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RESTORATIVE JUSTICE WITHOUT A VICTIM: RISE AND THE ROADS NOT TAKEN

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Abstract

The utility of restorative justice for victimless crimes - specifically, drink driving - was tested as part of the Canberra Re-Integrative Shaming Experiments (RISE), one of the earliest systematic trials of restorative justice. The researchers envisaged two mechanisms whereby restorative justice might lead to reduced reoffending even in the absence of a victim: a victimless variant of reintegrative shaming, and the mobilisation of the offender's friends and family to exercise informal coercion over the offender. Reviewing the literature on the RISE trials, this paper analyses the reasons for the failure of both these mechanisms to have the desired effect, identifies the ways in which restorative justice would need to change - both as a practice and a philosophy - in order for the two mechanisms to function as anticipated, and considers the implications for contemporary restorative practice.

Keywords

reintegrative shaming; community resolution; Uncle Harry; shame

Introduction

Running from 1995 to 1997, the Canberra Re-Integrative Shaming Experiments (RISE) were one of the earliest systematic trials of restorative justice, comparing its effectiveness with that of a court hearing across four offence types. Only one of the four trials showed no measurable positive effect; this was also the only victimless offence (drink driving). While the researchers believed that victim-offender encounters would have a particularly strong effect on reoffending, it was hoped that the drink driving conferences would also show some effect; two alternative candidate mechanisms which could produce this were proposed.

This paper reviews publicly available data on the RISE trials (project reports and unpublished academic work as well as published papers) to assess why neither mechanism appears to have functioned as its proponents anticipated. This will contribute to a better understanding of the conditions of success of restorative justice, and the extent to which it can be used in connection with drink driving and other victimless crimes.

The paper is divided into six sections. The first identifies the anti-criminogenic mechanisms which the researchers expected to operate in the drink driving conferences: “victimless shaming” and “informal coercion” (through the mobilisation of the offender’s friends and family). The second section reviews the evidence of these mechanisms operating and finds a paradoxical picture, with both mechanisms apparently present but ineffective; the third and fourth sections assess the two mechanisms and ask why this was. The fifth section reviews more recent initiatives pursuing restorative justice in the absence of a victim and asks whether they have succeeded where the RISE drink driving conferences failed. The final section identifies the modifications to restorative justice - both as a practice and in theory - which would be required in order for the “victimless shaming” and “informal coercion” mechanisms to work as anticipated, and considers the implications of these changes.

Offenders without victims: victimless shaming and Uncle Harry

The Canberra Re-Integrative Shaming Experiments (RISE) were a set of four randomised controlled trials of restorative justice, focusing specifically on reintegrative shaming. Between 1995 and 1997, in Canberra and the Australian Capital Territory (ACT), groups of offenders awaiting trial for four types of offences were referred in equal numbers to court and to a restorative conference. The four offence types were juvenile violent crime; juvenile property crime (personal and shoplifting); and the victimless offence of drunk driving. 900 drink drivers took part in RISE, 450 being referred to a restorative conference; this was the largest single group of offenders, although in experimental terms the sizes of the four offender groups were equivalent¹. Data collection continued for several years after the court and conference hearings: the experiment’s key variable was reoffending, which could only be measured over a period of time after the conference or court

¹ The measured reoffending rate in the case of drink driving was low - 8.8% over two years (Sherman et al., 1998:11); assuming that this was representative, a large sample would be required in order to detect any treatment effect. (Post-RISE reoffending rates were 10% in years 1-2, 8% in years 3-4 (Tyler et al., 2007:567).)

appearance, particularly if a court had imposed a prison sentence or other incapacitative sanction (e.g. a licence suspension).

Reintegrative shaming, the main mechanism which the experimenters aimed to test, plays a key role in the model of restorative justice developed by John Braithwaite (a consultant on RISE). In summary, Braithwaite argued that criminal justice tends to shame offenders in stigmatising ways, labelling them as criminals rather than merely identifying their actions as crimes. As a result, instead of the shame attaching to a wrongful act, the offender is loaded with personal guilt, or at worst feels a defiant rejection of shame. Braithwaite argued that shaming offenders for their actions while offering them acceptance as individuals would be more effective in promoting repentance, which in turn would reduce reoffending. When an offender has admitted guilt, Braithwaite proposed replacing court hearings, which stage the stigmatising rejection of a convicted criminal, with rituals to promote contrition and stage the reintegration of repentant offenders (Braithwaite, 1989; Braithwaite and Mugford, 1994; Braithwaite, 1999).

Reintegrative shaming rituals are strongly associated with an encounter between offender and victim. The lack of a victim in the case of drink driving put a premium on the role of the other participants in the conference - the community's representative and the offender's 'supporters'. Braithwaite (1999:48) suggested that the sight of loved ones displaying shame on the offender's behalf could overcome the offender's repression of shame:

When a shaft of shame is projected across the room from victim to offender, the offender may have a shield that deflects the shame, only to find the deflected shame spears through the heart of his mother who quietly sobs beside him.

While this passage refers to conferences involving a victim, other conference participants might be able to elicit empathetic shame without a victim being present. In particular, they could help defuse the offender's reactance - the defiant rejection of imposed social control (Brehm and Brehm, 1981) - by modelling an alternative: "when there is a collective reaction of nonreactance, we observe this to calm the anger of a young offender" (Braithwaite, 1999:57).

As well as this process of victimless shaming, the research team expected a second anti-criminogenic mechanism to operate in the RISE drink driving conferences. Lead RISE researchers Lawrence Sherman and Heather Strang (1997a:n.p.) suggested that the prospect of repeated shaming (in the case of reoffending) might in itself have a deterrent effect, operating both directly on the offender and through pressure from their friends and family:

Once the offender has put family and friends to all the trouble of attending the conference, they generally become committed to helping the drink driver avoid repeat offending. ... conferences may do a better job at mobilising family and friends as a deterrent to crime.

