

THE POVERTY OF PUNISHMENT*

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ABSTRACT

This paper investigates a case of resistance to the dominant culture in which the criminal justice system is claimed to lack jurisdiction by an indigenous offender. Analysis is then given to the claims of shaming theory, within the context of republican criminology: (a) where there exist ethnographic differences between cultures impacting on conscience and shaming; (b) where there exists marginalisation of the Other impacting on reintegration; and (c) in terms of a Hegelian-Marxist position.

Kant's *Metaphysical Elements of Justice* (Rechtslehre) is largely devoted to what is surely the basic problem of political ethics: the nature and justification of coercion ... Kant quite clearly believed that freedom does not stand in need of any positive justification, for it is good in itself. Rather it is coercion, bad in itself, which must be defended¹

If crime and its annulment ... are treated as if they were unqualified evils, it must, of course, seem quite unreasonable to will an evil merely because 'another evil is already there.' To give punishment this superficial character of an evil is, amongst the various theories of punishment, the fundamental presupposition of those which regard it as a preventive, a deterrent, as reformative, etc, and what on these theories is supposed to result from punishment is characterised equally superficially as good. ... The various considerations which are relevant to punishment as a phenomenon and to the bearing it has on the particular consciousness which concerns its effects (deterrent, reformative, etc.) on the imagination, are an essential topic for examination in their place, especially in connexion with modes of punishment, but all these considerations presuppose as their foundation the fact that punishment is inherently and actually just.²

As Marx himself puts it: 'What right have you to punish me for the amelioration or intimidation of others?' And he further praises Hegel for seeing that punishment, if justified, must involve respecting the rights of the person to be punished. Thus Marx, like Kant, seems prepared to draw the important distinction between (a) what it would be good to do on grounds of utility and (b) what we have a right to do. Since we do not always have the right to do what it would be good to do, this distinction is of the greatest moral importance; and missing the distinction is the Achilles heel of all forms of Utilitarianism.³

* Thanks to Mark Findlay for comments made in preparing this paper.

1 Murphy, J G, *Kant: The Philosophy of Right* (1970).

2 Hegel, G W F, *The Philosophy of Right* (1969).

3 Murphy, J G, "Marxism and Retribution", in Cohen, M, Nagel, T and Scanlon, T (eds), *Marx, Justice and History* (1980).

EXORDIUM: PUNISHMENT OR REINTEGRATION

Republican criminology is informed by the position its authors have taken in traditional and contemporary debates towards punishment. Prior to the revelation that there could be a better world⁴ through a consequentialist, or teleological theory of criminal justice as explicated in *Not Just Deserts*,⁵ Braithwaite had already challenged the neo-classical return to retributivist theories of punishment, on utilitarian grounds in regard to punishing white-collar criminals in his 1982 essay "Challenging Just Deserts: Punishing White-Collar Criminals". The neo-classical position, outlined in *Doing Justice: The Choice of Punishments*,⁶ returned to the Enlightenment thinkers Beccaria and Kant in its theory of "just deserts" and accepted: "Kant's view that a person should be punished because he deserves it. We argue, as both Kant and Beccaria did, that severity of punishment should depend chiefly on the seriousness of the crime. We share Beccaria's interest in placing limits on sentencing discretion".⁷ It is maintained by proponents of "just deserts" that although notable philosophers such as Kant and Hegel "... have written on punishment and desert, ... their ideas found little echo in legal and criminological writing".⁸ By returning to the Kantian position latter day retributivists can adopt a philosophical position that punishment is just because it is deserved, and are thus able to analyse the right to punish in terms of negative liberty, rather than regard punishment as a "superficial good" on the grounds of utility; that is, for the greater good. Neo-classical criminologists are skeptical of the ability of rehabilitative theories of punishment to cure criminality, and see the involuntary rehabilitative treatment of criminals in prisons based on disposition as an infringement of rights in terms of negative liberty. It should also be noted that "just deserts" is directed at serious offences determined by the components of harm and culpability⁹ that deserve a prison sentence, it recognises that prison is a harsh environment, and that the intended outcome of this theory is to reduce sentences overall by eliminating discretion through considerations of commensurateness and proportionality in relation to criminal acts.

Braithwaite's challenge to "just deserts" attempts to demonstrate an irony, by applying retributivist theory to white collar crime to show that "utilitarian policies potentially can produce a more just and equitable criminal justice system than can ever be achieved by a theory of just deserts"¹⁰. His argument runs along the following lines: white-collar crime is the great unseen iceberg of crime much of which goes undetected; the public regards

4 Ezorsky (in Ezorsky, G (ed), *Philosophical Perspectives on Punishment* (1972) at xii) writes, "Teleologists view punishment as desirable either primarily for the guilty man, ie, making him a better person, or primarily for the world, eg, by isolating and reforming criminals or deterring potential offenders, punishment makes the world a better place." Equally, it is asserted, reintegrative shaming makes the world a better place.

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

6 von Hirsch, A, *Doing Justice: The Choice of Punishments* (1976).

7 Id at 6.

8 von Hirsch, A and Ashworth, A, "Not Not Just Deserts: a Response to Braithwaite and Pettit" (1992) 12/1 *Oxf JLS* 83.

9 von Hirsch, A, "Desert and White-Collar Criminality: a Response to Dr Braithwaite" (1982) 73/3 *J Crim L & Criminol* 1167.

