## HOW ARGUMENTATION THEORY CAN HELP RESTORATIVE PRACTICES MATURE

### INTRODUCTION

Restorative justice practices as rediscovered, redefined, and revamped for modern culture are in an early phase of development.[1] Modern argumentation theory and argumentation studies can help strengthen and develop restorative practices in many ways.[2] While I doubt I can clearly and substantially describe even a few of these, my ultimate goal with this paper is simply to start drawing these fields together. I am sure that each field will have a synergetic effect on the other.

At the heart of any restorative justice practice is an argument: an argument that an offender has harmed a victim and the wrongs done should be put right.[3] Argumentation theory reveals the essential dynamics of arguments and provides a nuanced terminology for understanding and evaluating arguments. By its very nature, therefore, it provides a means of greater understanding for and appreciation of the dynamics of a restorative justice practice.

Argumentation theory encompasses logic and rhetoric and dialectic, scholarly disciplines that have existed since antiquity. Modern argumentation theory provides a matrix that is a synthesis and refinement of the historical practices of logicians and rhetoricians. In short, it provides for restorative justice practices a broader and richer field to take deeper root in and therewith to flourish.

Restorative justice practices provide the means, the way, in which the hopes and aspirations of argumentation theorists and scholars can be actualized.[4] Restorative practices embody a form and culture of justice in which civil argumentation itself creates law, not statutory or case law but law for the impacted parties. At the heart of restorative justice and modern argumentation theory is an awareness that the real audience and the real people who are being impacted in arguments and by justice are of paramount importance – that they are critical in determining the values that should govern the outcomes of any argument and the justice rendered in resolving any conflict. Restorative practices provide a forum for their voices and their full concerns to be heard.

I believe that the more exposure restorative justice practitioners have to the substance of argumentation, and to its great depths and heights, the more confident and able they will be in facilitating conflicts – whether the conflicts involve multi-

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[1] I recognize that restorative practices are, in many ways, of ancient origin and have been practiced continually for centuries by some indigenous peoples.

[2] When I refer to "argumentation theory", I will be using that term to include all the academic studies that help make up the theory.

[3] Zehr, Howard. *The Little Book of Restorative Justice*. Intercourse, PA: Good Books, 2002. 19. Print.

[4] A wonderful article portraying such hopes and aspirations is in the online journal *Informal Logic*: "What Does an Argument Culture Look Like?" by David Zarefsky, Vol 29, No 3 (2009).

million dollar disputes or community, regional, national, or international disputes or the intimate disputes in our schools and homes. Without facilitators educated in the root disciplines of argumentation – in logic, rhetoric, and dialectic – I don't see how the movement can aspire to handle the kinds of conflicts that are peacefully resolved by our courts today. And, for the good of us all, of society at large, I think restorative justice practitioners should so aspire to handle such disputes. Too often our courts achieve resolutions not through persuasion or even actual trials but through the grinding down of parties through costly, eristic procedural mazes that do nothing to dignify the parties or, in my opinion, even the lawyers.[5] But, as I shall discuss later in this paper, the legal system will not give up its turf without a fight. Argumentation theory most certainly can be of great value to the restorative justice advocates who will need to engage in that fight, that national and global debate, if restorative practices are to develop widely.

**Restorative Justice Practices Are In An Early State Of Development**

Before explaining in more detail how argumentation theory can benefit modern restorative justice practices, I would like to point out that the International Institute of Restorative Practices ("IIRP") acknowledges that these practices are in an early state of development. The IIRP states on one of the opening pages of its website that restorative practices are an "emerging field" and that it "has been developing a comprehensive framework for practice and theory."[6]

The disclaimer that prefaces the "Real Justice" Conferencing Script the IIRP publishes and promotes for use in resolving conflicts reads as follows:

> This manual is a procedural guide to facilitating Real Justice conferences. It focuses on *lesser incidents of wrongdoing*, the vast majority of offenses. This manual will not, by itself, prepare readers to facilitate a conference for serious offenses involving severe trauma for victims.

That the Real Justice Script is by its own admission good for "lesser incidents of wrongdoing" and is not suitable for "offenses involving severe trauma for victims" is evidence of how this restorative practice is itself in an early developmental stage.

However, let me quickly add that I am aware of further development in the use of restorative circles processes in dealing with events involving serious trauma since the publication of the Script. The IIRP offers a DVD entitled "Conferencing for Serious Offenses: An Exploration" and another entitled "Facing the Demons," which deal with sexual abuse and a response to murder. I have not watched either of these DVDs. I surmise that other materials are now available on the use of restorative

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[5] An estimated fewer than 2% of federal civil lawsuits go to trial. See Bronsteen, John, et al. "Hedonic Adaptation and the Settlement of Civil Lawsuits." 108 Colum. L. Rev. 1516 (2008): 1519. Print.

