BRIT. J. CRIMINOL. (2002) **42**, 563–577

SETTING STANDARDS FOR RESTORATIVE JUSTICE

JOHN BRAITHWAITE*

Three types of restorative justice standards are articulated: limiting, maximizing, and enabling standards. They are developed as multidimensional criteria for evaluating restorative justice programmes. A way of summarizing the long list of standards is that they define ways of securing the republican freedom (dominion) of citizens through repair, transformation, empowerment with others and limiting the exercise of power over others. A defence of the list is also articulated in terms of values that can be found in consensus UN Human Rights agreements and from what we know empirically about what citizens seek from restorative justice. Ultimately, such top-down lists motivated by UN instruments or the ruminations of intellectuals are only important for supplying a provisional, revisable agenda for bottom-up deliberation on restorative justice standards appropriate to distinctively local anxieties about injustice. A method is outlined for moving bottom-up from standards citizens settle for evaluating their local programme to aggregating these into national and international standards.

Pluralizing State Power

This essay will explore the tensions between restorative justice as a bottom-up social movement and the fact that its philosophical fundamentals require it to exercise power accountably (Roche 2001). Top-down managerialist accountability of an 'audit society' that takes the techniques of the discipline of business accounting into fields to which they are not well adapted (Power 1997) does not have an encouraging history in criminal justice (Jones 1993). Managerialist restorative justice is also anathema to the bottom-up democratic (civic republican) ethos of the social movement. Yet this essay develops two philosophical positions: (a) that top-down accountability of some form is needed with top-down standards that are contestable bottom-up; (b) that human rights must be protected by restorative justice processes (Braithwaite and Pettit 1990). It will be argued that human rights meta-narratives that come from above can be made concretely meaningful by local standards that have contextual relevance to restorative justice programmes. This concrete experience can then generate democratic impulses that can inform the reframing of top-down human rights discourse (Habermas 1996).

In the article Northern Ireland is selected as a least likely case study (Eckstein 1975) for such an approach in Western societies—a case study selected as one where the approach would prove least likely to be feasible. Northern Ireland is a context where political trust is low, where there is a long history of democratic impulses from below being blocked by blood and domination and which has not had an exemplary rights culture. It is of course not as unlikely a case study as Afghanistan, but in the West we can plausibly advance Northern Ireland as a least likely case. If it can be shown that the approach can be

* Professor in the Law Program, Research School of Social Sciences, Australian National University, Canberra.

developed in a feasible way in the least likely case, then the methodological idea is that the approach might have prospects of being robustly relevant in many contexts.

One of the reasons restorative justice gathers modest support in reformist politics is that many can identify with a commitment to combating oppressive state structures of inhumane reliance on prisons. It also involves empowering citizens with responsibility for matters that over the past few centuries came to be viewed as state responsibilities. For most restorative justice advocates, restorative justice is consequentialist philosophically, methodologically, and politically. The restorative method is to discuss consequences of injustices and to acknowledge them appropriately as a starting point toward healing the hurts of injustice and transforming the conditions that allowed injustice to flourish. Politically, if citizens can see that there are consequences for offenders in taking responsibility for dealing with all of this, they may see less need for punishment because 'something needs to be done' and punishment seems the natural thing to do with crime. Notwithstanding this consequentialism, many of the limits that retributivists regard as central are also found to be important standards of restorative justice. The article considers what those standards should be and how they should be refined. But if restorative justice is about shifting power to the people, surely reimposing the state to set standards for restorative justice shifts the power back to the state?

It may. And there is certainly a worry here, especially in contexts like Northern Ireland. In Northern Ireland, as in South Africa, Bougainville (Howley 2002) and other post-conflict situations, all sides have their historical reasons for distrusting moves by the state that might disempower their people. Equally, there are historical reasons for the state to distrust paramilitary elements in civil society who they fear will use control of informal justice to sustain an armed tyranny over local communities. So we need state standards to render the empowerment of restorative justice robust. In popular justice throughout the ages we have seen all manner of disempowerment of minorities by majorities, of those without guns by those with guns (Abel 1981, 1982; Nader 1980). State-sanctioned human rights are vital for regulating the tyrannies of informal justice. They are also vital for regulating the tyrannies of the police, of state-sanctioned torture and violence, which in Northern Ireland have been considerable problems.

