 received a police caution rather than a formal charge (Ashworth, 1997: 315-316). Although cautioning rates for both of these groups fell somewhat in the wake of changes to the structure of the youth court, by the mid-1990s more than two-thirds of all juvenile offenders were formally cautioned by the police.

As noted by Young and Goold, one of the main ideas underlying the development of police cautioning for young offenders has been the belief that ‘this type of low-key response to a relatively minor offence avoids the risk of a courtroom appearance degrading offenders and ultimately confirming them in their deviant self-identity’ (Young and Goold, 1999: 128). Unfortunately, there is now evidence to suggest that many police cautions are administered in a manner that is deliberately designed to frighten (and potentially degrade) the offender, presumably on the assumption that such treatment will dissuade them from future offending. According to a study done by Lee, many police cautions are inherently punitive in nature,

functioning as 'degradation ceremonies' in which the offender is deliberately intimidated by the police and condemned as a criminal (Lee, 1995).

Concern over the use of such tactics – on the grounds that they may result in labeling and stigmatization – has inspired a number of police forces to move away from the use of 'old style' cautioning to a new form of intervention based on principles of restorative justice and reparation. Although a variety of different restorative cautioning schemes are now in operation throughout Britain, they all share a number of basic characteristics and objectives. Unlike the 'old style' caution, these new cautioning schemes typically emphasize offender and – where possible – victim participation, welcoming family and community involvement, and placing the attending police officer in the role of facilitator or convener. In the Aylesbury police area, for example, restorative cautions are conducted according to a set pattern or script (Young and Goold, 1999: 130-133). Following a brief introduction and welcome by the attending police officer, the offender is asked to give 'their side of the story', recounting the offence itself and the experience of being arrested. At this stage, the facilitating officer may also question the offender in an effort to help them identify all of parties – including themselves – who have been harmed by their behavior. The victim is then asked to explain to the conference how they have been affected by the offence, both personally and – where the offender and victim had known each another prior to the offence – in terms of his or her relationship with the offender. On those occasions where victims choose not to attend, the police facilitator may attempt to convey their feelings and describe to the offender how his or her behavior had affected them. Where appropriate, both the offender and the victim are encouraged to bring family members or friends along to the caution to offer support. In the latter stages of the conference, these supporters are asked to describe how the offence has affected them, with the facilitator encouraging them to express any feelings of disappointment or mistrust since the offence. This may be played out as in the following exchange between an offender's father and a conference facilitator in Aylesbury:

Supporter: If I thought I could do something that'd stop him, then I'd be happier,
but I don't know that I could.

Facilitator: So how's this been affecting you?

Supporter: I've just been watching him all the time.

Facilitator: Why?

Supporter: Because I don't know what he's going to do. Because he's done one thing, you worry that he's going to do something else.

(Young and Goold, 1999: 132)

Typically, the restorative caution ends with the facilitating officer 'summing up' the various feelings and opinions expressed during the conference, and suggesting ways in which the harm caused to the parties might be repaired. At this point the offender is also given the a final opportunity to speak to the group and deliver an apology if desired. The conference then ends with an explanation of the legal significance of the caution, with the offender being asked to sign a form indicating that this explanation has been understood.

Looking at this process from the perspective of ADR, it is clear that restorative cautioning represents something of a departure from more traditional notions of mediation and arbitration. Because the offender has already admitted to his or her wrong-doing prior to the commencement of the caution, there is no sense in which the process is designed to further apportion guilt or responsibility. Instead, the primary purpose of the process is to move beyond questions of blame towards reintegration and reparation. Although there have been suggestions that in certain cases it may be appropriate for offenders (and possibly victims) to bring legal representatives to the caution to ensure a degree of procedural fairness, to date no such reform has been given serious consideration by either the police or the British Home Office. Questions have also been raised about the role played by the facilitating officer. Although in principle a police officer is present simply to provide structure to the proceedings and to administer the legal caution at the end of the conference, Young and Goold observed a number of instances in which the officer presiding over the caution did more than act as a facilitator:

On occasion, it was apparent that the facilitator was attempting to mould the comments and interactions of the participants to conform to an ideal envisaged by the "cautioning script" rather than allowing them to express themselves freely or communicate directly with one another (Young and Goold, 1999: 133-134).