[6] The International Institute of Restorative Practices, 2009. "What is Restorative Practices." Web. 13 October 2009.

practices for dealing with serious offenses. It is my general understanding, however, that the restorative justice movement in concert with the legal system is developing slowly and prudently in dealing with criminal offenses involving serious trauma and serious wrongdoing. But my focus in this paper is not in how people who have been harmed by crime or serious wrongdoing can recover to the extent that they can face how they have been harmed but in that aspect of restorative practices that deals with how any party arrives at a restorative agreement through discussion – through *argumentation*, in other words – if possible, with those by whom they have been harmed.

## HOW ARGUMENTATION STUDIES CAN HELP RESTORATIVE JUSTICE PRACTICES DEVELOP

How then must restorative practices develop so that they can focus on bringing restoration to "serious" incidents of wrongdoing? For that matter, how can they continue to improve so as to yield even better agreements at all times? Argumentation theory encompasses the dynamics and principles that have been at work in the processes that have resulted in civil justice agreements and conflict resolutions on the basis of persuasion and reason since antiquity. Argumentation theory offers a rational and matrix of understanding that can strengthen restorative practices so that they are prepared to handle the most intense conflicts in a restorative justice framework. How is this so?

### Argumentation Theory: An Overview

To begin my overview, I will quote Professor David Zarefsky of Northwestern University on the potential relationship of argumentation theory and restorative justice:

> Since argumentation theory is meant to be applicable to any situation in which parties want to resolve a disagreement by presenting and evaluating persuasive reasons for the claims they make, I certainly think it would be applicable to restorative justice facilitators. Similarly, it has been employed in the study of mediation, bargaining, adjudication, and other decision-making processes. [7]

Here, in a nutshell, is what argumentation theory involves: what happens when "parties want to resolve a disagreement by presenting and evaluating persuasive reasons for the claims they make." Argumentation theory identifies what happens, the "rules of the game," on a fundamental level during an argument – when parties in a controversy argue in the hope of resolving the controversy. Thus, more

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[7] Email correspondence with the author of September 15, 2009. Professor Zarefsky is the lecturer of a Teaching Company of America course entitled, *Argumentation: The Study of Effective Reasoning* and the article footnoted earlier in this paper, "What Does an Argumentation Culture Look Like?"

specifically, it explains the "rules of the game" when offenders and victims participate in the 7th phase of the Real Justice Conferencing Script ["Script"] – when "the participants discuss what should be in the final agreement."

**Argumentation Theory and Restorative Justice: A Snapshot Look at the Current State of the Union**

Are there really "rules" to the discussion phase of a restorative practice? Perhaps not if we look to the Script for an answer to that question. The Script instructs the facilitator broadly to "Solicit comments from the participants," to "ask the offender/s to respond to each suggestion before the group moves to the next suggestion, asking 'What do you think about that?" to "determine that the offender/s agree/s before moving on," to "Allow for negotiation," and to "clarify" and write down each item of the agreement. For the most part, therefore, according to the Script, a facilitator needs to passively observe the discussion without interfering, except to the extent he or she confirms that it is okay to move along. Is that it? Is this really all a facilitator needs to be prepared to do in the restorative agreement phase of a conference?

Chris Dinnan, an experienced facilitator of Real Justice conferences in Vermont and the head of one of its Probation and Parole Offices, told me it has been his overwhelming experience in facilitating 50 or more conferences that the parties in a conference are able to arrive at an agreement without the more active role that is typically employed in mediation, but there are times that some more active approach is "necessary … to take out of the toolbox." If this is the case with Real Justice conferences, which are appropriate for "lesser incidents of wrongdoing," I think it is safe to surmise that a facilitator in conferences concerning greater incidents of wrongdoing will need to be even more alert and ready to actively participate in the "reaching an agreement" phase, perhaps like a referee who is impartial to the outcome but whose duty is to safeguard the integrity of the process.[8] In my own limited experience as a facilitator, I have had to remind participants to focus on the questions and issues currently being discussed. I have cut short discussions that could have been perceived as threatening to one of the parties, and I have called for timeouts to allow parties to parley amongst themselves so as to present more specific accounts of their needs to offenders.