10 Braithwaite, J, "Challenging Just Deserts: Punishing White-Collar Criminals" (1982) 73/2 *J Crim L & Criminol* 724.

white-collar crime as serious, along with other offences such as armed robbery, assault, etc and believes prison sentences are just deserts; punishing white-collar criminals merely drives the problem underground; immunity from prosecution is often offered to the worst offenders; very few white-collar criminals are apprehended anyway; there are other (more satisfactory) ways in which white-collar crime is dealt with by regulatory agencies. The conclusion:

The utilitarian, can no more fill the prisons with white collar criminals than can the retributivist. The utilitarian, however, realising that his goals are not being achieved by putting common criminals in prison, can set the common criminals free. A more equitable criminal justice system can be as readily attained by being less punitive to the powerless as it can be through increased punitiveness to the powerful. The desert philosopher cannot accept this, since those who deserve to be punished by imprisonment should be so punished.¹¹

To this von Hirsch replied that Braithwaite had confused levels of explanation, and that in the utilitarian view, imprisonment for heinous white-collar crimes would “interfere with administrative convenience”.¹² Moreover, the adoption of the desert rationale would mean that white-collar criminals found to be serious offenders would risk substantial punishment with prison terms approaching that of violent street criminals, whereas under Braithwaite’s proposal it would be the lesser white-collar criminals who would be imprisoned whilst the executives found guilty of more serious offences would be on probation or doing community service.¹³

Republican criminology draws on this debate, offering reintegrative shaming as a more appropriate method of managing white-collar crime, as well as other crime. Shaming is central to republican criminology, and the explanation it offers to the causes of crime. Braithwaite asserts in *Crime, Shame and Reintegration* that “Societies with low crime rates are those that shame potently and judiciously.”¹⁴ He consequently develops a philosophical and political position within which to enclose this in *Not Just Deserts*, whilst challenging retributivist assumptions towards punishment and rehabilitation, by asserting that the criminal justice system should be aimed at reintegrating the offender into the community on the basis of a concept of social negative liberty — defined as dominion. He argues amongst other things that there should be maximum sentences though not minimum sentences, as room for discretion allows for the possibility of reintegration through processes of shaming which would permit the criminal justice system to have a moral re-educative effect. Thus sentences of imprisonment should be imposed only when there is a threat to dominion, the dominion of the victim.

Debate between retributivists and republicans has continued following the publication of *Not Just Deserts*, with a critical review by von Hirsch and Ashworth,¹⁵ and in a response by Pettit with Braithwaite,¹⁶ published in a previous issue of this journal. In their

11 Id at 759.

12 Above n9 at 1170.

13 Id at 1175.

14 Braithwaite, J, *Crime, Shame and Reintegration* (1989) at 1.

15 Above n8.

16 Pettit, P with Braithwaite, J, “Not Just Deserts, Even in Sentencing” (1992) 4/3 *Curr Iss Crim Just*

critique von Hirsch and Ashworth identify that the basic objection to desert theory in republican criminology "... concerns the link between punishment, censure and desert,¹⁷ censure being the term used to analyse reintegrative shaming. By uncoupling censure from the quantum of sentence and in the fusion of censure with stigma,¹⁸ these critics argue that Braithwaite and Pettit have misconceived the nature of censure in the process of punishment, and by retaining punishment their "... mistake lies ... in supposing that we can keep punishment as presently constituted with its blaming implications in this society, and still separate the blame from the severity of the sanction".¹⁹ This becomes a problem when community fears about punishment levels, exaggerated by fears of the effect on citizens' dominion, influence sentencing to create a large disparity in the types of punishment meted out to different types of offenders,²⁰ or disparity in sentencing for the same type of offence when based upon an actor's disposition towards reintegrative shaming to be found in the capacity "... for moral assessment of ... conduct",²¹ therefore punishments may be determined irrespective of the gravity or seriousness of the offence.²²

In this paper, the irony that in a criminal justice system guided by republican explanations indigenous peoples would probably fare no better than in one guided by retributivist assumptions is explored by considering salient aspects of the theories propounded by Braithwaite and Pettit. It is *de rigueur* to critique classical, and thus neo-classical conceptions of sentencing and punishment as developed in desert theory on the basis that these are undermined by the contradiction which exists in capitalism between formal equality before the law and substantive economic inequality, thereby promoting social injustice in the level of incarceration between blue and white-collar criminals: this was one of the first objections raised by Braithwaite towards desert theory in his 1982 challenge to "just deserts". Having raised the objection, however, Braithwaite does not ask, as Marx did, whether there is a right to punish when that contradiction exists, but instead formulates with Pettit a republican theory which aims to bring about social and class justice in punishment without challenging the contradictions within capitalism. Despite the objection of Pettit with Braithwaite²³ to the "charge ... that whatever we say to the contrary, the logic of the republican position supports a licence-to-optimize sentencing policy" made against them by von Hirsch and Ashworth, in the continuing debate between republicans and retributivists over whose sentencing policy is the more deleterious, this is merely a controversy between the schools of the new rationalism. In countering the charge of having adopted a position which is a licence-to-optimize in sentencing Pettit with Braithwaite,²⁴ defends the notion of dominion in regard to reintegration or punishment through speculating on types of responses which the court could elicit from the offender in relation to the victim in terms

225–239.

17 Above n8 at 92.

18 Id at 93.

19 At 95.

20 At 86.

21 At 93.

22 At 89.

23 Above n16 at 226.

24 Id at 232.

of “recognition”, “recompense”, and “reassurance”. Fundamental to this is the idea that there should be reconciliation between offender and victim,²⁵ however it is recognised that in some cases an offender may not wish to “render an act of apology or reconciliation”,²⁶ and it is in this failure to be reconciled that an irony arises in relation to indigenous peoples as incapacitation through imprisonment would continue to occur without considering the ground for rejection of reconciliation, or the inapplicability of the assumptions of shaming theory and republicanism.