State standards can enable the deliberative democracy of the people or it can disable it. It all depends on what the standards are and how they are implemented. So we must get down to detail. But before we do that, it is worth mentioning that part of the genius of restorative justice as a policy idea is that many of its most precious ideals are invulnerable to state power. An example is Kay Pranis's (2000) great insight about how empowerment works with restorative justice. Pranis says we can tell how much power a person has by how many people listen to their stories. When the prime minister speaks from his podium many listen; when the pauper on a street corner mutters his stories we walk past. The deadly simple empowering feature of restorative justice here is that it involves listening to the stories of victims and accused offenders, both groups which the criminological literature shows to be disproportionately poor, powerless and young (Hindelang *et al.* 1978; Braithwaite and Biles 1984). The empirical evidence is that women's voices are actually slightly more likely to be heard in restorative justice conferences than men's voices (Braithwaite 2002: ch. 5), a very different reality from the voices that are heard in the corridors of state power and judicial power. Pranis's point is that by the simple fact of listening to their story we give them power. So long as the core listening principle of restorative justice is retained, this kind of empowerment cannot be threatened by state standards.

Dangers in Standards

While it is good that we are now having debates on standards for restorative justice, it is a dangerous debate. Accreditation for mediators that raises the spectre of a Western accreditation agency telling an Aboriginal elder that a centuries-old restorative practice does not comply with the accreditation standards is a profound worry. We must avert accreditation that crushes indigenous empowerment.

We should also worry about standards that are so prescriptive that they inhibit restorative justice innovation. We are still learning how to do restorative justice well. The healing edge programmes today involve real advances over those of the 1990s and the best programmes of the 1990s made important advances over those of the 1980s. We should even worry about regulatory proposals that are highly prescriptive about how we should define what a standard or a principle of restorative justice is, or which matters should be formulated as rights that are guarantees that should never be breached. I am not sure we have learnt enough yet about what happens in restorative processes to be ready for such prescription.

We must be careful in how we regulate restorative justice now so that in another decade we will be able to say again that the healing edge programmes are more profoundly restorative than those of today. Unthinking enforcement of standards is a new threat to innovating with better ways of doing restorative justice. It is a threat because evaluation research on restorative justice is at such a rudimentary stage that our claims about what is good practice and what is bad practice can rarely be evidence-based.

At the same time, there is such a thing as practice masquerading as restorative justice that is outrageously poor—practice that would generate little controversy among criminologists that it was unconscionable, such as the conference discussed in the next section where a child agreed to wear a t-shirt announcing 'I am a thief'. Such practices are an even greater threat to the future of restorative justice. So we have no option but to do something about them through a prudent standards debate. We can craft open-textured restorative justice standards that allow a lot of space for cultural difference and innovation while giving us a language for denouncing uncontroversially bad practice. This contribution to the standards debate will be a modest one that will not seek to be exhaustive in defining the issues standards must address.

The Principle of Non-Domination

From my civic republican perspective (Braithwaite and Pettit 1990; Pettit 1997), a fundamental standard is that restorative processes must seek to avoid domination. We do see a lot of domination in restorative processes, as we do in all spheres of social interaction. But a programme is not restorative if it fails to be active in preventing domination. What does this mean in practice? It means that if a stakeholder wants to attend a conference or circle and have a say, they must not be prevented from attending. If they have a stake in the outcome, they must be helped to attend and speak. This does not preclude special support circles for just victims or just offenders; but it does mandate institutional design that gives every stakeholder a meaningful opportunity to speak and be heard. Any attempt by a participant at a conference to silence or dominate another participant must be countered. This does not mean the conference convenor has to

intervene. On the contrary, it is better if other stakeholders are given the space to speak up against dominating speech. But if domination persists and the stakeholders are afraid to confront it, then the convenor must confront it by specifically asking to hear more from the voice that is being subordinated.

Often it is rather late for confronting domination once the restorative process is under way. Power imbalance is a structural phenomenon. It follows that restorative processes must be structured so as to minimize power imbalance. Young offenders must not be led into a situation where they are upbraided by a 'roomful of adults' (Haines 1998). There must be adults who see themselves as having a responsibility to be advocates for the child, adults who will speak up. If this is not accomplished, a conference or circle can always be adjourned and reconvened with effective supporters of the child in the room. Similarly, we cannot tolerate the scenario of a dominating group of family violence offenders and their patriarchal defenders intimidating women and children who are victims into frightened silence. When risks of power imbalance are most acute our standards should expect of us a lot of preparatory work to restore balance both backstage and frontstage during the process. Organized advocacy groups have a particularly important role when power imbalances are most acute. These include women's and children's advocacy groups when family violence is at issue (Strang and Braithwaite 2002), environmental advocacy groups when crimes against the environment by powerful corporations are at issue (Gunningham and Grabosky 1998).

Of course, holding the threat of a punishment beating, of kneecapping, over the head of a person is an intolerable violation of the principle of non-domination. Common ground among all the restorative justice initiatives in Northern Ireland seems to be to transcend this particular form of domination, though there are competing visions of how to accomplish this. While I am in no position to adjudicate these competing visions, I would like to submit the principle of non-domination and the values that flow from it as a values framework for the debate.

