

PARADOX AND CIVIC REPUBLICAN VISION

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Jennifer Brown and Linda Wolf do a wonderfully incisive job of drawing out the promise of restorative attorney discipline.¹ In this Comment, I focus more on the paradoxes described in their essay. I redefine their three main paradoxes inherent in attorney discipline as the paradox of impunity, the paradox of injustice, and the paradox of consumerism:

- The paradox of impunity is that punitive attorney discipline produces widespread impunity.
- The paradox of injustice is that consumers receive less justice when they suffer injustice at the hands of justice practitioners than when they suffer injustice at the hands of providers of non-justice goods and services.
- The paradox of consumerism is that if victims of justice system injustice are treated as consumers, they will suffer more injustice.

Like Brown and Wolf, I agree that applying restorative justice to attorney discipline can help dissolve these paradoxes.

THE PARADOX OF IMPUNITY

My tweak of the Brown and Wolf argument on impunity is that punitive attorney discipline produces widespread impunity. The many reasons for this are nicely explained in their essay.² Brown and Wolf show that the consequence of punitive attorney discipline is that stakes become high for lawyers who are elite professionals with much to lose. Consequently, they dig in. A politics of denial can become endemic. Denial seems attractive because lawyers are professionals at denial, while complainants are amateurs. Lawyers contest complaints on their turf through a tournament of lawyers, and lawyers more often have more resources to fight than individual victims of bad lawyering. Under these circumstances, denial and dismissal in which nothing is conceded to the aggrieved complainant becomes the norm. This is one explanation for the pattern Brown and Wolf show of 117,598 complaints to disciplinary agencies (many against multiple lawyers) in 2007 resulting in only 4,782 lawyers being charged with disciplinary violations.³ Victims of unethical lawyering learn to

* My thanks to Christine Parker for helpful comments on an earlier draft.

¹ See generally Jennifer Gerarda Brown & Liana G.T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L.J. 253 (2012).

² *Id.* at 259 (“When misconduct does not arise from deliberate or calculated wrongdoing, a system modeled on criminal justice and its requirement of mens rea may simply be barking up the wrong tree.”).

³ *Id.* at 258.

lump it because they have an intuitive grasp of the fact that their odds of success with an adversarial complaint are low, and because they shy away from challenging lawyers on their own turf. Consequently, the statistics radically understate the impunity that unethical lawyers secure.

Because success at getting behind lawyers' shields of denial is statistically rare, findings against lawyers are often professionally devastating, even fatal. Prevailing victims want blood when they win because these complainants have won against a legal culture of denial and victim-blaming. Also, the moral guardians of the profession feel then they must give them some blood in order to defend the legitimacy of a profession and a justice system that citizens widely perceive as protecting its own. As with law enforcement against all forms of complex, "white-collar" wrongdoing, scapegoating of individuals for more systemic failures becomes normal when there is an imperative to defuse a scandal;⁴ the individualising of punitive justice neglects the systemic reform of the legal profession and legal procedures that are the priority when restorative justice seeks to respond to an example of systemic injustice.⁵ For these reasons, among others, Brown and Wolf and Garvey⁶ are right to ponder whether attorney discipline systems are too punitive when they do punish, while being too soft on the vast numbers of culpable lawyers whose denials deliver impunity.

Both the lawyers singled out for punishments that derail their careers and the victims who see their lawyers enjoy impunity feel a great sense of injustice. We do not have a well-functioning justice system when almost every case leaves someone feeling such a deep sense of injustice. As Brown and Wolf point out, part of the promise of restorative justice is that overwhelming majorities of victims and offenders, in many studies over ninety percent, feel satisfied with the justice they obtained.⁷ How do we encapsulate the paradigm shift that produces this result? Simply put, because injustice hurts, justice should heal. In the typical client-lawyer conflict, there are feelings of injustice on both sides. Maybe a lawyer has cut some corners and this is a source of client grievance. Perhaps the lawyer believes this corner-cutting was what the client demanded in the past, so it is vexatious for the client now to soil the lawyer's reputation. In such a case, apology for the corner-cutting, making good the losses the client suffered as a result, and an apology from the client to the lawyer for any unfair attacks on the lawyer's professional reputation are a package likely to produce a more just outcome—and an outcome perceived as more just by all sides—than an adversarial declaration of a winner.

A justice that heals requires a different vision of who should be in the room. A court case assembles people who can inflict maximum damage on the opposition's case. A restorative justice conference assembles in a room people who can offer maximum support to their own side, be it the side of the complainant or the defendant. When a meeting of two communities of care or support occurs, the prospect for a mutually healing outcome is maximised.

⁴ See BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY 129–67, 181–87 (1993).