The reference to inconveniencing family and friends was not speculative. The police force organising the RISE conferences required drink driving offenders each to nominate five 'supporters' to attend their conference; if necessary, conferences were cancelled and rescheduled until a full complement of supporters was obtained (ibid.). Sherman et al. record that the average number of drink driving offender supporters was 5.1 for conferences, 0.5 for court cases (Sherman et al., 1998:86). The researchers speculated that this enforced mobilisation of friends and family might in turn lead on to sustained, longer-term mobilisation, which might complement or even replace the reintegrative shaming process: the offender could be restored to a law-abiding way of life through extended informal coercive interventions.

This possibility was explored by Braithwaite in a series of papers. Braithwaite (1997:12) wrote:

a restorative plan of action ... may include ... preventive agreements that draw on the capacity of many hands to prevent. Drinking mates may sign a designated driver agreement. Bar staff at the drinker's pub may undertake to call a taxi when the offender has had too much to drink. Uncle Harry may undertake to ensure that the car is always left in the garage on Friday and Saturday nights.

The outcome agreement of a restorative conference might enlist the offender's intimates, not only to assist the offender, but to intervene so as to reduce opportunities to reoffend. In Braithwaite's 1999 paper cataloguing the advantages and disadvantages of restorative justice Uncle Harry reappears, explicitly invoked as a source of incapacitation. Informal coercion could be deployed, not only in the context of an outcome agreement agreed, but 'dynamically', in response to breaches of an agreement. Specifically, the weekend car key confiscation can be escalated by a conference in response to noncompliance by agreement up front that the consequence of failure to hand over the car at these times is that Uncle Harry will take permanent possession of the car for a year (Braithwaite, 1999:67).

The suggestion is that mechanisms of informal coercion would have a bigger effect on reoffending than deterrent or incapacitatory measures imposed by a court (e.g. licence suspension in the case of drunk drivers). As Braithwaite wrote in 1998:

My hypothesis is that restorative justice conference agreements attain higher levels of implementation than court orders precisely because they are agreements rather than orders. ... collective obligation based on kinship and credible monitoring of compliance are structured into the agreement. (Braithwaite, 1998:n. p.)

Informal coercion would reduce reoffending more effectively than criminal justice, thanks to the greater power of informally agreed over officially imposed measures of social control; the power of informal but directly coercive control measures; and the

opportunities for informal surveillance and control afforded by social contact among friendship and kinship groups.

Present but ineffective: two mechanisms in practice

The RISE drink driving experiment was not a success: “the detected rates of drinking and driving remained unchanged before and after assignment to court, while they doubled after assignment to conferences” (Sherman, Strang and Woods, 2000:13). Noting that this difference dissipated after the first year post-experiment, Sherman et al. (ibid) suggest that it derived from the court’s power to suspend driving licences - for twelve months in the case of repeat offenders - which arguably has a stronger effect on a drink-driver’s behaviour than anything a conference can order. This being the case, “drink driving conferences have no chance of preventing drink driving more than court unless conferences are given the same power to recommend licence suspensions” (Sherman, Strang and Woods, 2000:14). This interpretation was endorsed by Braithwaite: “[p]erhaps the most likely reason for the failure of the RISE drunk driving experiment is about the incapacitative effects of license suspensions being available in court cases and not in cases assigned to the restorative justice conferences” (Braithwaite, 2001:238).

However, this position is unsatisfactory: it is inconsistent both with the trial outcomes and with the claims originally made for the trial. Over and above not “preventing drink driving more than court”, the RISE conferences do not appear to have prevented drink driving at all. Even on the charitable assumption that the rise in detected reoffending following conferences would also have followed court appearances but for the effect of licence suspension, the trial suggests only that conferences were no worse - no more criminogenic - than a court appearance. Moreover, as we have seen, Braithwaite’s original suggestion was not that restorative justice would need to be supplemented by licence suspension, but the reverse - that restorative justice would perform better than court sentencing including licence suspension.

The simplest explanation for the restorative conferences’ failure is that they did not run as planned. An observer found that conferences were dominated by police facilitators and their outcome agreements highly routinised, even “monotonous”, “constantly requiring offenders to perform volunteer work at particular organisations and to donate money to specific charities (Inkpen, 1999:95). Offenders might experience this simply as a variant form of sentencing:

If a conference was well run then the offender had volunteered to do community work. When a conference was not well run then volunteer work was imposed on them and it is possible to argue that it was in fact similar to court imposed community service. (Inkpen, 1999:96)

In 80 of the 84 conferences observed by Inkpen the facilitator either directed the outcome agreement or (in 12 cases) “bypassed the negotiation phase and simply constructed the outcome agreement themselves” (Inkpen, 1999:95). Nor was this simply a question of police officers imposing themselves; participants tended to follow the facilitator’s lead, and “when the participants were told that what they decided was ‘up to their imagination’, the most common reaction ... was silence” (Inkpen, 1999:95). In short, the

conferences arguably reproduced the assumptions of criminal justice by virtue of taking place “in the shadow of the axe” (Holtermann, 2009). Conferences were structured to deliver an outcome agreement committing the offender to restitutive and rehabilitative action, and consequently did not promote shaming; the kind of reintegrative encounter which might bring offenders to a new perspective on the offending behaviour was an optional extra.

As for “Uncle Harry”, accounts differ on whether any interventions of this type took place. While his specific examples are couched in hypothetical terms (“may undertake”, “will make sure”, etc), Braithwaite refers repeatedly to the RISE conferences; contrasting court-mandated licence suspension with a variety of “alternative modalities of incapacitation” (with “Uncle Harry” invoked once again), Braithwaite and Roche wrote in 2001 that “[w]e have seen all these forms of active incapacitation negotiated at restorative drunk driving conferences” (Braithwaite and Roche, 2001:71). Sherman (2000:276) commented similarly, if more cautiously:

offenders' families often make explicit undertakings to prevent the offender from driving after drinking in the future ...What lacks empirical evidence so far is a test of the effectiveness of these promises.