Due process is perhaps the major domain where there have been calls for standards. It seems reasonable that offenders put into restorative justice programmes be advised of their right to seek the advice of a lawyer on whether they should participate in the programme. Perhaps this would be an empty international standard in poorer nations where lawyers are not in practical terms affordable or available for most criminal defendants. But wealthier nations like the United Kingdom can afford higher standards on this issue. Arresting police officers who refer cases to restorative justice processes should be required to provide a telephone number of a free legal advice line on whether agreeing to the restorative justice process is prudent.

In no nation does it seem appropriate for defendants to have a right for their lawyer to represent them during a restorative justice process. Part of the point of restorative justice is to transcend adversarial legalism, to empower stakeholders to speak in their own voice rather than through legal mouthpieces who might have an interest in polarizing a conflict. A standard that says defendants or victims have a right to have legal counsel present during a restorative justice process seems sound. But a standard that gives legal counsel a right to speak at the conference or circle seems an unwarranted threat from the dominant legal discourse to the integrity of an empowering restorative justice process. This does not mean banning lawyers from speaking under any circumstances; if all the participants agree they should hear some expert opinion from a lawyer then that opinion should certainly be invited into the circle. Moreover, I have argued that where lawyers

have signed a collaborative law agreement and been trained in collaborative law values and methods, there may be special virtue in hearing from them (Braithwaite 2002: 250–1).

The most important way that the criminal justice system must be constrained against being a source of domination over the lives of citizens is that it must be constrained against ever imposing a punishment beyond the maximum allowed by law for that kind of offence. It is therefore critical that restorative justice never be allowed to undermine this constraint. Restorative justice processes must be prohibited from ever imposing punishments that exceed the maximum punishment the courts would impose for that offence. As someone who believes that restorative justice processes should be about reintegrative shaming and should reject stigmatization, it seems important to prohibit any degrading or humiliating form of treatment. We had a conference in Canberra where all the stakeholders agreed it was a good idea for a young offender to wear a t-shirt stating 'I am a thief'. This sort of outcome should be banned.

Another critical, albeit vague, standard is that restorative justice programmes must be concerned with the needs and with the empowerment not only of offenders, but also of victims and affected communities. Programmes where victims are exploited as props for programmes that are oriented only to the rehabilitation of offenders are morally unacceptable (Braithwaite 2002: ch. 5). Deals that are win-win for victims and offenders but where certain other members of the community are serious losers, worse losers whose perspective is not even heard, are morally unacceptable. The key principle here is equal concern for all stakeholders. The most important way to manifest that concern is through respectful listening, which is also the obverse of banning disrespectful or humiliating, degrading ways of reacting or punishing.

The right to appeal must be safeguarded (Brown 1994; Warner 1994). Whenever the criminal law is a basis for imposing sanctions in a restorative justice process, offenders must have a right of appeal against those sanctions to a court of law. That said, not all of the accountability mechanisms of criminal trials seem appropriate to the philosophy of restorative justice. For example, if we are concerned about averting stigmatization and assuring undominated dialogue, we may not want conferences or circles to be normally open to the public. But if that is our policy, it seems especially important for researchers, critics, journalists, political leaders, judges, colleagues from restorative justice programmes in other places, to be able to sit in on conferences or circles (with the permission of the participants) so there can be informed public debate and exposure of inappropriate practices. Most importantly, it is critical that restorative justice processes can be observed by peer reviewers whose job it is to report on compliance with the kinds of standards I will discuss.

International Standards

In general, UN Human Rights instruments give quite good guidance on the foundational values and rights restorative justice processes ought to observe. The first clause of the Preamble of the Universal Declaration that most states have ratified is:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . .

Obviously freedom, justice and peace have a lot of appeal to someone who values republican freedom to frame the pursuit of justice and peacemaking in restorative justice. In its 30 Articles the Universal Declaration defines a considerable number of slightly more specific values and rights that seem to cover many of the things we look to restore and protect in restorative justice processes. These include a right to protection from having one's property arbitrarily taken (Article 17), a right to life, liberty and security of the person (Article 3), a right to health and medical care (Article 25) and a right to democratic participation (Article 21).

From the restorative justice advocate's point of view, the most interesting Article is 5: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' Of course, all states have interpreted Article 5 in a most permissive and unsatisfactory way from a restorative justice point of view. The challenge for restorative justice advocates is to take the tiny anti-punitive space this Article creates in global human rights discourse and expand its meaning over time so that it increasingly acquires a more restorative interpretation. This is precisely how successful NGO activists have globalized progressive agendas in many other arenas—starting with a platitudinous initial rights framework and injecting progressively less conservative and more specific meanings into that framework agreement over time (Braithwaite and Drahos 2000: 619–20).