Republican theory will be interpreted in this essay through examining a case study of an indigenous Australian at “war” with the dominant culture, ethnographic and historical evidence purported to lend credibility to shaming theory, ethnocentrism in the roots of republicanism, and the formalising of an ethnocentric notion of shame.

A CASE STUDY THAT INTERPRETS THE REPUBLICAN THEORY

Republican criminology, as predicated on the insights of shaming theory into other theoretical traditions in criminology, interprets the criminal justice system in terms of parsimony, checking of power, reprobation, and reintegration in relation to the maximisation of dominion.²⁷ The use of this case study allows an investigation to be made into an aspect of republican theory which is central to its debate with retributivism, sentencing and punishment.

In challenging “just deserts”, republican criminology focussed on ironies present in sentencing and punishment in relation to white-collar criminals. In *Not Just Deserts* Braithwaite and Pettit write that: “Whenever judges decide a sentence then, not only our checking of power presumption, but also our reprobation presumption suggests that they must make clear why they do so. The criminal justice process should always seek to be a communicative process that engages the defendant in moral discourse.”²⁸

25 Id at 234.

26 Ibid.

27 Above n5 at 86–92. This interpretation is predicated on the assumption that shaming theory “enables us to integrate previously irreconcilable theories — control, subcultural, labelling, opportunity and learning theories” (Braithwaite, J, “Diversion, Reintegrative Shaming and Republican Criminology”, paper presented at an International Symposium entitled *Diversion and Social Control: Impacts on Justice, Delinquents, Victims and the Public*, Bielfeld, Germany, 27-29 November 1991 at 7). Braithwaite does this by “... imagining Fagin’s lair as something of a caricature of a criminal subculture. We need control theory to bring young offenders to the doorstep of the criminal subculture (primary deviance); stigmatization (labelling theory) to open the door; subcultural and learning theory to maintain the lair as rewarding place for secondary deviants to stay in; and opportunity theory to explain how such criminal subcultures come to exist in the first place. This is the scheme supplied by the theory of reintegrative shaming for synthesizing the dominant theoretical traditions.” (Above n14 at 16).

The problem with this scheme is that it is more imaginary than real, because the “... Fagin pattern of socialisation into delinquency is probably rare” (Sykes, G M and Matza, D, “Techniques of Neutralization: a Theory of Delinquency” (1957) 22 *Amer Sociol Rev* 665) and it cannot be supported by statistical evidence. Thus, although the dominant theoretical traditions in criminology can be integrated through a Dickensian fiction it must undermine the efficacy of republican criminology in both explaining real crimes and offering real solutions.

28 Above n5 at 128.

Archie Glass is an indigenous Australian; a member of the Wiradjuri people he was born at the Cowra Mission, the Erambie Aboriginal Reserve, in New South Wales. At the age of eight and a half he was taken away from his mother and sent to Kinchela Boys Home. Some of his other siblings were also sent to homes. He states that his mother could speak Wiradjuri, but she was made to feel ashamed of this and did not pass on the language. The Wiradjuri at mission were forbidden to hunt or live in the traditional way and were compelled to accept rations. When he was at the boys home he was brought up to believe he was White, and was forbidden to speak to other Aboriginals in the township. He views this assimilationist policy, as part of the process of genocide practised against indigenous Australians by brainwashing them into Anglo-Saxons. This is a possible reason for the alienation he felt from his other siblings when reunited with them at holiday times. When we have discussed the role which shame played in the disintegration of Aboriginal culture, he has conveyed to me that this played a role particularly at the level of religious institutions, but also another more powerful factor was the power of terror induced by the criminal justice system. He described the confinement at Erambie Mission as that of people held as Prisoners of War by the state.²⁹

Currently he is on remand at Long Bay. He claims that he is at “war” with non-Aboriginal Australian society as it has maintained an unjust, undeclared war against himself and his people since the time of colonisation. He asserts that there are two types of Aboriginals: talkers and warriors. He is a warrior. In 1976, when known as James Wedge he challenged the Crown to demonstrate then that it had jurisdiction over him in a murder trial. At that time the Crown asserted that it did have jurisdiction.³⁰ In his current case before the courts he has claimed that the criminal justice system has no jurisdiction over him: his challenge is based in part on the Mabo ruling from the High Court of Australia which overturned the concept of terra nullius. He has stated that he is prepared to maintain his challenge that he be returned to the jurisdiction of customary law (of the Wiradjuri) even if he has to stay on remand for five or ten years. That he may spend more time in prison as a result of his challenge than he would if he was found guilty of the alleged charges and sentenced, leads him to believe that he is becoming a political prisoner. The conviction that this is the case leads him to question why the criminal justice system will not grant his application for bail to a jurisdiction of customary law, and thus punishes him for challenging jurisdiction through imprisonment. If the criminal justice system wishes to try him they will have to “drag him into court in chains”.³¹ He also believes that other Aboriginals in the criminal justice system could (and do), as a part of a social movement, claim that the criminal justice system has no jurisdiction over them, thus applying pressure on Government to back up its talk of reconciliation with action. He is opposed to the concept of reconciliation however, as it does not allow for argument over every wrong done in the past, and would like to see a treaty or two separate governments.