Such actions and interference were well within my jurisdiction as a facilitator, I believe, and argumentation theory helps explain why. But I have also informed victims of the principles of contract law and that their time spent in dealing with any harm done can be included when they tally up the financial harm inflicted upon

[8] Facilitators are trained to "just follow the Script." I have twice been trained as a Real Justice facilitator to do so in 2003 and again in 2007. But how does one "follow the Script" if an offender or victim does not agree to a suggestion? One is left to interpret the cryptic guidance "Allow for negotiation" without any clue as to what constitutes fair or foul in negotiations.

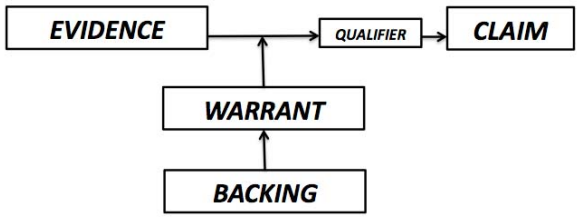
them. Did I cross a line of what a neutral facilitator is supposed to do when I did so? I might have, but given the context of that particular conference I think I did the right thing. Again, I believe argumentation theory can help identify in a systematic manner the critical issues that were at stake when I decided to share such information and can do so in a manner facilitators can learn from for future conferences.

**Argumentation Theory Model**

Argumentation theory today is to a great extent based on an argument model that was developed by an English logician and philosopher named Stephen Toulmin. Toulmin presented the model in a book called *The Uses of Argument*, first published in 1958. He created the model because he felt that logic had gotten too abstract to be of much use with real world ethical conflicts. The model has since been dubbed a model of *informal logic*.

The model Toulmin proposed consists of the arguer's "claim," an assertion of what he thinks is true, the "evidence" (also called "grounds" and "data") upon which his claim is asserted, and the "warrant," the reasoning that allows the arguer to infer the claim from the evidence. These three main features of the model are supported and qualified by two other aspects, aptly named the "backing" and the "qualifier." The *backing* consists of generalizations making explicit the body of experience relied on to establish the trustworthiness of the *warrant*. The *qualifier* makes explicit the relative strength of the *claim*, how vulnerable it is to rebuttal.[9]

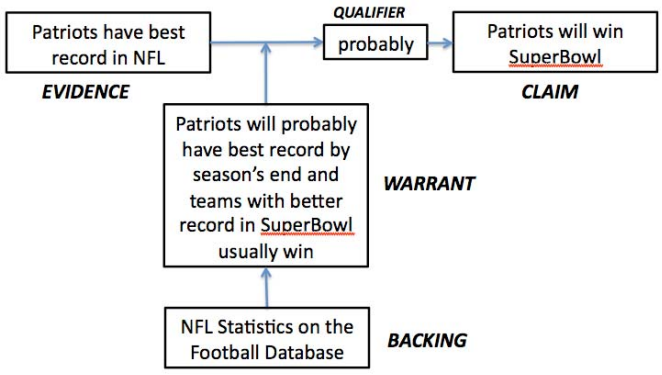
Here is how the model can be simply diagrammed:




How does this work in an argument? I make a simple claim. Let's say I claim the New England Patriots are the best bet to win the Super Bowl this year. This claim made in 2009 in Pennsylvania, the home state of the Pittsburgh Steelers and the Philadelphia Eagles, may well be challenged by a fan of either of those teams. If it is, then I'll need to defend my claim by pointing to the evidence for my claim. I say, then, "Look at their record – they have the best record in the NFL." Now if this is true but, nonetheless, does not persuade my audience to agree with me, I might be asked for more evidence of my claim or to explain how the current best record has

[9] The best explanation of this model and how it functions that I have found is in *An Introduction to Reasoning*, 2nd Ed. by Stephen Toulmin, Richard Rieke and Allan Janik and published by Macmillan Publishing Co., New York, 1984.

any bearing on the Super Bowl outcome, in other words, to explain or reveal how the evidence warrants the claim. "So what?" he or she may say. "It's early in the season and the teams they've played so far have been pretty weak." I explain my reasoning by making explicit my warrant – my license, so to speak, that allows me to infer my claim from the evidence. "Since the Patriots have the best record now, they'll probably have the best record at the end of the season, and the teams with better regular season's records than their opponents in the Super Bowl have won the game much more often than not." In other words, I am telling my audience that my claim is warranted on the basis of the historical record.[10] A diagram of my argument unit might look like this:




My audience may not agree that my warrant allows me to make my claim or may even doubt the authenticity of my backing, but by making my thinking about my evidence clear I have defended my argument. If the argument is going to progress further towards a resolution between us, then the audience will either need to challenge more explicitly the substance of my warrant or present a counter-claim to my argument. My audience may, in deed, be able to draw a different yet as rational a generalization from the same set of statistics I relied on to support my warrant.[11] Then we may have to agree to disagree or bring into the argument some new evidence that warrants my original claim or makes me want to revise it or set it aside completely.