We can already move to slightly more specific and transformative aspirations within human rights discourse by moving from the Universal Declaration of 1948 to the less widely ratified International Covenant on Economic, Social and Cultural Rights of 1976 and the International Covenant on Civil and Political Rights of 1966. The former, for example, involves a deeper commitment to 'self-determination' and allows in a commitment to emotional wellbeing under the limited rubric of a right to mental health. The 1989 Second Optional Protocol of the Covenant on Civil and Political Rights includes a commitment of parties to abolish the death penalty, something most restorative justice advocates would regard as an essential specific commitment. Equally most restorative justice advocates would agree with all the values and rights in the United Nations Declaration on the Elimination of Violence Against Women of 1993, the United Nations Standard Minimum Rules for Non-Custodial Measures of 1990 (the Tokyo Rules) and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly in 1985. The latter includes some relevant values not so well traversed in other human rights instruments such as 'restoration of the environment' (Article 10), 'compassion' (Article 4), 'restitution' (various Articles), 'redress' (Article 5) and includes specific reference to 'restoration of rights' (Article 8) and 'Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices' which 'should be utilized where appropriate to facilitate conciliation and redress for victims'. (Article 7).

A Proposal

So a proposal for a starting framework for a debate on the content of restorative justice standards might take the values discussed above, all of which can be found in the UN human rights instruments I have discussed. From a civic republican perspective we can

distinguish constraining standards that specify precise rights and limits and maximizing standards which, while they might justify specific constraints, are also good consequences in themselves which we should want to maximize.

Constraining standards

- Non-domination
- Empowerment
- Honouring legally specific upper limits on sanctions
- Respectful listening
- Equal concern for all stakeholders
- Accountability, appealability
- Respect for the fundamental human rights specified in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Second Optional Protocol, the United Nations Declaration on the Elimination of Violence Against Women and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

Maximizing standards

- Restoration of human dignity
- Restoration of property loss
- Restoration of safety/injury/health
- Restoration of damaged human relationships
- Restoration of communities
- Restoration of the environment
- Emotional restoration
- Restoration of freedom
- Restoration of compassion or caring
- Restoration of peace
- Restoration of a sense of duty as a citizen
- Provision of social support to develop human capabilities to the full
- Prevention of future injustice.

Not only are these values that can be justified from the text of UN human rights instruments, as outlined above, they are also consistent with the empirical experience of what victims and offenders say they want out of restorative justice processes (see Strang 2000), at least at our present limited state of knowledge of these matters. The privileging of empowerment on the first list of standards we are constrained to honour means that stakeholders are empowered to tell their own stories in their own way to reveal whatever sense of injustice they wish to see repaired. This can mean at times quite idiosyncratic conceptions of justice that are not reflected in the second starting list of maximizing standards. The idea is that we must honour the standards on the constraining standards list, but that we are not constrained to accomplish always the standards on the maximizing standards list. Constraining standards (list 1) versus maximizing values (list 2)

against which we can evaluate the performance of restorative justice in comparison to its alternatives without always being required to honour the standard. With many types of crime, restoration of the environment, for example, will simply not be relevant, as will healing physical injuries not be relevant when a crime is non-violent. With the maximizing standards, the measure is not that they are always secured, but that they are more likely to be increased across a large number of cases that go into a restorative justice programme compared to cases that do not, and more likely to be increased after a restorative justice process than before. So they are certainly the stuff of useful yardsticks for evaluating restorative justice programmes.

Together these values imply parsimony in the use of punishment; together they say there are many positive approaches to regulation that we can consider before we consider our reluctant willingness to resort to punishment. The first 11 standards on the second priority list are different forms of healing that can all be justified in terms of values in the UN human rights instruments above and the empirical experience of what participants often say is the healing they want out of restorative justice processes. Beyond saying that, I will not mount a detailed defence of them. Obviously, there are many dimensions of a value like emotional restoration—some want relief from the emotion of fear, others from hate, others from shame, others vindication of their character.

The twelfth standard—providing social support to develop human capabilities to the full—is essential as a corrective to the concern that restorative justice may be used to restore an unjust status quo. The key design idea here is that regulatory institutions must be designed so as to nurture developmental institutions. Too often regulatory institutions stultify human capabilities, the design of punitive criminal justice systems being a classic example.

For the final standard, preventing future injustice, there are as many modalities of evaluation as forms of injustice. The one being most adequately researched at this time is prevention of future crime, an evaluation criterion that has shown progressively more encouraging results over the past three years (Braithwaite 2002: ch. 3).

Emergent standards

- Remorse over injustice
- Apology
- Censure of the act
- Forgiveness of the person
- Mercy.