Conversely, Inkpen’s (1999) account makes no reference to any such intervention. More recently, Strang (2020) has noted that the training received by the RISE police facilitators did not cover eliciting ‘Uncle Harry’ interventions, and that these - accordingly - were not observed). It is possible that the more positive statements related to earlier drink driving conferences rather than those forming part of the RISE trial (Braithwaite, 2020).

However, there is evidence that the mechanisms intended to produce ‘victimless shaming’ and ‘informal coercion’ did, in fact, operate. A survey administered to offenders, measuring 17 components of reintegrative shaming, found 15 components with statistically significant differences, all suggesting that reintegrative shaming was experienced in conference more than in court (Sherman et al., 1998:129-30). As compared to court observers, conference observers recorded “higher levels of emotional power in the description of the act, the offender’s response to this description, their level of emotional engagement, and degree of discomfort”; offenders faced “higher levels of disapproval towards drink driving in general and their particular offence ... [but] were three times more likely to be treated by their supporters as someone they loved”; expressions of approval for the offender were “twice as likely to occur in a conference over court” (Sherman et al., 1998:89,99).

Subsequent analysis by Tyler et al. (2007) supports this picture of a real but weak shaming effect. Tyler et al. found that RISE drink driving conference attenders were slightly more likely than court attenders to believe that they had experienced procedural justice, reintegrative shaming or both,² and significantly more likely to believe that their

²Perceived experience of procedural justice was a construct including beliefs about the justice of police conduct and the legitimacy of the law; the experience of reintegrative shaming included integration, shaming and the perception that rule breaking would cause interpersonal problems

conference or court experience would help them avoid reoffending;³ this belief in turn had a strong negative association with recidivism. The researchers argue that “the psychological dynamics identified by procedural justice and reintegrative shaming models, when either one is activated, lead to reductions in reoffending” (Tyler et al., 2007:572). No correlation was found between conference attendance and reduced reoffending, however; evidently the psychological effect produced was not “a strong-enough effect to impact behaviour” (Tyler et al., 2007:571).

There is also some evidence for an ‘Uncle Harry’ effect, insofar as conference attenders were more likely to feel that the conference/court experience had “made them more proud of their family, brought their family closer together and ‘increased the respect we have for one another in my family’”; conference offenders were also more likely to believe that reoffending would cause problems with family and friends (Sherman et al., 1998:138). The researchers anticipated that this reassertion, or rebuilding, of social ties would promote the emergence of informal coercion: “certain kinds of family solidarity are strengthened (which in turn ought to enhance informal control capacities)” (Sherman et al., 1998:138).

The RISE drink driving conferences thus present a paradoxical picture. Both victimless shaming and the preconditions for informal coercion seem to have been experienced, and yet lower reoffending failed to materialise. Two main groups of explanations for this paradoxical state of affairs will be considered, corresponding to the two main mechanisms suggested.

Understanding an absence, 1: in search of victimless shaming

The weakness of the RISE conferences’ shaming effect is illuminated by Harris’s (2001) study, developing on work done as part of the RISE team (Harris and Burton, 1997). Harris found that, contrary to the theory on which the conferences had been predicated, RISE drink driving offenders did not distinguish between experiences of act-based shame and personal guilt; moreover, they did not see reintegration and stigmatisation as opposites, but as qualities either or both of which might be present (Harris, 2001:152).

The key distinction identified by Harris was between “Shame-Guilt” and “Unresolved Shame” - although these, unlike the other pairings, were not mutually exclusive (Harris, 2001:117). Shaming can be resolved by the person being shamed adopting a penitent attitude: the “threat to identity” posed by shaming is removed through “the realignment of behaviors and ethical values” (Harris, 2001:186). This in turn leads to the uncomfortable but bearable state of Shame-Guilt, which “involves acknowledging wrongdoing and is associated with empathy for those hurt” (Harris, 2006:343). If the offender is unable or unwilling to realign their values as required, however, the result is the state of Unresolved

(Tyler et al., 2007:566).

³Tyler et al. (2007) give this belief the label of ‘legitimacy’; however, it was tested with the two statements “The conference/court case will keep you from breaking the law in the future” and “What happened in the conference/court case will encourage you to obey the law in the future.” (Tyler et al., 2007:582), and does not directly correspond to any belief about the legitimacy of the court or conference process.

Shame, associated with “uncertainty regarding the offense and the legitimacy of shaming” (Harris, 2001:173). As Unresolved Shame cannot remove the threat to identity posed by shaming, it effectively preserves and perpetuates it. Braithwaite and Braithwaite (2001b:318) relate this state to the “perseveration with shame” discussed by Ahmed (2001:233-40) - a compulsive and perpetually unresolved oscillation between self-blame and blaming others. Harris (2001:206) concludes that reoffending will be more likely where an offender feels low Shame-Guilt and high Unresolved Shame.

The failure of the RISE drink driving conferences may thus derive from a counter-productive success in inducing Unresolved Shame, rather than Shame-Guilt (to use Harris’s terms). The observed factors which promote Shame-Guilt rather than Unreserved Shame, Harris (2001:171-2) argues, were respect felt by the offender for those attempting to induce shame and a pre-existing belief that the offence was wrong, making it more likely that shaming will resonate.

Multiple sources suggest that the desired combination of shaming and respect was not achieved at the drink driving conferences: the participants whom offenders respected were not the people who tried to shame them, and vice versa. Instead, supporters offered ‘their’ offender unconditional support, undermining the effect of the conference. Inkpen (1991:91) notes that supporters were encouraged to “see themselves as citizens as much as supporters”, but adds that “[w]hen offenders brought along friends, or as facilitators often called it, their ‘giggle gang’, it was very difficult to get the supporters to realise their dual role.”