I hope this brief example explains with some clarity how the Toulmin model identifies the basic unit of a simple argument. In the Toulmin model, from the evidence and on the basis of the warrant an arguer infers a claim. The soundness of the claim in any unit of argument will depend on the soundness of the evidence and

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[10] Argumentation theory reveals basic reasoning patterns of warrants, for example, ones based on comparison, on cause, on analogies, on signs, and commonplace generalizations. A good overview of these patterns is in *Argumentation and Critical Decision Making,* 5th Edition, by Rieke and Sllars.

[11] For example, although the team with the better season record in the regular season has actually won the Super Bowl far more often than not in the past 40 years (25 of 33 times, with teams having identical regular season records 7 times), in the past 11 years the better record team has only won less than 50% of the time. And in the past 4 years, the team with the worse record has won 3 times. See NFL.com. "History." Web. 13 October 2009.

the soundness of the warrant.

**Audience In Argumentation Theory**

One could say it s*ounds* like I am relying on the self-evidentiary qualities of one word to explain this model, doesn't it – "soundness"? That's true. Argumentation theory has its limits in how clearly it can depict the core of an argument – and argumentation scholars continue to argue about what constitutes those limits.[12] But these limits bring me to the other great development in the modern field of argumentation theory, a critical appreciation of the role of the audience in any argument.

Whatever is "sound" in an argument, according to argumentation theory, as I understand it –whatever is true, good, and reliable at the core of a good, true, and reliable argument – is relative to the audience whom the arguer hopes to persuade. An argument's success, in other words, ultimately hinges on how it "sounds" to the audience. And how it "sounds" will depend to some degree on the shared values and perspectives and reasoning patterns that distinguish the audience.

Does argumentation theory propose that there are no universal answers or laws or truths from which arguers can deduce and present infallible answers? That question, according to my understanding, is *not* the question. The question is instead how can we reason and argue effectively in the context of being situated, inevitably, within an audience when faced with a conflict that can be resolved, perhaps, with competing claims *and* which the audience wants resolved?

A critical appreciation of the role of audience in argumentation was championed and promulgated by one of the other great figures in modern argumentation studies, Chaim Perelman.[13] Perelman's foundational theory in his book *The New Rhetoric*, coincidentally also published in 1958 (the same year of Toulmin's book), is that every argument has an audience and that the success of an argument hinges on the audience's adherence: "It is evident that the aim of oratory, the adherence of the

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[12] So I have witnessed in perusing and reading articles in the archives of the online journal *Informal Logic*.

[13] Perelman was a Jewish philosopher in Belgium who experienced the brutality of totalitarianism. First, he was forced out of his position as professor in Brussels because he was Jewish and then was in hiding from 1943 until the liberation of Belgium in 1944. He returned to this teaching post in 1945 and published a work titled *De la justice* that he completed while in hiding from the Nazis. But he published it with great reservations because his conclusion based on the rigorous methodology of logical positivism was that justice had no basis in reason, with reason as reason understood by contemplative philosophers – in other words philosophers who were concerned with universal and not the uncertain or relative truths that would concern a man of action. Frank, David A. and Bolduc, Michelle K. "Chaim Perelman's 'First Philosophies and Regressive Philosophy': Commentary and Translation." *Philosophy and Rhetoric*, Vol. 36, No. 3, 2003, 179. Web. 6 October 2009.

minds addressed, is that of all argumentation."[14] Perelman argues that an audience adheres to an argument on account of shared values.[15] He also clarified the importance of persuasion in comparison to logical deductions, "To the person concerned with results *persuading* surpasses *convincing.*"[16] Just because someone can be convinced of the validity and soundness of an argument that calls for a specific action, for example, doesn't mean that that someone will also be persuaded to take the specific action called for.

Perelman's work and my further readings in argumentation theory, ancient and modern, have led me to appreciate that the art of persuasion entails a commitment and a passion on the part of the arguer – an investment of heart and mind and body, so to speak. Such an investment itself provides surety that those who allow themselves to be persuaded won't be drawn into a vacuum, devoid of human intercourse. The dynamic of argumentation with real audiences and with real conflicts, therefore, requires more than just cold, absolute logic. Effective argumentation requires a fundamental identification with an audience on the part of the speaker and with the substance of his own argument. Think, for example, of Martin Luther King's I Have A Dream speech – a supreme example, in my opinion, of the union of heart and mind and body *and* audience.