As a list of specific restorative values, the maximizing standards list is unsatisfactorily incomplete. The above list of what we will call emergent standards is nowhere to be found as values in these UN documents. The list of emergent standards differs from the earlier list of maximizing standards in a conceptually important way. It is not that the emergent values are less important than the maximizing values. When Desmond Tutu (1999) says 'No Future Without Forgiveness', many restorative justice advocates are inclined to agree. Forgiveness differs from say respectful listening as a value of restorative justice in the following sense. We actively seek to persuade participants that they ought to listen respectfully, but we do not urge them to forgive. It is cruel and wrong to expect a victim of

crime to forgive.[1] Apology, forgiveness and mercy are gifts; they only have meaning if they well up from a genuine desire in the person who forgives, apologizes or grants mercy. Apart from it being morally wrong to impose such an expectation, we would destroy the moral power of forgiveness, apology or mercy to invite participants in a restorative justice process to consider proffering it during the process. People take time to discover the emotional resources to give up such emotional gifts. It cannot, must not, be expected. Similarly, remorse that is forced out of offenders has no restorative power. This is not to say that we should not write beautiful books like Tutu's on the grace that can be found through forgiveness. Nor does it preclude us evaluating restorative justice processes according to how much remorse, apology, forgiveness and mercy they elicit. Some might be puzzled as to why reintegrative shaming does not rate on my list of restorative values. It is not a value, not a good in itself; it is an explanatory dynamic that seeks to explain the conditions in which remorse, apology, censure of the act, forgiveness, mercy and many of the other values above occur. There is redundancy in listing remorse, apology and censure of the act because my theoretical position is that remorse and apology are the most powerful forms of censure since they are uttered by the person with the strongest reasons for refusing to vindicate the victim by censuring the injustice. However, when remorse and apology are not elicited it is imperative for other participants to vindicate the victim by censuring the act.

Let us clarify finally the distinctions among these three lists of standards of restorative justice. The constraining list are standards that must be honoured and enforced as constraints; the maximizing list are standards restorative justice advocates should actively encourage in restorative processes; the emergent list are values we should not urge participants to manifest—they are emergent properties of a successful restorative justice process. If we try to make them happen, they will be less likely to happen in a meaningful way.

Many will find these values vague, lacking specificity of guidance on how decent restorative practices should be run. Yet standards must be broad if we are to avert legalistic regulation of restorative justice that is at odds with the philosophy of restorative justice. What we need is deliberative regulation where we are clear about the values we expect restorative justice to realize. Whether a restorative justice programme is up to standard is best settled in a series of regulatory conversations (Black 1997, 1998) with peers and stakeholders rather than by rote application of a rulebook. That said, certain highly specific standards are so fundamental to justice that they must always be guaranteed—such as a right to appeal.

Yet some conventional rights, such as the right to a speedy trial as specified in the Beijing Rules for Juvenile Justice, can be questioned from a restorative perspective. One thing we have learnt from the victims' movement in recent years is that when victims have been badly traumatized by a criminal offence, they often need a lot of time before they are ready to countenance healing. They should be given the right to that time so long as it is not used as an excuse for the arbitrary detention of a defendant who has not been proven guilty.

[1] As Martha Minow (1998: 17) puts it: 'Forgiveness is a power held by the victimized, not a right to be claimed. The ability to dispense, but also to withhold, forgiveness is an ennobling capacity, part of the dignity to be reclaimed by those who survive the wrongdoing.'

This is an illustration of why at this point in history we need an international framework agreement on standards for restorative justice that is mainly a set of values for framing quality assurance processes and accountability in our pursuit of continuous improvement in attaining restorative justice values. There is some hope that the Committee of Experts established in pursuance of the Declaration of Vienna from the 2000 UN Congress on the Prevention of Crime and the Treatment of Offenders will accomplish precisely that.

Not Waiting for the United Nations

At the local level what we need to think about is how to make the quality assurance processes and accountability work well. We don't have to wait for the United Nations for this. A local restorative justice initiative can take a very broad list of values, such as the ones I have tentatively advanced here, and use them as the starting point for a debate on what standards they want to see accomplished in their programme. A few discussion circles with all the stakeholders in the programme may be enough to reach a sufficient level of shared sensibility to make quality assurance and accountability work. Not every contested value or right has to be settled and written down. The unsettled ones can be earmarked for special observation in the hope that experiential learning will persuade one side of the debate to change their view or all sides to discover a new synthesis of views. I will illustrate with the restorative justice standards debate in Northern Ireland.

Northern Ireland actually has a more mature debate on standards and principles of restorative justice than any society I know. It is certainly a more sophisticated debate than in my home country of Australia. I suspect this is because Northern Ireland has a more politicized contest between state and civil society models of restorative justice than can be found in other places. Such fraught contexts are where there is the greatest risk of justice system catastrophes. But they also turn out to be the contexts with the richest prospects for rising to the political challenges with a transformative vision of restorative justice. During a short visit to Northern Ireland in 2000 I found the restorative justice programmes in both the Loyalist and Republican communities inspiring. Partly this is because of the courage and integrity of the community leaders involved and the reflective professionalism of those in the state who are open to restorative justice. I have been struck by the way so many ex-prisoners from both sides I met, who agree on very little politically, share remarkably similar restorative justice values. We saw them discover these shared values with other community leaders sitting in the same circle in a conference organized in Belfast by Kieran McEvoy and Harry Mika (2001). There is hope in this for Northern Ireland.