29 Cf Read, P (ed), *Down There With Me on the Cowra Mission: An Oral History of Erambie Aboriginal Reserve, Cowra* (1984); Ronalds, C, Chapman, M and Kitchener, K, “Policing Aborigines”, in Findlay, M, Egger, S and Sutton, J (eds), *Issues in Criminal Justice Administration* (1983).

30 *R v Wedge* (1976) NSWLR 581–87.

31 Personal communication.

Republican criminology asserts that sentencing and punishment should be a communicative process, but when an individual from an indigenous culture is at “war” with the dominant culture because of policies of the State which have separated children from families, that have dispossessed a people of land, language and culture, and have led to marginalisation in the dominant economic culture it is unlikely that any meaningful moral discourse can take place. Archie Glass sees the moral to be drawn from the actions of the State towards indigenous peoples through the criminal justice system, as the discourse of a dominant society at war with those within it through no choice of their own. Any educative or reintegrative slant given to the criminal justice system would still necessitate surrender to an alien value system, by a criminalised indigenous person, as that system is not prepared to recognise its own inequity. Thus republican theory, unable to bring about reconciliation between offender and victim, or between State and offender, and unable to reintegrate would imprison to maintain social harmony, as social values such as dominion would be threatened with subjective erosion if challenged on the basis of ethnocentrism,³² by a warrior from an indigenous people who is not prepared to be integrated into them. In the light of the Wiradjuri claim for land in New South Wales following Mabo, and of the fact that Archie seeks to be returned to a Wiradjuri jurisdiction in a climate where panic is induced through media hysteria about Mabo, republican criminology is vulnerable to criticism that as its policy on sentencing is based on community and political perceptions of the effect upon dominion which reintegrating an offender would have when inappropriate responses have been elicited by a court in regard to reconciliation, then incapacitation of the offender through imprisonment is the response which the theory offers.

Archie’s actions can be interpreted as “neutralisation”; through denial that in the circumstances the injury to the victim is justified — he is at war; or through condemnation of those condemning him — European society through the criminal justice system promotes an undeclared war against indigenous peoples.³³ However, his actions can also be seen as being symptomatic of a clash in values, between those shaped by the dominant economic culture, and those of the Other which still have an historical force. An untested hypothesis to explain the seeming lawlessness (anomie) amongst indigenous Australians in the eyes of the criminal justice system is as follows: Australia’s indigenous peoples had an economic system based on totemism. The assumptions of totemism in regard to proprietorship and the community values it engendered through social organisation, are completely opposite to those of proprietorship in English based law. Those values are unable to be integrated into a capitalist economy, and the holders of those values have been shamed and terrorised in the past by the institutions of the dominant culture. Thus, in a heterogeneous society shame can function to increase crime rather than control it, as sacred values may be profaned, even when the highest rehabilitative and reintegrative ideals are held. This will be demonstrated in the remainder of this paper through reference to other ethnographic and historical evidence, which though cited by Braithwaite, does not support his contentions.

32 Cf Republican Ethnocentrism below.

33 Sykes and Matza, above n27 at 668.

CONSEQUENTIALISM AND SHAME

SHAMING THEORY AND ETHNOGRAPHIC EVIDENCE

Republican criminology is consequentialist (teleological), rather than deontological,³⁴ and is embedded within a normative analysis of the state. It has targets for agents to aim for, rather than constraints, in universal values.³⁵ Teleology argues from cause to effect, thus consequentialism argues from cause to targeted effect.

If the value which the consequentialist wants realised in the state is a certain idea of shame, it must also imply that in the maximum realisation of that value, the means used, side-effects and unintended consequences, which achieve the end are justified in being for the greater good.³⁶ Thus, if Japanese society is extremely oppressive but is able to reintegrate through shaming, despite suicides caused by shame being common, it is for the greater good.³⁷ Or, if a homily on a war time experience about a kangaroo court in a POW camp indicates the danger of gossip and a subsequent injustice attributable to shaming,³⁸ this is also for the greater good because it serves to instruct about the potential of the ideal as a target. Instead of recognising that phenomena such as gossip can become impregnated with hearsay, or only allow for superficial interpretations of situations thereby making it difficult to decide what information comes from the original source,³⁹ or recognising that gossip may pass along groundless talk which closes off the opportunity for disputation, or any new inquiry into the facts by an injured party,⁴⁰ republican criminology, enclosing the postulates of the theory of reintegrative shaming, advances the use of gossip and shaming because some ethnographic facts lend “a kind of support for certain important elements of the theory”.⁴¹

Ethnographic evidence is not persuasive at all in lending support to the theory. Braithwaite glosses over the destructive aspects of gossip, scandal and shaming which exist in the real world to insist instead that these can become virtues in his consequentialism.