In a recent article published in the online journal *Informal Logic*, Professor Zarefsky identifies the rhetorical dynamics of argumentation succinctly:

> [A]rguers both adapt their ideas so that they will be palatable to the audience and also try to move the audience to acceptance of their ideas. In the process, both audience and ideas are changed somehow, and to that degree a new social world is created.

Modern argumentation theory, thus, at its core consists of the Toulmin model that has been dubbed a model of *informal* logic situated in a sort of force field of audience awareness. Argumentation theory stakes its domain outside of the aspects of reasoning, the formal logic, relative to absolute certainty and embraces the aspects of reasoning relative to adherence. If something can be demonstrated to be true with absolute certainty, such as the Pythagorean theorem, then there is simply no place for argumentation.

> For the very reason that argumentation aims at justifying choices, it cannot provide justifications that would tend to show that there is not choice, but that only one solution is open to those examining the problem.[17]

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[14] Perelman, Chaim and Olbrechts-Tyteca, L. *The New Rhetoric: A Treatise on Argumentation*. Notre Dame, Indiana: University of Notre Dame Press, 2008. 6. Print.

[15] Perelman, Chaim. 13-62. "Part One: The Framework of Argumentation."

[16] Perelman, Chaim. 27.

[17] Perelman, 62.

**Argumentation Theory and Restorative Practices: Striking Parallels, Important Benefits**

Modern argumentation theory is particularly well-suited to strengthen restorative justice practices. The parallels between modern argumentation theory and restorative justice are striking. Both fields reject a strictly scientific approach to resolution. Howard Zehr makes this clear for restorative justice in *Changing Lenses* in the chapter "Justice as Paradigm."[18] Both fields also renounce coercion as a means of resolution. Restorative justice advocates often distinguish their field by referring to traditional, legal justice as "punitive" justice. Whereas with argumentation, according to Perelman:

> "The use of argumentation implies that one has renounced resorting to force alone, that value is attached to gaining the adherence of one's interlocutor by means of reasoned persuasion, and that one is not regarding him as an object, but appealing to his free judgment. Recourse to argumentation assumes a community of minds, which, while it lasts, excludes the use of violence."[19]

In argumentation theory the strength of an argument, whether legal or otherwise, is determined within the context of its audience; similarly, the strength of a resolution in a restorative justice practice is determined within the context of its audience, those impacted by the harm that triggered the restorative justice process in the first place. In argumentation theory, there is no need to have an argument automatically adhere to the dictates of formal logic; similarly, in a restorative justice practice there is no need to adjust restoration agreements to precedents in case law. Both are grounded in present realities and present needs. The effectiveness of a restorative practice and the effectiveness of a particular argument in modern argumentation theory will always be *informed* – truly formed – by the audience impacted.

Argumentation theory, thus, predictably offers important insights respecting the arguments that take place as part of a restorative practice. Here is an example. Perelman observes that parties to a controversy would be hostile if a "stranger to a debate should dare to interfere in something that is none of his business" and that, therefore, "interference in a controversy whose outcome will affect a specific group may be made only by one who is a member of, or closely bound up with, the group in question."[20] This insight itself provides a basis for having the persons impacted by the harm to be the foremost people *interfering* in the restoration process and not judges or prosecutors or defense attorneys – yet it also implies that a facilitator may need to have some connection to the group, as well, some reason why the

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[18] Zehr, Howard. Changing Lenses. Scottsdale , PA: Herald Press, 2005. 83-94. Print.

[19] *Perelman, The New Rhetoric, 55*.

[20] Perelman, 61

controversy is "his business" even when he is impartial to the outcome.[21]