The drafting of local charters, as commended in the 'Blue Book' (Auld, Mika and McEvoy 1997) discussed in Harry Mika and Kieran McEvoy's paper (this issue, see also McEvoy and Mika 2001a, 2001b and Mika and McEvoy 2001), is consistent with the approach I commend here. So is the approach Greater Shankill Alternatives has developed through its local 'Principles of Good Practice' (drafted by Debbie Watters and Billy Mitchell). There are a lot of similarities between these principles (from the Loyalist community) and those articulated by the Republican community through statements such as the 'Standards and Values of Restorative Justice Practice' of Community Restorative Justice Ireland (from the Republican side). The latter has some distinctively

interesting standards as well, such as 'flexibility of approach' and 'evaluation' (and both 'confidentiality' and 'transparency'). There is also indigenous distinctiveness in the proposal that key elements of the charters 'are slated to appear as large murals at strategic locations, in spaces that have traditionally been reserved for the political iconography that is well known within and outside Northern Ireland' (McEvoy and Mika, 2001b). For all the local distinctiveness, both the Republican and Loyalist charters have values that sit comfortably beside the values I have derived from the UN human rights instruments and beside those that the Northern Ireland Office has derived from European human rights instruments (for example, in *Restorative Justice and a Partnership Against Crime* 1998).

Recent email correspondence with Kay Pranis revealed the important work she has been doing on bottom-up values clarification in Minnesota. Let me quote at length from her email:

> During the training we do a values exercise right away that becomes a touchstone throughout the rest of the training. We give participants a family conflict dilemma, suggest that the siblings come together for a day to try to work it out and then ask them to imagine they are driving home after the day with their siblings. We pose the question: what would you hope was true of your behavior that day working through the problem with your siblings, regardless of the outcome? They make a list individually, then group in pairs to come up with a consensus list for the pair, then group in fours to develop a consensus list and then we go to the large group and put together a consensus list—which is a list of values. There is always general acknowledgement that the list represents who we would like to be but we don't often achieve that—especially in our conflicts. I then talk about circles as a space that tries to maximize the possibility of staying close to those values in our behavior—the circle is designed to help us be our best selves.
>
> In the training with the staff from time to time someone would say 'But these kids don't have these values so the circle won't work with them.' I didn't think it was true (because every group we do the exercise with comes up with essentially the same list) but didn't have a basis to refute that claim until I did the training with the kids. I modified the conflict situation to make it more relevant for the kids but kept it close to the original and used exactly the same process I use with adults. The kids produced a wonderful list—like the adults but even more elaborate. It was so exciting. Who they want to be looks just like who the adults want to be—but what became apparent in the training was that they don't think the world is a safe place to be that kind of person.
>
> Anyway, it was a great experience for me. The kinds of kids who were in the training would have been very intimidating to me as an adolescent. I was very shy and had no idea of the kinds of environments that other kids experienced—so I only saw the defiance or bullying. It was very healing for me to experience them in their humanity and vulnerability.

Systematic empirical work on such initiatives could test Pranis's observation that surprising degrees of consensus over restorative justice values emerge bottom-up from the normally disenfranchised and could document what those values are. Over time compilations of such empirical work from around the world could be bottom-up democratic inputs for revising the hoped-for UN standards. Compilations for one nation can inform the restructuring of national law.

Once there has been a preliminary discussion of the principles, standards and rights a local programme should honour, training is needed for all new restorative justice convenors to deepen the furrows of shared sensibility around them. Training carries a risk of professionalization. This risk can be to some extent countered by making the

training participatory, by giving trainees the power to reframe the curriculum. It need not be long. Three days of training followed by a period when convenors work with an experienced mentor and a follow-up day of reflection on the initial period of practice can turn out excellent convenors. Most people do not make good restorative justice facilitators. But I believe that in any large group of people, say in any 7th grade schoolroom, there will be someone with the ability to be an empowering facilitator of a restorative justice circle with only limited training.

It follows from this view that quality assurance is more important than training. I have sat through more restorative justice training sessions than any sane human being would aspire to and taught many others. As well trained as I am, a good quality assurance programme would weed me out as someone whose talents were better suited to other roles. My main deficiencies as a restorative justice conference facilitator are that I am sometimes too intellectually curious about things that are not important to the parties, I am sometimes more emotionally engaged than is best and my personality causes me to have too much dominance in a room; even when I have my mouth shut, my body language is too inured to leadership—communicating encouragement or doubt when all I should be communicating is attentive listening.