Gluckman in his essay “Gossip and Scandal”⁴² examines in detail the function of these phenomena amongst the Makah Indians. The Makah belonged to the group of North West Coast Native Americans / First Nations People who performed the potlatch. Through the potlatch one’s position in the social order was determined by the extent to which the feast organised demonstrated consumption, distribution of prestations and destruction of resources. “Consumption and destruction are virtually unlimited. In some potlatch systems one is constrained to expend everything one possesses and to keep nothing. The rich man who shows his wealth by spending recklessly is the man who wins prestige. The

34 Above n5 at 25.

35 Id at 26–28.

36 Mackie, J L, *Ethics: Inventing Right or Wrong* (1977) at 159.

37 Above n14 at 138, 158.

38 Id at 157.

39 Heidegger, M, *Being and Time* (1962) trans J Macquarie and E Robinson, at 212.

40 Id at 213.

41 See Braithwaite, above n14 at 109. He cites Gluckman for example (below n42).

42 Gluckman, M, “Gossip and Scandal” (1963) 4/3 *Curr Anthropol* 309–314.

principles of rivalry and antagonism are basic. Political and individual status in associations and clans, and rank of every kind, are determined by the war of property ... Sometimes there is no question of receiving return; one destroys simply in order to give the appearance that one has no desire to receive anything back".⁴³ The visitors would lose face if they could not return the feast on a greater scale.⁴⁴

The Makah no longer perform the potlatch as the American Indian Service, until 1932, set out to transform them through a process of indoctrination where like "Sunday School addicts, aware of the value of money and averse to destroying their own property",⁴⁵ they would become responsible citizens. Western values are today transmitted through the propagandising power of the mass-media. Even though they resent the Whites who have robbed them of independence, land and culture, they are not unified against the Whites but are instead dislocated by gossip and scandal. These phenomena are directed at producing equality between members of the Makah through means such as slander, etc, and can be interpreted as part of a "factious struggle for class status ... a relic of the former ranked potlatching competition".⁴⁶ "These Makah values and traditions largely persist in gossip and in no other way".⁴⁷ Gossip and scandal serve to maintain a struggle for class status by promoting exclusion from the social group on the basis of slanders about an individual of low class birth. Internally they are aware that there exist differences in statuses through hereditary rights to resources, however to the external world, other Americans, they are unprepared to admit this even in court cases as this might promote the claims to status of an individual.⁴⁸

Braithwaite seeks to establish that these phenomena, as described in ethnographies, can function to highlight a means to reintegrative shaming. However this ignores that ethnographies, in attempting to describe the total social fact in one society do not necessarily attempt to provide universal rules, in regard to phenomena, which can be applied to all societies. In the example of the Makah, it is evident that the institution of the potlatch was eliminated through shaming associated with the mores of the dominant culture in the Victorian era, and that a facade of social equality is maintained in appearances to the dominant White culture through the shame associated with gossip and scandal.

The theory of shaming thus also ignores the opportunity to use the explanatory power of these phenomena to investigate the extent to which gossip, scandal and shame are different from culture to culture, and impact on the marginalisation of indigenous peoples integrated into Western economic systems, causing crime rather than preventing it. For example: "Makah also attach great value to the theory that kinsmen should help one another, and for pride's sake to maintain their social standing; they go out of their way to assist distant kin. So that the poor Makah who runs a store or restaurant is compelled to give credit to his kin, and they do not feel it necessary to pay their debts. He cannot, on

43 Mauss, M, *The Gift* (1970) trans I Cunnison, at 35.

44 Above n42 at 309.

45 Id at 309.

46 At 311.

47 Ibid.

48 Id at 311-12.

the other hand make a living out of people who are not related to him; for unrelated people will not buy from him because if he becomes rich he will rise in status. They prefer to buy from Whites and make Whites rich”.⁴⁹ Non-repayment of debt may be construed as the taking of an unfair advantage, or a form of unreported crime in which the impact of conscience is minimalised due to the priority accorded to potlatching values. Braithwaite⁵⁰ claims “... shame operates at two levels to effect social control. First, it deters criminal behaviour because social approval of significant others is something we do not like to lose. Second, and more importantly, both shaming and repentance build consciences which internally deter criminal behaviour even in the absence of any external shaming associated with an offence. Shaming brings into existence two very different kinds of punishers — social disapproval and pangs of conscience.” It is evident that among the Makah different cultural perceptions as to the value of property and work arising from an indigenous economic system, impact on shame and conscience differently and in accordance with what they regard as social priorities. It can be seen therefore that gossip, scandal and shame may have different cultural uses, in that these phenomena are reflected in value structures that have different cultural origins and this impacts on conscience sometimes promoting rather than deterring “delinquency”. This brief investigation of gossip and scandal foregrounds the extent to which a consequentialist republican criminology reifies concepts to produce ideal targets thereby minimalising any contradictory evidence found in ethnographic facts.

SHAMING THEORY AND HISTORY

Braithwaite⁵¹ also suggests that: “If a theory can jump the hurdle of making sense of, and not being refuted by, what we can observe of existing societies, then we should confront it with what we can read of past societies.” Through historical research he believes it can be demonstrated that in the Victorian era throughout the English speaking world there was a downturn in crime rates, attributable to the rise of institutions designed to instill moral character and self control such as Sunday Schools, etc.⁵² The Victorian era was marked not only by the attempt to structure moral values, but also by more rehabilitative attitudes to the criminal which sought to reintegrate rather than exclude through religious and charitable institutions seeking to encourage repentance:

The rehabilitative criminal justice policies developed in the Victorian era perhaps were on balance more effective and humane than the retributive and stigmatising policies they replaced, but this is not the point. The theory of reintegrative shaming would interpret the rise of the rehabilitative ideal as a symptom of a cultural transformation that saw Victorian society refine the power of shaming while increasingly rejecting the principle of casting out. According to the theory, the cultural transformation would be the nub of Victorian success in crime control. Similarly, the decline in the rehabilitative ideal in the West ... would not be interpreted as a cause of our growing crime rates, but as a symptom of our disenchantment with these Victorian values ...⁵³

49 Id at 311.

50 Above n14 at 75.

51 Above n14 at 111.

52 Id at 113.

53 Id at 116.

The historicism in this view avoids issues such as the fact that problems amongst the Makah can be attributable to Sunday School addicts who have marginalised the values of another culture in attempting to impart an ethnocentric Victorian value structure; that crime rates have risen post-World War II because new behaviours and acts have been made criminal; or because the over-representation of indigenous peoples in criminal justice systems is an indication of the extent to which rehabilitative policies have assumed the position of the value structure of the dominant culture thus reinforcing marginalisation.