⁵ See Brown & Wolf, *supra* note 1, at 274. Again I am grateful to Christine Parker here.

⁶ See Steven P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 303 (2003).

⁷ See Brown & Wolf, *supra* note 1, at 294.

Sitting down with complainants, listening to their story in their own words, owning responsibility for the things that should be owned and offering something to repair the harm, is not impunity. Nor is it severe punishment. Restorative justice dissolves the bifurcation of impunity versus severe punishment. Denial is not necessary or wise with a justice system where it is common for both sides to get something that they think is just and to give something they think is just (whether the getting and giving is material, such as compensation, or symbolic, such as acknowledging unfairness). As Brown and Wolf also imply, restorative justice can be designed to punish denial, such as where there is only escalation to adjudication of punishment, or to $X+1$ punishment (where X is the normal sanction), when there is provable denial of injustice.⁸ A combination of such restorative justice settings can end cultures of denial and defeat this paradox of impunity.

THE PARADOX OF INJUSTICE

The paradox of injustice is that consumers receive less justice when they suffer injustice at the hands of the justice system than when they suffer injustice at the hands of the providers of non-justice goods and services. Almost all justice systems have chronic system capacity crises at all levels. Victims wait too long for compensation and healing. Innocent defendants wait too long to clear their names. The legal profession bears the burden of climbing mountains of backlogs to ameliorate system incapacity. If we distract lawyers too much by requiring them to defend themselves against allegations of abuse as they go about that business, then we may cause the backlog to grow bigger. While this is largely true, it is not entirely true, as some complaints against lawyers are for causing needless delay.⁹

Because there is a justice system capacity crisis that needs more lawyers to fix, there is resistance to tying lawyers up with complaints against lawyers' own injustices. This is compounded by the fact that for the most part lawyers control justice claims against lawyers while suppliers of other kinds of goods and services do not ultimately control complaints against themselves. Such complaints go to consumer protection agencies, generalist ones and specialized ones, like the Food and Drug Administration.¹⁰ Where complaints against lawyers are received by a state consumer protection agency, their convention around the world is to pass the complaint on to a disciplinary system in the hands of legal professionals, and sometimes in the private hands of the profession itself.

The combination of a justice system capacity crisis (paradoxically driven by the high costs the legal profession has inscribed on that system) and lawyer control over claims against lawyers has produced severely rationed access to justice against lawyers. When lawyers lead generalist consumer protection agencies that respond to complaints against widget manufacturers, these regulators worry about causing the collapse of the widget industry or making it less

⁸ *See id.* at 274.

⁹ *See id.* at 260.

¹⁰ *See, e.g., Report a Problem*, U.S. F.D.A., <http://www.fda.gov/Safety/ReportaProblem/default.htm> (last visited Jan. 20, 2012).

competitive than foreign widget firms; regulators might be captured or corrupted by the widget industry (just as can happen in regulation of lawyers); but because the widget-maker supplies widgets and not consumer protection, regulators do not have to ponder whether their consumer protection action may paradoxically reduce the future supply of consumer protection. Nor is this consumer affairs regulation performed by one member of the same industry against another. This is why consumers get less justice when they suffer injustice at the hands of justice professionals than when they suffer injustice at the hands of the providers of non-justice goods and services. Admittedly, there is also the fact that it is a simpler matter for a consumer protection agency to advise the consumer to take the defective appliance back to the retailer and say that the agency had recommended that it would be reasonable to ask for a replacement, or to ask a tradesperson to come back and install something properly, with the agency following up with a concerned phone call or letter if the retailer or tradesperson refuses. Simpler or not, in most parts of the world¹¹ it is not the standard move in consumer protection for defective lawyering to expect the lawyer to perform the defective service again without charge.

Structurally driven injustice is not inevitable in the face of powerful actors who are shown a way that will leave them better off. Even lawyers who see restorative justice as deprofessionalized justice, which threatens professional incomes when it is used to tackle the wider system capacity and cost of justice crises, can nevertheless see restorative justice as a better way of doing attorney discipline for the same reason that it will have lower cost and greater effectiveness. But also because restorative attorney discipline might provide a form of justice which attorneys experience as more satisfying and, as Brown and Wolf explain, better defends the legitimacy of the profession.