Argumentation theory, or more accurately the academic studies included in the theory, will also provide more than just insights for restorative justice practitioners. With a basic knowledge of argumentation, facilitators will become alert to fallacies, patterns of illogical reasoning that have bedeviled audiences and arguments for ages. Fallacies often have modern and Latin names and various writers schematize them in different ways. Here are a few worth noting now in the context of restorative practices. One is the *ad hominem* fallacy in which one attacks another's argument on the basis of the arguer's personal qualities or facts known about him. Example: "Why should I agree to do what Frank says is good for me? He just got out of prison on parole." Well, Frank's suggestion may have value in itself. Another fallacy is the *false dilemma* when only two choices are presented as if the situation can be reduced to an either/or question. Example: "Either the young men repair the damage done to the cabin or they pay me the cost of fixing it, including payment for my time and labor." Maybe none of the young men have any skill with carpentry? Maybe the owner intends to redo the whole cabin and create greater costs? Maybe there are other ways in which the young men can contribute their time and labor and energy in a restorative fashion. Another fallacy I am certain no restorative justice agreement discussion is immune to is the *red herring* fallacy when a related but tangential issue is introduced that confuses the argument's issues. "Unless you are all oblivious to the news, I would like to remind everyone that there is a major debate going on in our country as to the wisdom of pursuing the so-called 'War on Drugs.'" Okay, so should the parties not try helping someone deal with a drug use problem until the debate is resolved? How, specifically, is mentioning the so-called War on Drugs relevant to the needs of those present?

I have mentioned just three of a host of fallacies that exist, many which are less obvious but which may be no less damaging or obstructive to agreement discussions in the course of a restorative practice. I think a facilitator qualified to handle intense disputes should be familiar with them all and be able to discern when they pose a threat to a conference and when they can pass along relatively harmlessly.

One last example I would like to mention of how argumentation theory can benefit facilitators is by teaching them the concept of *stasis*, of how every argument as it progresses unto resolution will have a point of equilibrium, of balance, where the argument is at a standoff though not at rest. *Stasis* reveals how preliminary resolutions within categories of *stasis* are needed, if not explicitly at least implicitly, if a well-grounded resolution will ever be achieved – in other words, the most basic "rules of the game" in any argument. Main categories of *stasis*, originally a Greek term, include issues of facts, of definitions, and of values. Even questions about the appropriateness of the time and place, the forum, in which parties will meet to argue for an agreement, are *stasis* issues that need preliminary resolution before sound

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[21] Perelman distinguishes between being "impartial" and being "objective." Perelman, 60.

resolutions can be achieved. There is a natural order in the resolution of these issues as well: facts, then definitions, then values. Being aware and familiar with the concept of *stasis* will heighten the awareness of facilitators as to what are the relevant and essential issues that need to be settled if the conference is to have any hope of success. If the participants, for example, can't agree as to the harm done in general by an offender, then there is little hope they will agree or be satisfied as to how those who have been harmed can be restored. Using a flip-chart to document the harm at the beginning of the discussion concerning the restoration agreement is a suggestion Chris Dinnan once made to me that I think is right on target. It is an improvement within the order of *stasis*.

**The Legal Profession and The Future Of Restorative Justice**

Restorative justice practices cut into the practice field of traditional justice professionals – of lawyers. Lawyers have a vested interest in opposing the spread of restorative practices simply because their turf is being invaded. To put it simply, restorative practices are in competition with the traditional legal system's practices.

Restorative justice practices have spread rather slowly in Vermont, in my opinion, despite there being a statute that declares it is "the policy of [Vermont] that principles of restorative justice be included in shaping how the criminal justice system responds to persons charged with or convicted of criminal offenses." One of the main reasons for the slow development is because Vermont prosecutors are almost always unwilling to let "crimes" be resolved in a restorative venue without first imposing a penalty of some sort that is non-arguable. Doing so robs conferences of a lot of their impetus and makes them appear to the participants as another form of punishment. On the other side, the defense attorneys don't think of restorative justice resolutions for their defendants because they cannot advise them as to what kind of sentences to expect.[22] These prosecutors and defense attorneys are defending their turf. If it is true in Vermont, I must be true elsewhere. Also, lawyers will oppose restorative practices simply because they are used to thinking and operating in an adversarial manner. When I asked a young district attorney in Vermont if she ever considered restorative justice alternatives to sentencing, she told me, "Not really. People are fighters – they want to fight their charges." I am sure she gets to see what she believes.

Now, if an enlightened awareness ever pervades our justice system and it allows for more and more restorative justice interventions, then inevitably the day will follow when parties involved in restorative justice practices will engage in them with

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[22] Attorney Stephen Fine of Athens, Vermont, was reported as saying in a USA Today Cover Article "Sentencing Boards Give Citizens Power to Punish," February 12, 1997, that he seldom encourages his clients to opt for the boards because he can not "tell them with any precision" what kind of sentence to expect. The article quotes him as telling his clients, "Look you're going to come up in front of a couple of civilians who think they're going to save the world . . . by having you write letters and paint fire hydrants and who knows what else."