Moreover shame is a cultural affect, and as he states elsewhere: "What we think of today as guilt is, I think rightly, conceived as shame where the original sources of shame in social interaction have been forgotten or suppressed ...".⁵⁴ Also, "Reintegrative shaming ... might shame an evil deed, but the offender is cast as a respected person rather than an evil one. Even the shaming of the deed is finite in duration, terminated by ceremonies of forgiveness-apology-repentance".⁵⁵

Shame is a cultural affect, and its origin in cultures relative to other values in a heterogeneous social structure must be fully investigated. It is not enough to merely examine the development of shame in Eurocentric cultures as a corollary to changes in class structures in the rise of capitalism,⁵⁶ or as a function of religious institutions. Signifiers such as guilt, shame, forgiveness, remorse, repentance are all imbued with theological significations and should be deconstructed. Nor is it enough to examine the function of shame in an homogeneous ethnocentric culture such as Japan, so as to provide a parallel example to Western capitalist democracies. The function of shame must also be examined in any relevant indigenous culture which might exist within a dominant culture in terms of prior and present modes of productions, theological intervention, etc, thus resulting in interplays between values. This must be included in the heuristic of republican criminology.

FROM SHAMING THEORY TO THE REPUBLICAN MYTHOLOGY

Examination of the phenomena of gossip, scandal and shame amongst the Makah, demonstrates the extent to which such phenomena are distorted by the power relations between cultures and within a culture. That republican theory is predicated on the efficacy of shame to promote reintegration is not enough as that phenomenon remains culturally loaded with a variety of meanings which are distorted by those power relations which create the other. By referring to the Makah, the effect of the rehabilitative ideals of the Victorian era which Braithwaite espouses as providing a model for reintegration could be seen in the suppression of the native culture. Likewise, that savage repression has occurred in Australia can be seen in the case study included above, which challenges the reintegrative model as the possibility of reconciliation is denied because of prior history and the politics of freedom in a heterogeneous society.

54 Braithwaite, J, "Shame and Modernity" (1993) 33/1 *Brit J Crim* 1-18 at 7.

55 Above n27 at 7.

56 Cf Braithwaite, above n54.

Republicanism explains reintegration in terms of an existential desire for community,⁵⁷ however in a heterogeneous society the question to be asked is which community, and is this really the role of desire in history. As will be seen in the next sections desire for community in republicanism, in the definition of dominion is explained by recourse to ancient history and mythology. That dominion is defined by a history, which from the view of the present assumes the form of mythology, is a mythology that competes with that used to define asocial negative liberty, and is a history and mythology which excludes that of indigenous peoples.

REPUBLICAN ETHNOCENTRISM

FREEDOM TO BE OUTSIDE THE CITY

The vision of the republic is defined in terms of social negative liberty, where freedom of the city is recognised in the rights of dominion of members of the society to participate through franchisement, in contrast to asocial negative liberty where the fictive original position is to be free through being left alone.⁵⁸ Braithwaite states that: "To fully enjoy liberty, you must have equality of liberty prospects with other persons".⁵⁹ However, to enjoy the full benefits of liberty one must first of all prefer to be franchised within the city. Braithwaite and Pettit⁶⁰ suggest that, although bearers of dominion do not have the same actual prospects for liberty, the Athens-Sparta principle provides this preference because a society which secures greater equality of liberty prospects through less taxation is the ideal, as well as because in a society where people feel safe, subjective erosion of concepts such as dominion is less likely to occur.

These definitional conceptions, informed by classical antecedents such as the "Roman notion of *libertas*",⁶¹ and the Athens-Sparta principle, when used to theorise about an ideal city-state are ethnocentric and ignore historical realities. Ancient city-states such as Athens were notoriously ethnocentric, treating those external to the polis as barbarians, and as a source of slaves captured in war. City-states did not develop from theoretical conceptions, but from changing forces in the historical mode of production and related decision making. The relevant communities for the purposes of republican criminology are stipulated as being "the Western-style democracies of the modern world".⁶² In some Western-style democracies there exist indigenous communities whose traditions are not informed by these definitional conceptions, and yet republican criminology does not address issues such as the liberty prospects of those peoples who are/or wish to remain external to the polis, or whether those indigenous communities wish to be part of the reintegrative agenda,⁶³ as they perceive the assumptions generated by these ideals as still part of the dominant culture which is at war with them.

57 Personal communication with David Fraser, Faculty of Law, University of Sydney.

58 Above n5 at 55–71.

59 Braithwaite, above n27 at 4.

60 Above n5 at 66–7.

61 Id at 66.

62 Id at 42.

63 Personal communication with Mark Findlay, Faculty of Law, University of Sydney.

This is of relevance when consideration is given to the importance of cultural homogeneity in shaming theory,⁶⁴ and therefore to republican criminology. Ethnocentricity is fundamental to republican criminology as the site of its application, the stipulated “ideal” Western-style democracy where the general theory of shaming has evolved, and where reintegrative shaming in an “ideal city-state” can take place, is culturally homogeneous. If values such as dominion are undermined by cross-cultural dissensus, then a social movement originating from an indigenous people aimed at challenging the jurisdiction of a criminal justice system would lead to subjective erosion of concepts such as dominion, as ensuring safety and social harmony in the broader community at the expense of the liberty of those who challenge jurisdiction would result in the diminution of negative liberty.