Sherman and Strang (1997b: n. p.) had anticipated that community representatives might provide the “counterweight” to over-supportive offender supporters; Braithwaite (1999:52), suggested that an offender’s law-neutralizing friends might be counterbalanced by “law-abiding citizens who also enjoy the respect and trust of the offender”, and urged “efforts to recruit exemplars of virtue, grace, Mana” (1999: 25) to fill this role. Unfortunately, the community representatives present at the RISE conferences often seem to have been imbued less with ‘grace’ than with a conventional, censorious morality: “[t]he word ‘scolding’ ... describes what community representatives often did” (Sherman, 2003:21). Compared to court sessions, “drink driving conferences possessed significantly greater amounts of stigmatising shaming”; “disapproval of the offender as a person” and “moral lecturing” were twice as likely to occur, and (perhaps unsurprisingly) “conference-assigned offenders possessed a higher level of defiance” (Sherman et al., 1998: 102, 103). One particularly striking finding is that detected reoffending did not increase - in fact may have decreased - among the small minority of offenders whose conferences were **not** attended by a community representative (Sherman and Strang, 2007:74). While the size of the numbers involved suggests caution,⁴ these results certainly do not support the thesis that the presence of a community representative would help reduce reoffending.

⁴ A community representative attended 86% of conferences (Tyler et al., 2007:561). By extension, only 14% of the 450 offenders attended a conference without a community representative - 63 people, five or six of whom could normally have been expected to reoffend within two years. At this sample size and with this effect magnitude, any but a very substantial treatment effect would be

Value consensus was also lacking in many conferences: in some cases multiple participants did not agree in principle that drink driving was a problem, let alone that the offender's own conduct was wrong. In practice, this cemented the counter-productive division between those participants who shamed the offender and those offering acceptance. This acceptance did, ironically, offer one form of compensation for the conferences' overall failure. One way to resolve the contradiction posed by Unresolved Shame is in favour of oneself, "by not feeling shame at all" (Harris, 1999:198); the offender supporters who minimised the wrongness of drink driving, although they guaranteed the failure of the conference, did make it more tolerable in the short term, leaving the offender "unburdened from Unresolved Shame as a result of entanglement with the criminal process" (Braithwaite and Braithwaite, 2001b:318).

In short, victimless shaming failed to take place because offenders were largely not induced to feel Shame-Guilt but only (at most) Unresolved Shame, owing to a lack of mutual respect and value consensus. Under these conditions, Harris suggests, it may be possible to induce shame *per se*, but the offender is likely to get stuck - and perseverate - in a state of Unresolved Shame, rather than progressing to the Shame-Guilt which is conducive to reduced reoffending. Harris's argument supplements Tyler et al.'s diagnosis of imperfectly executed reintegrative shaming, while also suggesting revisions to Braithwaite's earlier model of restorative justice (discussed and developed in Braithwaite and Braithwaite 2001a, Braithwaite and Braithwaite 2001b).

Understanding an absence, 2: in search of Uncle Harry

The trouble with Uncle Harry, as far as the RISE conferences were concerned, was that - although the conditions appear to have been right - the mechanisms of informal coercion which he represents did not function. Braithwaite touched on this secondary anti-criminogenic mechanism in 2001, in a sole-authored paper and a book chapter co-authored with Valerie Braithwaite. Recalling Sherman and Strang's argument from inconvenience (Sherman and Strang 1997a:n.p.), the Braithwaites argue that restorative justice's combination of informality and official endorsement makes it well suited for addressing both drink driving and the compulsive behaviour (problem drinking) which arguably underlies it, particularly by mobilising family members:

A ritual in which trouble with the police has to be dealt with is a unique opportunity for a family member who wishes to make an issue of an underlying alcohol problem. The seriousness and family shame of trouble with the police can motivate the confrontation of a touchy matter which has been swept under the carpet many times before. (Braithwaite and Braithwaite, 2001a:65)

"Unfortunately," the Braithwaites note, "the police in Canberra were somewhat discouraging of this kind of confrontation" (Braithwaite and Braithwaite 2001a: 65). In some cases observed by Braithwaite "a mother or other loved one ... was deeply concerned about the effect that excessive drinking was having on the life of the offender and the family and ... wanted to talk about this" (Braithwaite, 2001:239). However, "when the conference would begin to struggle with confronting an underlying alcohol problem",

the police convenor would often shut down the discussion, maintaining “that the offense was drink driving, not drinking, and ‘drinking problems are not police business’” (Braithwaite and Braithwaite, 2001a:65). Inkpen (1999) records similar attitudes, rising on occasion to outright denial. In one conference, in which the offender had admitted to being an alcoholic, the facilitator even challenged suggestions that the outcome agreement should address the offender’s alcohol problem (“No alcohol at all? Surely he can have the occasional drink!” (Inkpen 1999: 96-7)).

In short, Uncle Harry and other friends and relations would have swung into action, offering informal coercion of problem drinkers, had the police not stood in their way. Needless to say, this interpretation is highly speculative. Braithwaite also suggests that the RISE conferences’ failure to tackle problem drinking may itself explain their failure to reduce reoffending: “The worst patterns of drunk driving arise in the lives of people who are chronically under the influence of alcohol. ... A criminal justice program that fails to confront the substance abuse problem that underlies these, the worst cases of repeat offending, is bound to have a limited effect on repeat offending” (Braithwaite, 2001:239-40). Observers considered more than one in six of all conference offenders to have a possible drug or alcohol problem (Sherman et al., 1998:112); this relatively low incidence of alcohol problems may have been strongly represented among repeat offenders, given the even lower incidence of reoffending. Braithwaite goes further, however, suggesting that large-scale repeat offending by a hard core of alcohol dependent recidivists explains the reoffending data. Without any directly relevant data to support it, this interpretation must be considered speculative.

Restorative justice, victimless shaming and Uncle Harry: strange bedfellows?