*premeditated awareness*. As soon as the stakes get high in any sort of legal conflict, parties are going to have advisors and advisors will have vested interests in the outcome.[23] This is true in any field where there is a lot at stake, from sports to the arts and everywhere in between. The advisors may well be lawyers, but they may also be psychologists, economists, or any assortment of other professionals who will try to influence if not co-opt the outcome of a restorative practice. They will be aware of in-grained biases specific to the parties and in general to our human psychology, and they will advise their clients to take advantage of them. I believe restorative justice scholars should be foreseeing this development and be contemplating how to defend against it.

This past summer, for example, I took a continuing legal education course for attorneys interested in optimizing negotiation settlements for their clients. The lecturer revealed a host of cognitive biases that people are almost universally beset by, like the status quo bias (which is just like its name suggests, a bias in favor of the status quo), the affirmation bias (we are more likely to believe someone who affirms our judgments) or the illusion of control bias (a bias in favor of engaging in events where the participants have an illusion of control). All these biases can be gamed by a crafty negotiator – so I was taught.

But what was of most interest in this course for me came in light of my enthusiasm for and advocacy of restorative justice practices when the lecturer defended his negotiation strategies in his book *The Science of Settlement* (sold along with the course) as follows:

> The parasite gets smarter, the host gets stronger. The predator gets faster, the prey figures out a way to hide. To stop evolving is to die. Lawyers and dispute resolution systems are no different; they also co-evolve. As the system changes, the lawyers working within it must also change. As the lawyers change, the system must change.

The lecturer then gives a brief history of trial tactics that necessitated the revision of discovery rules and then the subsequent "gaming" of the discovery rules by lawyers. He argues that "Evolutionary pressure then created mediation" since "[l]awyers survive by making their clients happy" and that "[c]lients are unhappy when they lose or when it costs so much to win that it's indistinguishable from losing." He talks of how the book *Getting to Yes* made many people believe "that we had at last reached the end of the road" but how there are now courses and books teaching attorneys and negotiators how the *Getting to Yes* philosophy itself can be "gamed":

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[23] Think, for example, if a wealthy CEO of a major corporation injures a poor pedestrian in a motor vehicle accident and the poor pedestrian wants resolution through a restorative practice, is it possible that the CEO won't have advisors informing him of what to expect during it in order to safeguard his reputation and assets *if* he agrees to participate in it?

> You can read a book like *Start With No* by Jim Camp, in which "America's number one negotiating coach explains why win-win is an ineffective, often disastrous strategy and how you can beat it."

The lecturer, himself an attorney, portrays lawyers as eager to glom onto any dispute resolution process in which money can be made:

> Lawyers are in competition with each other and with other professionals for dispute resolution dollars. Like leopards and lice, baboons and bacteria, lawyers in competition for resources adapt to circumstances and respond to incentives. At the same time, the societal institutions for the resolution of disputes – the environment in which lawyers practice – are also evolving. The process and the practitioners co-evolve…
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> It is only a matter of time. Lawyers will game these systems (any new system of dispute resolution) because it is their job. Just as it is the job of a bug to evolve so it can eat bug-resistant plants. And it is the job of a plant to evolve so it is bug resistant.
>
> There is no end to the process of co-evolution. Gaming the system *is* the system.[24]

Believing there is a large measure of truth in this perspective, I think it is only a matter of time until lawyers begin to focus on how to manipulate restorative justice practices, if they ever become widespread, to serve their own ends. In Vermont, as I pointed out, restorative justice is being "gamed," actually sidelined, by being sabotaged by prosecutors and ignored by defense attorneys. They may be doing so with the best of intentions – or not. It does not matter. What's certain is that it is being done, and restorative justice advocates, myself included, should be able to argue persuasively in the future against such "gaming" and develop strategies to defend, as well as promote, the integrity of restorative practices.[25]

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[24] Goldman, Barry. *The Science of Settlement: Ideas for Negotiators*. ALI-ABA. Philadelphia, PA. 2008.

[25] Given what is happening in the field of mediation practices, I foresee the day when lawyers actively attempt to corral restorative practices through legislation. Consider this perspective on the Uniform Mediation Act:

> The Uniform Mediation Act, currently, constructed by drafting committees from the National Conference of Commissioners on Uniform State Laws and the American Bar Association's Section of Dispute Resolution, as well as legal academics, is an attempt to bring *uniformity* to mediation across the country. A *primary purpose* of the Act is to provide "a *privilege* that assures *confidentiality* in *legal proceedings*." Providing this privilege promotes full disclosure of facts to the mediator by all parties and helps bring a higher level of success and party satisfaction to all mediations. Achieving a higher level of success will promote greater community confidence in the mediation process, which should result in more disputes being

## Knowledge of Argumentation Theory Can Help in the Defense and Strengthening of Restorative Practices

Restorative justice advocates, educators, and practitioners should take heed to the future challenges that will come their way from the legal profession. Argumentation theory can help them prepare for these challenges. First and foremost, it will help them become more persuasive advocates and defenders of restorative justice practices in public forums. Restorative justice advocates should be well-versed in the arts of rhetoric and in persuasive models of logic and reasoning. They will need these skills in their arguments with lawyers, legislators and public authorities. They will be ably utilized by their opponents, I am sure, many of whom are in law schools throughout our country learning these skills now in the course of their curriculums.