These concerns aside, restorative cautioning has continued to grow in popularity with the police and other criminal justice professionals in Britain. While many remain skeptical about claims regarding the impact of this new approach on recidivism rates, most acknowledge that the movement away from the punitive ethos of the past towards a more reparative ideal has been a positive one. Significantly, the apparent success of restorative cautioning in Britain has also led many academics and policy-makers to take a greater interest in the nature and function of shame within the criminal justice system, and within society at large.

iii. Reintegrative Shaming and the Influence of Japanese Culture

Central to the theory of restorative cautioning is the evocation of positive feelings of shame. By encouraging offenders to focus on the harm that they have caused to themselves, their victims, and the community at large – and providing a forum in which offenders can offer apologies and victims and supporters forgiveness and understanding – cautioning processes such as those used in Aylesbury aim at avoiding the stigmatizing effects of either formal court hearings or ‘old style’ police cautions. This commitment to identifying and harnessing an offender’s shame in a productive, restorative manner has for the most part been inspired by the work of the Australian criminologist John Braithwaite. An advocate of restorative justice, Braithwaite has argued that attempts at reparation and reform are most likely to be successful when emotions such as shame are evoked in a manner that does not degrade or stigmatize the offender but rather condemns the offending *behavior*. In this regard, he is at pains to distinguish between what he refers to as ‘reintegrative’ and ‘disintegrative’ shaming:

Reintegrative shaming means that expressions of community disapproval, which may range from mild rebuke to degradation ceremonies, are followed by gestures of reacceptance into the community of law-abiding citizens. These gestures of reacceptance will vary from a simple smile expressing forgiveness and love to quite formal ceremonies to decentrify the offender as deviant. Disintegrative shaming (stigmatization), in contrast, divides the community by creating a class of outcasts (Braithwaite, 1989: 55).

Lisa Y. Gourd

Comment: I don't think you need the first part of this quote. It's redundant with the you previous sentence.

In making his case for the use of reintegrative shaming, Braithwaite relies heavily on the use of examples drawn from Japan and Japanese legal culture. As he rightly points out, given the speed of post-war urbanization and modernization, Japan might reasonably have been expected to experience rising crime rates and greater levels of general public disorder. Instead, Japanese society has remained remarkably stable and has enjoyed some of the lowest crime rates in the world. With the possible exception of Switzerland, Japan is the only country in the developed world whose crime rates have consistently fallen since the end of the second world war, and is certainly one of the few to see its overall prison population decline as well.

Lisa Y. Gourd

Comment: I would re-write into something like "whose crime rates have consistently fallen."

According to Braithwaite, Japan's success can in part be explained by the commitment of the Japanese criminal justice system – and Japanese society in general – to notions of reintegration and reparation. In support of this argument, Braithwaite points to the roles played by apology and forgiveness in everyday life in Japan, and the emphasis on achieving reconciliation:

Apology has a central place in the aftermath of Japanese legal conflicts. Ceremonies of restoration to signify the reestablishment of harmony between conflicting parties are culturally pivotal; the best way for this reconciliation to occur is by mutual apology, where even a party who is relatively un-blameworthy will find some way in which he contributed to the conflict to form the basis of his apology (Braithwaite, 1989: 64).

For Braithwaite, the all-pervasive nature of this communitarian attitude to the significance of crime and criminal behavior has produced a society in which the appropriate response to wrongdoing is not punishment but rather a desire to bring about repair, rehabilitation, and reintegration. In essence, processes of reintegrative shaming as described and advocated by Braithwaite are not forms of ADR in Japan; instead they are the dominant paradigm for the resolution of conflicts. This is a point that has also been made by the American criminologist David H. Bayley (whose work is quoted extensively by Braithwaite). Based on his study of Japanese policing styles, Bayley concludes that the primary difference between a Japanese police officer and his

American counterpart rests with his approach to the use of shame and the importance of genuine apology:

In psychological terms, the [Japanese] system relies on positive rather than negative reinforcement, emphasizing loving acceptance in exchange for genuine repentance. An analogue of what the Japanese policeman wants the offender to feel is the tearful relief of a child when confession of wrongdoing to his parents results in a gentle laugh and a warm hug. In relation to American policemen, Japanese officers want to be known for the warmth of their care rather than the strictness of their enforcement. (Bayley, 1976: 156; quoted in Braithwaite, 1989: 63)

For Bayley, this basic contrast helps to explain the very different nature of police-offender interactions in each country:

An American accused by a policeman is very likely to respond 'Why me?' A Japanese more often says 'I'm sorry'. The American shows anger, the Japanese shame. An American contests the accusation and tries to humble the policeman; a Japanese accepts the accusation and tries to kindle benevolence. In response, the American policeman is implacable and impersonal; the Japanese policeman is sympathetic and succoring (Bayley, 1976: 150; quoted in Braithwaite, 1989: 65).