Many deficiencies of this kind can be cured by colleagues who sit in on our circles and communicate with us frankly about how we can improve. Other failings may require that we be gently steered into making a contribution somewhere other than in this front-line role. Either way, the crucial remedy is peer review complemented by feedback from participants. The feedback I mean involves the peer reviewer talking to participants after a conference or circle to elicit any concerns they have about the way the facilitator played out their role. It is this process of post-conference regulatory conversations about the conduct of the conference itself that helps clarify how we should give life to the principles, standards and rights that restorative justice must honour. The 'regular inspection by the independent criminal justice inspectorate' recommended by the Criminal Justice Review for Northern Ireland could be crafted to fulfil this role.[2]

Conclusion

The suggestion here is to do something like the following before setting up a new restorative justice programme:

(1) Assemble stakeholders to reflect on a starting set of principles, standards or rights. These starting objectives might be grounded in the values and rights in UN or European human rights instruments.

[2] One of the referees pointed out the double standard that this inspectorate was to be 'created exclusively for restorative justice (and not for any independent inspection of conventional justice organizations or practices)'. I do not know enough to have a view on whether this inspectorate as the referee implies is a statist conspiracy to crush community justice. But on the double standard of restorative justice having to face superior accountability mechanisms than state justice, of the courts being a sufficient check on poor prosecutorial practice but not on poor restorative conference practice, of restorative justice being set evaluation research expectations much higher than have ever been set for the efficacy and justice of courts, these double standards are a good thing. This is because the accountability standards of extant criminal justice institutions are intolerably unsatisfactory from the perspective of restorative justice philosophy, certainly from a civic republican one (see Roche 2001).

(2) Secure through this local democratic deliberation a set of local commitments to standards that are widely shared. Secure commitment to continuing regulatory conversations around other standards that stakeholders consider important, but where sensibilities are not shared.
(3) Try to resolve the contested standards through reflexive praxis—restorative justice practice that reflects back on its starting assumptions.
(4) Avoid didactic training. Make the training sessions, especially role-plays, part of this locally reflexive praxis that continually rebuilds the ship of restorative justice while it sails the local seas.
(5) Use peer review not only to counsel against practices that threaten the consensually shared standards but also to advance our understanding of the contested standards through regulatory deliberation.
(6) Aggregate these local regulatory conversations into a national regulatory conversation. If the local regulatory conversations converge on the importance of certain rights that should never be infringed, then the state should stand behind those rights, for example by legislating for them or threatening programme funding when they are flouted. But where there is no democratically deliberated consensus, the state should be wary of national standards that threaten local innovation and local cultural difference.

At the end of the day it is better that restorative justice learn from making mistakes than that it make the mistake of refusing to learn. This mistake usually takes the form of believing that standards and rights should be grounded in the rulings of lawyers whose eyes are blinkered to the reflective practice of justice by the people. Recent experience is ground for optimism that if we regulate flexibly, being mindful of all the local ideas for innovation, richer models of restorative justice can blossom. Critics who believe in a univocal justice system as opposed to a legal pluralist one will look askance at the long list of standards I have suggested might emerge from allowing a thousand flowers to bloom bottom-up. But it may be that citizens will find they like a criminal justice system with a lot of bottom-up aspirations for reducing injustice and perhaps a rather smaller number of top-down constraints on what sort of flowers should be allowed to bloom. Designing research that asks citizens with experience of a restorative justice process to evaluate it on 20 or 30 criteria is actually not difficult, just as it is not impossible to collect objective outcome data on multiple criteria of evaluation. If the worry is that justice innovations that seek to accomplish many things will actually do the most important things badly, then this worry can be tested empirically by such research.[3] Of course we already have a criminal law that at some levels aspires to most of the objectives canvassed here. It aspires to enact criminal laws and execute enforcement that *protects the environment*, without manifesting much interest in empirical research on whether its criminalization strategies actually do improve the environment. Defenders of our criminal law claim that it does many of the things it does to *protect the dignity* of citizens without demanding evaluation

[3] If they are right, such critics will be able to specify a set of core evaluation criteria. Programmes that perform well on a large number of non-core standards they set out to maximize will produce poor results on the core criteria. Of course, my hypothesis is that this will prove wrong. My reasons are that injustice is variegated and requires creativity to confront in all its forms and that injustice in the periphery (a refugee camp) is a cause of injustice at the core (the World Trade Centre). While it equally sounds plausible that the best way to advance knowledge might be to create knowledge institutions with highly focused objectives, empirically it is non-focused institutions called universities that win most Nobel Prizes, not specialist research institutes or business laboratories.

research on how dignified citizens believe they have been treated by said institutions, and so on. Evidence and innovation from below instead of armchair pontification from above should be what drive the hopes of restorative justice to replace our existing injustice system with one that actually does more to promote justice than to crush it. It would be a less tidy justice system, but tidiness seems decisively not a good candidate for a justice standards framework.

References

Abel, R. (1981), 'Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice', *International Journal of the Sociology of Law*, 9: 245–67.