Many would agree that the “underlying principle” of restorative justice is “that crimes ‘belong’ to victims just as much as they do to offenders” (Daniels, 2013:314), and that “it is questionable whether a justice system in which victims rarely participate can be said to be truly ‘restorative’” (O’Mahony and Doak, 2014:498). The three successful RISE trials, and extensive experimental data from subsequent trials (see e.g. Shapland et al., 2006), speak volumes for the efficacy of restorative justice considered as a process centred on a controlled encounter between offender and victim. The interest of the fourth RISE trial lies in the failure of anti-criminogenic processes to develop in the absence of a victim, and particularly in the type of additional mechanisms - extensions to the core model of restorative justice - that had to be presupposed in order to envisage those processes. If these extensions are a poor fit to the core model, this in turn may tell us something about the nature of ‘core’ restorative justice.

Victimless shaming, as we have seen, required pre-existing value consensus and mutual respect among participants; this raises the question of how these properties are to be ensured. Where no community representatives can be found who can combine shaming with holding the offender’s respect, Braithwaite suggests, the search should be continued until they are found; at one point he suggests repeating conferences over a period of years, so as to give the offender’s peers the time to ‘age out’ of offending (Braithwaite, 1999:51). Value consensus should also be engineered through the “undominated

empowerment” of loved ones who want to broaden the conference agenda in appropriate ways (Braithwaite, 2001:239).

Citing Habermas’s concept of ‘undominated dialogue’, Braithwaite had argued that value consensus could be left to emerge of its own accord. Given a “moral fact of the matter” regarding the wrongness of a particular offence, “undominated dialogue will converge on consensus” - and “the fact of the matter is that most criminal offenses brought to justice in democratic societies ... are unambiguously wrong to most citizens attending a conference” (Braithwaite, 1999:50). Indeed, it may be the case that “restorative justice might only work with crimes that ought to be crimes”; “[i]f a group of citizens cannot agree in an undominated conference that an act ... is wrong, then the [act] should not be a crime” (Braithwaite, 1999:50). A ‘failed’ conference, in other words, may in reality be no more a failure than an unconditional discharge represents a ‘failed’ court case; both might do justice precisely by declining to impose any sanction on an individual who had been found not to deserve it.

In the case of drink driving, however, Braithwaite does not consider the possibility of letting supportive ‘offender supporters’ contribute to the dialogue. Indeed, he sees drink drivers’ supporters as “[d]rinking mates, who often themselves had serious alcohol problems” and were partially responsible for the failure of conferences (Braithwaite, 2001:239). The presence of drink drivers’ supporters is valued only to the extent that they voice the moral conscience that they share with the offender; if they fail to do so their presence is itself seen as a form of ‘domination’, disempowering people whose voices should have been heard instead of theirs. It seems that the “moral fact of the matter” may be more apparent to an observer (or the conference facilitators) than to the conference itself. Consequently, what is required is not genuinely undominated dialogue but the selective empowerment and disempowerment of different members of the conference, so as to ensure that reliable upholders of the criminal law and conventional social morality can drown out any dissenting voices.

In short, victimless reintegrative shaming can only be guaranteed to deliver if the restorative justice process is reshaped into a process for giving moral gravity and community endorsement to the pre-existing judgment of the criminal justice system (or its more enlightened elements). Where restorative justice is implemented as a form of diversion from trial, as in the RISE drink driving conferences, this amounts to conflating the community’s moral conscience with the judgment of the police. It would be no surprise if, as Inkpen suggested, many offenders saw their outcome agreements as indistinguishable from a sentence handed down in court.

The second theoretical extension involved the reduction of reoffending through the mobilisation of informal coercion. In this model community disapproval is expressed through incapacitatory coercion by the offender’s family and friends; where this failed to emerge, Braithwaite argues, the blame lay with police facilitators who actively prevented friends and relations from intervening as they would have wished. The answer was for restorative justice to be taken, and take itself, more seriously - with “a depth of communal empowerment and some serious back-up of state resources” (Braithwaite, 2001:242). Rather than silence the concerned mother, the police should encourage her to bring both

moral and coercive pressure to bear on her errant child, letting it be known that any informal sanction she wanted to exert could be imposed with the backing of the criminal justice system.

This model assumes a lack of agency on the offender's part which - oddly - would make him or her ineligible for reintegrative shaming. An offender who can be successfully shamed and reintegrated is a competent moral agent, operating at the base level of Braithwaite's pyramid (Braithwaite, 2002:20-21); such a person would not need to be physically restrained from reoffending. The underlying model - made explicit in Braithwaite's speculation on the contribution of problem drinkers to drink driving figures - is the offender as addict. Drink driving is framed not as the reckless choice of an illegal and potentially dangerous behaviour, but as the effect of a larger "*underlying* alcohol problem" (Braithwaite and Braithwaite, 2001a:65; emphasis added). More generally, offending is interpreted as a compulsively repeated pattern of behaviour arising from an underlying problem over which offenders have no control, making them incapable of controlling their actions.

It is this unseen problem, inferred from a pattern of habitual anti-social behaviour, which informal coercion is best placed to disrupt. Consequently, if Uncle Harry is to be mobilised, the offending behaviour and the offender need to be understood in these terms. But if offenders are understood as being in the grip of an unseen underlying problem, they cannot be trusted to work their own reformation, nor can conferences be trusted reliably to identify the key issue. To deal with offending understood in these terms through restorative justice requires squaring the circle: restorative outcome agreements are agreed with offenders, but how can offenders agree an appropriate agreement if their behaviour is driven by problems of which they know nothing? Once again, restorative justice in the absence of a victim seems to entail the imposition of a moral judgment on the offender - this time backed up by (informal) coercion.

The theoretical afterlife of "Uncle Harry" is instructive. Smith and Vanstone suggest that probation officers could usefully "begin to make more focused sense of family intervention and mobilize Braithwaite's archetypal Uncle Harry" (Smith and Vanstone, 2001:824). Similarly, McAlinden uses Uncle Harry as a positive example of the kind of "networks of support and control" in which communities can enmesh sexual offenders (McAlinden, 2005:386). Gal invokes Uncle Harry, in his dynamic role, in the context of child protection, arguing that relatives are better than professionals both at generating "creative, holistic and practical plans" and at monitoring their implementation (Gal, 2015:42). It is noticeable that, in two of these three cases, offenders would generally be considered less than fully morally responsible.