Given the influence of Braithwaite's work on contemporary thinking about restorative justice and the role of reintegrative shaming, it should come as no surprise that many of the characteristics and tendencies observed by Bayley in Japan are now becoming more pronounced in policing practices in Britain and elsewhere. A belief in the importance of rehabilitation and community acceptance lies at the heart of Japanese thinking about criminal justice, as does an emphasis on decoupling condemnation of behavior from condemnation of the individual. In attempting to adhere to the same basic principles, many police officers in Britain, whether they realize it or not, are now following models based on a traditionally Japanese approach to the resolution of conflicts and the treatment of victims and offenders. Indeed, the following

statement made by a police facilitator in Aylesbury to a young offender could just as easily have come from his counterpart in Japan:

You're lucky, because you've got all this help. People are desperate to help and guide you. Because they care about you. If they didn't care they wouldn't be here. And you obviously care because I can see that you're upset. (Young and Goold, 1999: 133).

iv. Some Lessons for Japan?

Despite the fact that Japanese notions of shame have had a pronounced effect on the thinking of criminologists and policymakers outside of Japan, it is somewhat ironic that the systematic use of re-integrative shaming techniques and restorative forms of youth cautioning have yet to be formally adopted by the police in Japan. Although the Japanese police – as both Bayley and Braithwaite point out – have traditionally made extensive use of shame and positive notions of community in dealing with offenders, practices such as police cautioning still follow a model that closely resembles the ‘old style’ cautioning identified above. In light of the popularity and apparent success of restorative cautioning in countries like Britain, the question that necessarily faces the Japanese police is whether they should attempt to institutionalize general social practices and take ‘greater advantage’ of the strong community ties that remain one of the defining aspects of Japanese culture.

One argument that can be made in favor of such a move is the potential harmonization of police practices across the country as a whole. Although questions of criminal law and procedure in Japan are for the most part determined by national law, the practice of law enforcement tends to vary across different geographical and political regions. Efforts to establish some sort of national model for the treatment of young offenders based on reintegrative shaming and restorative justice may encourage greater sharing between different police forces and help to identify ‘best practices’. Equally, in those regions in which police practices conform to a more punitive model, exposure to restorative techniques may help local officers make better use of pre-existing

communities of support and informal social controls. Given that there is now a growing body of research available on the administration and results of restorative conferencing programs outside Japan, there is also an opportunity for the Japanese police to learn how other criminal justice systems have adapted already familiar ideas about shaming to their particular circumstances and problems.

Of course, there is a danger that any attempt to formalize the shaming processes identified by both Bayley and Braithwaite may have the opposite effect; that is, it may force fluid and successful informal practices into a rigid model that is incapable of taking full advantage of the community's involvement in the shaming process. Despite having become increasingly 'westernized' since the end of the second world war, Japan remains a deeply communitarian society in which complex and highly effective forms of social discipline are entrenched in almost every aspect of daily life. As Clifford has observed about Japan,

There is... a vast reserve of community counseling and community potential that can be brought to bear on any individual to help him (or coerce him) to avoid crime-creating situations. This is a source of community control and support that is used by Japanese authorities at all levels (Clifford, 1976: 97-98).

Police juvenile justice units in Japan (*shonen gakari*) already make extensive use of police-school liaison councils (*gakko keisatsu renraku kyogikai*), student guidance counselors (*seito shido shuji*), and various community volunteers (*shonen kyojoin*) in their efforts to prevent juvenile re-offending. Attempts by the police to further increase their reach and formally institutionalize positive shaming processes may unfortunately tip the scales and send the unintended message that the community no longer bears primary responsibility for the reintegration of offenders or the restoration of relationships. If this were to happen, then the result of reform may be to weaken rather than strengthen the general social commitment to the principles of restoration, reparation, and forgiveness. At present the Japanese approach 'works' because criminal behavior is seen as a collective problem demanding a collective response. By undermining this sense of shared responsibility, the police may inadvertently make the task of dealing with offenders more, instead of less, difficult.

v. Conclusion

As interest in the principles of restorative justice and the use of reintegrative shaming techniques continues to grow in countries like Britain, it is inevitable that criminal justice academics and professionals will continue to look to Japan and Japanese policing practices for inspiration. The question that now faces the police and policy-makers in Japan, however, is whether there is a need to pay closer attention to the ways in which familiar notions of shame and responsibility are being adapted and used by other criminal justice systems. Mediation, arbitration, and other forms of ADR well-known in the West have already been successfully incorporated into private law in Japan. Whether the Japanese criminal justice system is ready to 'retake' practices like restorative cautioning and the formal use of reintegrative shaming, however, remains to be seen.

Dr Benjamin Goold
Associate Professor of Anglo-American Law
Faculty of Law, Niigata University

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