Fortunately for republican criminology it is consequentialist, so the problem of whether real indigenous minorities do contribute negatively to communitarian consensus in actual heterogeneous societies does not have to be addressed, as consequentialist theories do not have to mention which relevant culturally homogeneous communities in Western-style democracies exist to implement or be anything more than a mere republican idea.

FORMALISING SHAME THROUGH FORMATIVE INSTITUTIONS

Embedded in the design of the republican idea is a recognition of the role which the formative institution plays in society in reinforcing values such as liberty. Formative institutions are designed “to shape ... individuals ... inducing a more-or-less permanent shift in their behavioural dispositions or deliberative habits”.⁶⁵ Republican criminology distinguishes between coercive institutions based on legal definitions of behaviour (prescribing penalties or rewards), and socialising institutions which “seek to inculcate virtuous habits of deliberation by a combination of measures: by bringing home to people the admirable character of such deliberation, creating in them an appropriate sense of right and wrong; and by ensuring that if agents deliberate and act in a non-virtuous way, there is a good chance that they will be exposed by their peers and subjected to public disapproval”.⁶⁶ Republican criminology is in favour of socialising institutions, as opposed to coercive institutions. If for example shame for an act is considered when agents make deliberative choices in regard to actions they may take that effect the dominion of others, and it is developed through a formative socialising institution, then the targets outlined in the preceding quotation would be met. Braithwaite and Pettit⁶⁷ state moreover that: “Most

64 Braithwaite in *Crime, Shame and Reintegration* (above n14 at 96) states that: “Cultural heterogeneity only undermines shaming over values which are the subject of cross-cultural consensus” and that “Whether or not the theory would be better if cultural homogeneity were posited as a condition conducive to reintegrative shaming is an empirical question. It is not a major modification to the theory to add cultural homogeneity as an extra variable to the top right corner of Figure 1, p99” (at 96-97). Interestingly, despite there only being two variables, urbanization and residential mobility as factors contributing negatively to communitarianism, represented on that part of the table (at 99). in his description of the table he says: “the three at the top right are characteristics of societies” (at 98). Thus cultural homogeneity must be viewed as being integral to this theory despite that fact that it is conveniently glossed over.

65 Above n5 at 81.

66 Id at 82.

of us refrain from fraud and theft and murder, not because we calculate that they are against our self-interest, but because they are unthinkable to us. Socialisation has developed in us a powerful sense of the evil of these crimes, and an equally powerful sense of the shame attendant on being found to contemplate them. It has influenced us to the point where calculation over such crimes is put off our deliberative agenda.”

Shaming is central to republican criminology, and the explanation it offers to the causes of crime. Braithwaite asserts in *Crime, Shame and Reintegration* that “Societies with low crime rates are those that shame potently and judiciously”.⁶⁸ Two types of shaming are distinguished in his theory: reintegrative shaming and stigmatising shaming. Recently he has enunciated the characteristics of each as follows: “Reintegrative shaming is disapproval extended while a relationship of respect is sustained with the offender. Stigmatization is disrespectful, humiliating shaming where degradation ceremonies are never terminated by gestures of reacceptance of the offender. The offender is branded an evil person and cast out in a permanent open ended way. Reintegrative shaming, in contrast, might shame an evil deed, but the offender is cast as a respected person rather than an evil one. Even the shaming of the deed is finite in duration, terminated by ceremonies of forgiveness-apology-repentance”.⁶⁹

According to republican criminology formative institutions should be those which create a potent sense of shame by removing impulses to crime off an agents deliberative agenda, and should foster rehabilitative tendencies within the community through reintegrative ideals that look to the Victorian era, rather than through a stigmatising process linked to retributivism. If formative institutions were socialising rather than coercive, rehabilitative and reintegrative rather than retributive and stigmatising, would there be any freedom of choice or merely formalised shame? Retributivism defends coercion only on the grounds that it is justified “because it prevents invasions against freedom. Freedom itself is the only value which can be used to limit freedom, for the use of any other value (eg utility) would ultimately undermine the ultimate status of freedom”.⁷⁰ Murphy explicates the Kantian defence of coercion as being only possible if rational freedom is expanded, and thus punishment can only be justified if prevention of harm to others is grounded in principles of justice not in social utility.⁷¹ Principles of justice give legal authority to an institution to render punishments based on law, which is a normative order functioning as a “coercive system of social control”.⁷² Justly constituted authority eliminates the social harm caused by vigilante groups, because although there might be a natural need to punish there is not a natural right.⁷³ The need for coercion arises because “human beings are not fully rational beings; they are, rather creatures of limited knowledge and self-restraint”.⁷⁴ Rawls⁷⁵ appears to indicate

67 Id at 82.

68 Above n14 at 1.

69 Above n27 at 7.

70 Above n1 at 109.

71 Id at 112.

72 At 112.

73 At 125.

74 At 123.

75 Rawls, J, “The Right and the Good Contrasted”, in Sandel, M (ed), *Liberalism and Its Critics* (1984) at

deliberative rationality need not be considered in the establishment of formative institutions, also, in regard to rational choice, as once the principles of justice have been chosen, to force unanimity on standards would contradict the right to freedom of choice in just institutions. Whilst republicanism accepts the need for coercion, and one assumes the rational defence of coercion, it limits choice in conduct through the creation of normative standards in socialising institutions and thus undermines freedom of choice in the dominion of citizens. It is not surprising then that republicanism defines liberty in terms of equality prospects, rather than in terms of actual equality.