Writers on restorative justice have been less enthusiastic, however. Dignan, in the context of juvenile offending, cites "the authoritarian 'Uncle Harry'" as a reminder that "families are not necessarily the most effective guarantors of 'fair outcomes'" (Dignan, 2002:175). Hudson characterises the "enlistment of community as a resource for incapacitating offenders" as an "extension of control [which] has no clear limits", and cautions that the community enlisted might be "a coercive community rather than [a] community of care" (Hudson, 2003:89). Geeraets cites Uncle Harry as an example of community-driven social

control and notes that, unlike a criminal sentence, “the control the community exercises ... may last a lifetime” (Geeraets, 2016:279), while Ashworth cautions against “raging deterrent and incapacitative strategies, with rogue elements like Uncle Harry calling the shots” (Ashworth 2002: 590).

Braithwaite (2020) for his part has offered two significant correctives to the critical readings cited above. Referring to ‘Uncle Harry moments’, Braithwaite stressed that informal coercion and surveillance would normally only be applied as a supplement to the terms of an outcome agreement; an example would be a conference agreeing that the offender should attend a training course and a relative undertaking to ensure that he or she did so. Braithwaite also emphasises the contestability of the shaming process, by the offender not least: if any restorative conference did prevail on the offender to agree terms that he or she found unfair, a subsequent conference could and should convene and agree an alternative - or, if no alternative could be agreed, refer the offender to the criminal justice system. While welcome, these clarifications do not entirely dispel the concerns raised above.

Restorative justice without victims: does practice trump theory?

While restorative justice is not widely used to deal with drink driving, its use on a range of crimes and disputes has proliferated over the last quarter-century with the growth of

‘community’- and ‘neighbourhood’-based forms of justice and dispute resolution. In England and Wales, restorative justice can be seen in restorative cautions (Hoyle, Young and Hill, 2002), neighbourhood justice panels (Turley et al. 2014) and referral order panels (Stahlkopf, 2009); in Northern Ireland, in restorative cautioning (O’Mahony and Doak, 2004) and pre-sentencing youth conferences (Campbell 2006); and in offender reparation panels in Ireland (McStravick, 2018). Most of these routinely take place in the absence of a victim, and many include victimless crime in their remit. Another, US-based exemplar - the Victim Impact Panel - specifically addresses drink driving (Joyce and Thompson, 2017). Do the theoretical concerns raised above shed any light on problems faced by these practical initiatives - or are they avoiding the pitfalls that undermined the RISE drink-driving conferences?

On closer inspection, most of these initiatives are more victim-centric than might appear. Neighbourhood justice panels may avoid the terms ‘victim’ and ‘offender’ in favour of alternatives such as ‘harmed’ and ‘harmer’, and may process some cases on a ‘no blame’ basis (Turley et al., 2014:8,5); however, the default assumption remains that one person’s actions have affected another adversely. The low level of victim involvement in referral order panels is a constant in the literature, but it is repeatedly instanced as a failing rather than being seen as a feature (Earle, Newburn and Crawford, 2003:143; Stahlkopf, 2009:238; Newbury, 2011:254; Hoyle and Rosenblatt, 2016:39). The non-participation of victims is also noted as a problem for restorative cautioning in Northern Ireland (O’Mahony and Doak, 2014:498) and (with qualifications) for offender reparation panels in Ireland (McStravick, 2018:118).

Crucially, the absence of a victim is seen as limiting the extent to which shame can reliably be induced in the offender:

In the victim's absence, panel members often tried to make a victim out of someone in the room ... Panel members also "produced" victims in cases of "victimless" crimes ... None of the young people appeared to be convinced by this (Hoyle and Rosenblatt, 2016:39)

The attempted construction of an emotionally compelling victim scenario - generally with limited success - has also been observed in restorative cautioning in England (Goold and Young, 1999:135) and offender reparation panels in Ireland (McStravick, 2018:113).

As in the case of the RISE drink-driving conferences, where direct victim-offender interaction is absent, mutual respect and value consensus are all the more important - and hard to ensure. In the case of referral order panels, "[m]ost respondents considered the panel members to be ... out of touch with the lives of the young people before them" (Stahlkopf, 2009:239). Indeed, this dissociation between offenders and panel members may have been by choice: "[f]ar from community members being part of a geographical community shared with the young offender, many choose to serve as a panel member in a neighboring area ... to reduce the chances of knowing the young offenders." (Hoyle and Rosenblatt, 2016:41).

Nor can value consensus be assumed: shaming, contrition and apologies could not reasonably be expected "where the offender has admitted to behaviour which ... is not considered to be immoral or harmful" (Hoyle, Young and Hill, 2002:32). Offending behaviour was more likely to be considered harmless in the absence of a victim who could attest to the harm that had been done. In Northern Ireland, both restorative cautioning conferences and pre-sentence youth conferences have had some success using surrogate victims ('victim representatives'); however, O'Mahony and Doak (2004: 491, 498) note that the surrogates' testimony "lacked emotional impact" and that "there were very few occasions where an immediate, direct apology could be given and accepted". Campbell et al.'s (2006:76) evaluation of pre-sentence conferences is more positive - "there was a high rate of apology from young people whether or not a victim attended" - but they note that apologies were more forthcoming when a victim was present: "young people indicated that they did not apologise for various reasons including that, 'the actual victim wasn't there' and that, 'the crime was victimless'". Victimless crimes posed a particular problem, with one offender puzzled by the idea of an offence against the 'general public'; the police officer attending eventually advised the offender to apologise to a senior officer (Campbell et al., 2006:77).