——(1982), 'The Contradictions of Informal Justice', in R. Abel, ed., *The Politics of Informal Justice, I: The American Experience*, 1–13. New York: Academic Press.

Auld, J., Gormally, B., McEvoy, K. and Ritchie, M. (1997), 'Designing a System of Restorative Community Justice: A Discussion Document', *The Blue Book*. Belfast: The Authors.

Community Restorative Justice Ireland (n.d.), *Standards and Values of Restorative Justice Practice*. Belfast.

Black, J. (1997), *Rules and Regulators*. Oxford: Oxford University Press.

——(1998), 'Talking About Regulation', *Public Law*, Spring: 77–105.

Braithwaite, J. (2002), *Restorative Justice and Responsive Regulation*. New York: Oxford University Press.

Braithwaite, J. and Biles, D. (1984), 'Victims and Offenders: The Australian Experience', in *Victimization and Fear of Crime: World Perspectives*, edited by R. Block. Washington, DC: US Department of Justice.

Braithwaite, J. and Pettit, P. (1990), *Not Just Deserts: A Republican Theory of Criminal Justice*. Oxford: Oxford University Press.

Brown, J. G. (1994), 'The Use of Mediation to Resolve Criminal Cases: A Procedural Critique', *Emory Law Journal*, 43: 1247–309.

Eckstein, H. (1975), 'Case Study and Theory in Political Science', in N. Greenstein and N. Polsby, eds., *Handbook of Political Science*, Vol. 7: Strategies of Enquiry. Reading, MA: Addison-Wesley.

Gunningham, N. and Grabosky, P. (1998), *Smart Regulation: Designing Environmental Policy*. Oxford: Clarendon Press.

Habermas, J. (1996), *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. London: Polity Press.

Haines, K. (1998), 'Some Principled Objections to a Restorative Justice Approach to Working with Juvenile Offenders', in *Restorative Justice for Juveniles: Potentialities, Risks and Problems for Research*, in L. Walgrave, ed., selection of papers presented at the International Conference, Leuven, 12–14 May 1997, pp. 93–113. Leuven: Leuven University Press.

Hindelang, M. J., Gottfredson, M. R. and Garofalo, J. (1978), *Victims of Personal Crime: An Empirical Foundation for a Theory of Personal Victimization*. Cambridge, MA: Ballinger.

Howley, P. (2002), Breaking Spears and Mending Hearts, Sydney: Federation Press.

Jones, C. (1993), 'Auditing Criminal Justice', *British Journal of Criminology*, 33: 187–202.

McEvoy, K. and Mika, H. (2001a), 'Punishment, Politics and Praxis: Restorative Justice and Non-Violent Alternatives to Paramilitary Punishments in Northern Ireland', *Policing and Society*, 11: 359.

——eds. (2001), 'International Perspectives on Restorative Justice', conference report. Belfast: Queen's University.

MIKA, H., and MCEVOY, K. (2001), 'Restorative Justice in Conflict: Paramilitarism, Community and the Construction of Legitimacy in Northern Ireland'. *Contemporary Justice Review*, 3/4: 291–319.

MINOW, M. (1998), *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston: Beacon Press.

NADER, L., ed. (1980), *No Access to Law: Alternatives to the American Judicial System*. New York: Academic Press.

PETTIT, P. (1997), *Republicanism*. Oxford: Clarendon Press.

POWER, M. (1997), *The Audit Society: Rituals of Verification*. Oxford: Oxford University Press.

PRANIS, K. (2000), 'Democratizing Social Control: Restorative Justice, Social Justice and the Empowerment of Marginalized Populations', in L. Walgrave and G. Bazemore, eds., *Restoring Juvenile Justice: An Exploration of the Restorative Justice Paradigm for Reforming Juvenile Justice*. Monsey, New York: Criminal Justice Press.

ROCHE, D. (2001), *First By Persuasion: Accountabilities of Restorative Justice*, PhD dissertation. Australian National University, Canberra.

STRANG, H. (2000), *Victim Participation in a Restorative Justice Process: The Canberra Reintegrative Shaming Experiments*, PhD dissertation. Australian National Universityj, Canberra.

STRANG, H. and BRAITHWAITE, J., eds. (2002), *Restorative Justice and Family Violence*. Melbourne: Cambridge University Press.

TUTU, D. (1999), *No Future Without Forgiveness*. London: Rider.

VAN NESS, D. and STRONG, K. H. (1997), *Restoring Justice*. Cinncinnati, OH: Anderson Publishing.

WARNER, K. (1994), 'The Rights of the Offender in Family Conferences', in C. Alder and J. Wundersitz, eds., *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* Canberra: Australian Institute of Criminology.

ZEHR, H. (1990), *Changing Lenses: A New Focus for Criminal Justice*. Scottsdale, PA: Herald Press.