An irony lost on republican criminology is that values such as shame and conscience are culturally relative, and that the model of reintegrative shaming can only serve to limit the choices of indigenous peoples, if the values incorporated into the jurisdiction of the criminal justice system only reflect the assumptions of the dominant culture in regard to liberty, dominion, socialisation and consensus. Lost on republican criminology is the fact that not all cultures hold the same values towards property for example, and that what is rational in one culture may be criminal to the dominant culture, so socialising institutions may have the effect of suppressing culture in the way Victorian ideals did. The socialising institutions which are envisaged by republicanism may just be more of the same attempts at brainwashing to turn indigenous peoples into Anglo-Saxons if viewed from the subjective position of an indigenous person such as Archie Glass. Thus, if the dominant (dominant) culture was guided by republicanism, would the formative institutions of the city-state in encouraging reintegration by the community cause social harm to indigenous minorities by shaming based on a different set of values, sentencing on the grounds of utility to protect its concepts from subjective erosion, or would the formative institutions convey the sense of doubt pervasive in that society towards cross-cultural values lacking consensus and hold justice in abeyance instead?

CONCLUSION

The authors of *Not Just Deserts* conclude that: "Implementation of our theory would reduce class-based inequality of punishment in two ways: in a major way, by showing mercy to more blue-collar criminals; and in a minor way by punishing some types of white-collar crime which currently enjoy virtual immunity from the criminal law. Although it is not designed to conquer the problem of class inequality, its application would reduce class-based inequality in punishment. Retributivism, which sets its sights on injustice, worsens class injustice before the law".⁷⁶

If criminality is explained in historical materialism as arising out of the desire for recognition by human beings as expressed in fighting and work, and resulting in mastery and slavery throughout the various modes of production,⁷⁷ then at the end of history in the better world where republican criminology holds dominion, class inequalities in punishment would have been reduced in the dominant capitalist economic culture

48–49.

76 Above n5 at 200.

77 Cf Kojève, A, *Introduction to the Reading of Hegel*, assembled R Queneau, ed A Bloom, trans J H Nicholls Jr (1980).

without recourse to a critique of capitalism or of economic desire across cultures. Republican criminology is predicated on the presence of capitalism in society, and yet fails to acknowledge that capitalism has supplanted indigenous economies based on totemic rituals and myths, and customary law. In doing so, it is prone to ethnocentrism and historicism as demonstrated in this paper.

Retributivism sanctions the existing rules of society, and in abstracting free will, "one among the many qualities of man for man himself",⁷⁸ it defends punishment as the just response to the choice taken to transgress those sanctions. However, if the existing rules are inequitable, then punishment itself is unjust if behaviour is determined by other factors including the past. Braithwaite does not critique the basis of punishment in capitalism, but instead the phenomenon of punishment (rehabilitation, reintegration) on utilitarian grounds replacing free will as a human quality grounded in liberty, with dominion as a social quality that offers prospects of liberty. In abstracting dominion as a quality of social life, the prospects for which are grounded in the existing rules of modernity it promotes an equivocation in liberty. Dominion is not a univocal concept. Existing rules of a society may hold dominion over the individual, and if the society is not culturally homogeneous, cross-cultural consensus in regard to both the basis of punishment and the phenomenon of punishment will no doubt be decided in terms of the mastery of the dominant culture over the indigenous culture as a satisfaction of a desire that it be recognised. Whilst there is doubt over the values of justice, then justice is held in abeyance, as the actual prospects for liberty for dominion for indigenous peoples within a capitalist society are not only limited by the past, but are limited by the ethnocentrism and historicism inherent in republican theory. It is therefore in the poverty of punishment that justice is held in abeyance for those whom inequality is not merely economic but also cultural, as neither neo-classical retributivism or republicanism is addressed to indigenous minorities.⁷⁹

78 Marx, K, "Punishment and Society", in Ezorsky (ed), above n4 at 358.

79 Braithwaite would no doubt argue that problems such as these could be added to the political agenda of republican criminology. However, "A consequential principle will say merely that such-and-such is (or is not) to be brought about: it leaves no mention of who is (or is not) to bring it about" (Mackie, above n36 at 157). For example, who is capable of using the "idea" of shame reintegratively? Braithwaite ("The Political Agenda of Republican Criminology", paper presented to the British Society of Criminology, York, England, 27 July 1991) suggests progressive social movements would be "ideal" too [sic]: yet paradoxically the real progressive social movements hold different positions to the expert criminologist on the manner in which men who abuse their wives, or white-collar criminals should be dealt with, or on questions of jurisdiction in regard to customary law. Progressive social movements are needed to restore community involvement in crime control, since in western industrialised societies professional involvement in the study of crime does not foster a social climate conducive to community control of crime through mechanisms of shaming. Expert solutions produce an attitude in the community that it is better to leave such problems as crime control to the experts (Braithwaite, above n4 at 6). The advantage of the consequentialist position is that, even though Braithwaite postulates that crime is explained by the habit of the community of leaving it to the expert criminologist to proffer solutions, and he thus appears to be in contradiction with himself in regard to progressive social movements by discounting their solutions in favour of his own expert wisdom; it is the idea that counts, not who is or is not to bring it about.