Lastly, two unusual but successful approaches to victimless restorative justice can be considered. One is the use of surrogate victims in the Victim Impact Panel (VIP) process discussed by Rojek, Coverdill and Fors (2006). This involves bringing offenders convicted for driving under the influence of alcohol (DUI) together with a group of victims of drunk driving, each of whom tells his or her story. The immediate emotional effect of this encounter is undeniable - "[i]t was not uncommon to see panellists and DUI offenders weeping during VIP sessions" (Rojek, Coverdill and Fors, 2006:1324) - and its impact on recidivism is at least suggestive (Rojek, Coverdill and Fors, 2006; Joyce and Thompson, 2017).

However, offenders are not confronted with victims of their actions, nor do victims meet 'their' offender. Rather, victims are asked to witness to the harms which can follow from a victimless crime; in return, offenders are asked to imagine their own victimless offence as having culminated in a similar harm, and to mend their ways so as to keep this imaginary crime becoming a reality. Whether this qualifies as restorative justice is debatable. The complex articulation of past and present characteristic of restorative justice - the offender takes responsibility for the harm he or she caused in the past, the victim offers acceptance to the offender in the present - is remade as an exchange of reimagined pasts ("it wasn't you, but it could have been") and threatening futures ("I didn't do it, but I could do if I'm not careful").

An alternative approach is exemplified by offender reparation panels in Ireland. Working with the offender, McStravick (2018: 104) argues, the panel builds a meso-level 'reparation community'; "theoretically thinner relational bonds between the offender and criminal justice professionals, programme members and local volunteers came to represent, in reality, the thicker bonds more expected between family members and close friends". While regretting the lack of victim participation on restorative principles, McStravick (2018: 116) concedes that this "might actually be improving conditions for the meso-community of care and concern to flourish" by allowing a tighter focus on the offender. Significantly, when panel members did try to compensate for the absence of the victim by constructing victim scenarios, this was associated with greater punitiveness (McStravick, 2018: 113). Conceived in part as a restorative justice initiative, the panels seem to function as a forward-looking, welfarist alternative to restorative as well as criminal justice.

Conclusion

Twenty years on, the RISE drink driving trial remains a rich source of evidence on the nature of the restorative justice process. Given an experiment designed to exhibit particular mechanisms, it is worth asking why those mechanisms did not manifest (or else did not have the causal effect anticipated) under the given conditions. Identifying possible answers to this question in turn can help us understand under what conditions those mechanisms could be made to function as required. Understanding how not to do something - and why not - is an essential step on the way to understanding how it should be done.

When reintegrative shaming is conducted without a victim of crime, the RISE data suggest, the free deliberation of the community is liable to be replaced by a foregone conclusion, and an offender's unplanned encounter with shame supplanted by officially-endorsed shaming. When informal surveillance and coercion are deployed to prevent reoffending, on the other hand, the offender is liable to be understood not as the moral actor envisaged by restorative justice but as a compulsive recidivist, and the offence understood not as an anti-social action but as one outcropping of a larger pattern of problematic behaviour. In both cases, the restorative conference itself becomes secondary, serving not to arrive at its own judgments but only to give the seal of approval to judgments already made by police officers and other professionals.

The RISE drink driving data thus furnishes strong arguments for restricting the scope of restorative justice to crimes where a victim is willing to participate - and these arguments have not been disproved by the equivocal success of subsequent exercises in victimless restorative justice. The negative results of the RISE drink driving trial are eloquent testimony to the power - and the necessity - of the encounter between victim and offender, and the crucial role played by the victim in defining the moral weight of the offence. Conversely, extending restorative justice beyond this encounter - whether by attempting to implement it within the encounter between the offender and the police, or by invoking it as justification for informal incapacitatory measures - appears both unproductive and undesirable.

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References

- Ahmed, E. (2001), "Shame management: regulating bullying". In: Ahmed et al. (2001).
- Ahmed, E., Harris, N., Braithwaite, J. and Braithwaite, V. (2001), *Shame Management Through Reintegration*. Cambridge: Cambridge University Press.
- Ashworth, A. (2002), "Responsibilities, rights and restorative justice", *British Journal of Criminology* 42(3)
- Braithwaite, J. (1989), *Crime, shame and reintegration*, Cambridge: CUP
- Braithwaite, J. (1997), "On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republication Separation of Powers". *University of Toronto Law Journal* 47(3): 305-61. Braithwaite, J. (1998), "Linking Crime Prevention to Restorative Justice". Presented at the First North American Conference on Conferencing, August 6-8, 1998, Minneapolis.
- Braithwaite, J. (1999), "Restorative Justice: Assessing Optimistic and Pessimistic Accounts". *Crime and Justice* 25:1-127.
- Braithwaite, J. (2001), "Justice and a New Criminal Law of Substance Abuse". *Youth And Society* 33(2).
- Braithwaite, J. (2002), "Rewards and regulation". *Journal of Law and Society* 29(1).
- Braithwaite, J. (2020), email communication with the author.
- Braithwaite, J. and Braithwaite, V. (2001a), "Shame, shame management and regulation". In: Ahmed et al. (2001).
- Braithwaite, J. and Braithwaite, V. (2001b), "Conclusion". In: Ahmed et al. (2001).
- Braithwaite, J. and Mugford, S. (1994), "Conditions of successful reintegration ceremonies". *British Journal of Criminology* 34(2): 139-71.
- Braithwaite, J. and Roche, D. (2001), "Responsibility and restorative justice". In Bazemore, G. and Schiff, M. (eds.) *Restorative community justice: Repairing harm and transforming communities*, pp. 63-84. Cincinnati: Anderson.
- Brehm, S. and Brehm, J. (1981). *Psychological reactance: A theory of freedom and control*. New York: Academic Press.
- Campbell, C., Devlin, R., O'Mahony, D., Doak, J., Jackson, J., Corrigan, T. and McEvoy, K. (2006), *Evaluation of the Northern Ireland Youth Conferencing Service*, NIO Research and Statistical Series Report No. 12. Belfast: NIO.
- Daniels, G. (2013), "Restorative justice: Changing the paradigm". *Probation Journal* 60(3):302-315.
- Dignan, J. (2002), "Restorative Justice and the Law: the case for an integrated, systemic approach". In: Walgrave, L. (ed.), *Restorative Justice and the Law*. Cullompton: Willan.
- Earle, R., Newburn, T. and Crawford, A. (2003), "Referral Orders: Some Reflections on Policy Transfer and 'What Works'". *Youth Justice* 2(3): 141-50.
- Gal, T. (2015) "Restorative Child Protection" Unpublished paper, available at SSRN: <https://ssrn.com/abstract=2694399> or <http://dx.doi.org/10.2139/ssrn.2694399>
- Geeraets, V. (2016), "Fictions of Restorative Justice". *Criminal Law and Philosophy* 10.
- Goold, B. and Young, R. (1999), "Restorative police cautioning in Aylesbury - from degrading to reintegrative shaming ceremonies?". *Criminal Law Review* 126.
- Harris, N. (2001), "Shaming and shame: regulating drink-driving". In: Ahmed et al. (2001).
- Harris, N. (2006), "Reintegrative Shaming, Shame, and Criminal Justice". *Journal of Social Issues* 62(2).