Secondly, restorative justice advocates, scholars and educators, should begin to study and explore argumentation theory to strengthen existing restorative practices. Argumentation *is* at the heart of any restorative practice. Phase 7 of the Real Justice Script, "Reaching an Agreement" *is* the setting of an argument over what constitutes a good restorative agreement. Any phase in a restorative practice in which parties discuss restorative justice agreements *is* where argumentation occurs. Effective argumentation processes should govern these phases.

## A Vision For The Future

With this paper I hope I have, at least, enkindled enough interest in argumentation theory among restorative justice scholars to provoke them to seriously and profoundly ask, "What makes for a good restorative justice agreement?"

Right now, I see a great reliance in the restorative justice movement on "sciences" of recent vintage to bolster and support restorative practices. As insightful as these may be, I think they are not the best support available. I have a hard time myself seeing, for example, how the theory of reintegrative shaming or the psychology of affect along with the compass of shame provide a complete answer to what makes for a good restorative agreement. These may go a long way in explaining the

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resolved by mediation.

(Emphasis added.) The International Institute of Conflict Prevention and Resolution. News: "Legislation: Where the Uniform Mediation Act Stands in the States." Web. 14 October 2009. I note the *primary purpose* the drafters have with the Act is in categorizing mediation as *legal proceedings* and not in the timely and satisfactory resolution of conflicts! The website informs us that the Act's uniformity "should result in more disputes being resolved by mediation." And, I think, if mediation becomes a *legal proceeding*, then the legislation will result in more disputes being mediated *by* lawyers. According to the website, 8 states have currently passed the act and another 5 are considering doing so. Already in the District of Columbia a mediator is required to be a lawyer to mediate civil court cases other than family disputes, according to the website of the Mediation Training Institute International website, "State Requirements." Web. 14 October 2009.

psychological state of minds of participants in restorative practices, but I do not think they identify the underlying structural aspects and principles of sound agreements.

I believe the answer can be substantially given in terms of argumentation theory. Based on my own limited study in the theory, I will answer that a good restorative justice agreement is based, among other things, on the quality of the evidence presented to the impacted parties as to the harm done by the offender and on the quality of the reasoning with which the parties construct their agreement. I don't want to venture more because I am neither an argumentation scholar nor a restorative justice scholar, just a practitioner who is an advocate for both. The answer should be sifted out through the reasoned arguments among the scholars in both fields.[26]

**CONCLUSION**

Individuals, families and communities must face and struggle through conflicts if they are to find lasting and meaningful solutions *for themselves*.[27] Restorative justice practices are the practices consciously suited for them to do so when these conflicts take on societal dimensions. But restorative practices are relatively new and undeveloped, *immature* it may be argued, in comparison to the methods and means people and societies have been relying on for many generations to resolve such conflicts. Argumentation theory, in its modern state, is clearly in line with the philosophical underpinnings of restorative justice – for each their measure of effectiveness is relative to the audience they impact. Argumentation theory, once again, *is* focused on what is at the heart of every restorative practice – an argument as to the means of restoration.

Facilitators of the future who are educated in effective argumentation skills will have a confidence and breadth of training that encompasses the ages. With such training, they will be able to defend and advocate for their practices on a personal, local, regional – and for some – a national and international stage. They will also be aware when coercion and fear masquerade as good reasoning. They will be able to quickly and charitably identify the masquerades and safeguard the restorative practices they facilitate from the disruption these imposters may cause. And in facilitating any restorative practice unto a good restorative agreement, these facilitators will be peacemakers.

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[26] Other issues worth focusing on by both restorative justice and argumentation scholars have been raised by this paper. One how can restorative practices be modified to yield better agreements? Also, should a facilitator *referee* the agreement phase of a restorative practice? If so, how so?

[27] Christie, N. *Conflicts as property*. British Journal of Criminology 17 (1977): 1-15. Print

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