- Harris, N. and Burton, J. (1997), *The Reliability of Observed Reintegrative Shaming, Shame, Defiance and Other Key Concepts in Diversionary Conferences*. RISE Working Paper 5. Canberra: Australian National University.
- Holtermann, J. (2009), "Outlining the Shadow of the Axe: On Restorative Justice and the Use of Trial and Punishment", *Criminal Law and Philosophy* 3(2).
- Hoyle, C., & Noguera, S. (2008), "Supporting young offenders through restorative justice: Parents as (in)appropriate adults". *British Journal of Community Justice* 6(3): 67–85.
- Hoyle, C. & Rosenblatt, F. (2016), "Looking Back to the Future: Threats to the Success of Restorative Justice in the United Kingdom". *Victims & Offenders* 11(1):30-49.
- Hoyle, C., Young, R. and Hill, R. (2002). *Proceed with caution: An evaluation of the Thames Valley Police initiative in restorative cautioning*. York: Joseph Rowntree Foundation
- Hudson, B. (2003), *Justice in the Risk Society*. London: Sage.
- Inkpen, N. (1999). *Reintegrative shaming through collective conscience building*. Unpublished doctoral dissertation, Australian National University.
- Joyce, S. and Thompson, K. (2017), "Do Victim Impact Panels reduce drunk driving recidivism?". *Restorative Justice* 5(2).
- McAlinden, A. (2005), "The Use of 'Shame' with Sexual Offenders". *British Journal of Criminology* 45(3):373–394.
- McStravick, D. (2018), "Adult reparation panels and offender-centric meso-communities: an answer to the conundrum". *The International Journal of Restorative Justice* 1(1):96-121.
- Newbury, A. (2011), "'I Would Have Been Able to Hear What They Think': Tensions in Achieving Restorative Outcomes in the English Youth Justice System". *Youth Justice* 11(3): 250–265.
- O'Mahony, D. and Doak, J. (2004), "Restorative Justice – Is More Better? The Experience of Police-led Restorative Cautioning Pilots in Northern Ireland". *Howard Journal* 43(5): 484-505.
- Prichard, J. (2002), "Parent-Child Dynamics in Community Conferences - Some Questions for Reintegrative Shaming, Practice and Restorative Justice". *The Australian and New Zealand Journal of Criminology* 35(3):330-346.
- Rojek, D., Coverdill, J. and Fors, S. (2006), "The effect of Victim Impact Panels on DUI rearrest rates: A five-year follow-up". *Criminology* 41(4).
- Scheff, T. (2007), "A Concept of Social Integration". *Philosophical Psychology* 20(5).
- Shapland, J. et al. (2006), "Situating restorative justice within criminal justice", *Theoretical Criminology* 10(4)
- Sherman, L. (2000), "Domestic Violence and Restorative Justice: Answering Key Questions", *Virginia Journal of Social Policy & the Law* 8(1).
- Sherman, L. (2003), "Reason For Emotion: Reinventing Justice With Theories, Innovations, And Research". *Criminology* 41(1).
- Sherman, L. and Strang, H. (1997a), *The right kind of shame for crime prevention*. RISE Working Paper 1. Canberra: Australian National University.
- Sherman, L. and Strang, H. (1997b), *Restorative justice and deterring crime*. RISE Working Paper 4. Canberra: Australian National University.
- Sherman, L. and Strang, H. (2007), *Restorative Justice: The Evidence*. London: Smith Institute
- Sherman, L., Strang, H., Barnes, G., Braithwaite, J., Inkpen, N. and Teh, M. (1998), *Experiments In Restorative Policing: A Progress Report on the Canberra*

- Reintegrative Shaming Experiments (RISE)*. Canberra: Australian National University.
- Sherman, L., Strang, H. and Woods, D. (2000), *Recidivism Patterns In The Canberra Reintegrative Shaming Experiments (RISE)*. Canberra: Australian National University.
- Smith, D. and Vanstone, M. (2002), "Probation and Social Justice", *British Journal of Social Work* 32(6):815–830.
- Stahlkopf, C. (2009), "Restorative justice, rhetoric, or reality? Conferencing with young offenders". *Contemporary Justice Review* 12(3):231-251.
- Strang, H. (2020), email communication with the author.
- Turley, C., Kerr, J., Kenny, T., Simpson I. and Keeble, J. (2014), *Process evaluation of the Neighbourhood Justice Panels*. MoJ Analytical Series. London: Ministry of Justice.
- Tyler, T., Sherman, L., Strang, H., Barnes, G. and Woods, D. (2007), "Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders' Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment". *Law & Society Review* 41(3).