THE PARADOX OF CONSUMERISM

The paradox of consumerism is that if victims of justice system injustice are treated as consumers, they will suffer more injustice. The consumer protection model does have its positive side. Many client complaints are about

¹¹ Christine Parker suggests that the Australian states of Queensland and New South Wales are exceptions where “this is roughly what happens in relation to the consumer complaint stream of complaints against lawyers And I don’t see the justice system or the legal profession in those two states collapsing. And for most issues it is much simpler and easier to do this than to go through a Restorative Justice process. Or rather the above sort of process is as much restoration as you need given the scale of the complaint.” See Email from Christine Parker, Professor, Centre for Regulatory Studies and Law Faculty, Monash University, to author (on file with author); see also Christine Parker, *Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness*, 25 *UNIV. N.S.W. L. J.* 676, 676 (2002) (Austl.). See generally, CHRISTINE PARKER, *JUST LAWYERS* (1999). See also Steve Mark, *Regulating for Professionalism: The New South Wales Approach*, Address at the 2010 American Bar Association Annual Meeting and National Conference of Bar Presidents Workshop 13–15 (Aug. 5, 2010), [http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/Regulating_for_Professionalism_ABA_Conference_August2010.pdf/\\$file/Regulating_for_Professionalism_ABA_Conference_August2010.pdf](http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/Regulating_for_Professionalism_ABA_Conference_August2010.pdf/$file/Regulating_for_Professionalism_ABA_Conference_August2010.pdf); John Briton, *The System for Dealing with Complaints: The Commission’s Approach*, Address at the BAQ Conference 10–16 (Mar. 5, 2006), http://www.lsc.qld.gov.au/data/assets/pdf_file/0020/106229/system-for-dealing-with-complaints.pdf.

alleged neglect, overcharging, delay, and poor communication.¹² A consumer protection model can prompt lawyers who often fail to see clients as consumers to respond with more of a consumer service orientation.¹³ Brown and Wolf have a critical and insightful section on the consumer protection model of attorney discipline.¹⁴ They examine the risks of replacing punishment with a payout mentality whereby compensation to victims of professionally unethical conduct might become another cost of doing business for wealthy lawyers.¹⁵ When they discuss consumer culpability as an injustice, they also touch on the problem of the consumerism model: not all victims of injustice are consumers. Probably most of the victims of injustices perpetrated by lawyers are not consumers who have purchased the services of that lawyer. Here is the only place I advance a slight criticism of emphasis in the Brown and Wolf contribution. While they outline these critiques of the consumer protection model, and while they recognise that a “fellow attorney . . . or a third party” can be a complainant,¹⁶ their analysis still remains excessively focused on interactions between clients and attorneys.

The need may be to separate out two different kinds of problems: one is a lack of basic consumer service among lawyers and the corresponding weakness in the consumer redress ethos and mechanisms; the other is a want of creative ways to respond to more serious ethical misdemeanours by lawyers. For outsiders, the most ethically disturbing forms of lawyer misconduct—and the ones least disciplined—occur where lawyers are unethical for the benefit of corporate clients who therefore do not complain, such as tobacco, pharmaceutical, and asbestos industry attorneys destroying requested documents about the adverse health impacts of their clients’ products.¹⁷

There are many reasons why most victims of attorney injustice are not clients. In matters that go to trial there tend to be more witnesses than clients. Witnesses are often treated unethically and with appalling injustice. Lawyers and their clients often have financial and other interests in the case and witnesses usually do not. Very often witnesses, without being compelled, turn up to testify simply because they think it is the right thing to do—an obligation of citizenship to be a servant of justice. While lawyers inside the courtroom are stuffing money in their pockets, the taxi driver they keep endlessly waiting outside has money leaking from her pocket, as she endures a failure to cover the costs of her taxi licence. Then when she does enter the courtroom, still ready to be the good citizen, counsel or the judge, or both, in effect call her a liar. There, accusations about her past that are untrue are bandied about the court—accusations that she believes any decent person would treat as private even if they were true. If this injustice makes her angry and she calls the judge a liar at the end of her testimony she may be punished for contempt or manhandled out of the courtroom. Citizens should have access to restorative justice to confront prosecutors, opposing counsel, and judges who are rude to them, who

¹² See Brown & Wolf, *supra* note 1, at 260.

¹³ My thanks to Christine Parker for suggesting this qualification to my earlier draft.

¹⁴ See Brown & Wolf, *supra* note 1, at 267–69.

¹⁵ See *id.*

¹⁶ See *id.* at 253.

¹⁷ My thanks again to Christine Parker for this observation.

sleep during their testimony, who order excessive force to manage allegations of disorderly conduct during trials, or who scandalize them in ways that would be libel were they to occur outside a courtroom.

In jury trials there are also usually more jurors than clients. There has been some recent controversy in Australia about officers of courts failing to protect the anonymity of jurors in ways that make jurors vulnerable to the protagonists, with jurors having few remedial measures available to them should that happen as a consequence of their service.¹⁸

Perhaps more controversially, citizens should have access to a restorative justice conference when they can prove that they have served years in prison for a crime they did not commit, or when their son was executed for a crime he did not commit, or have a non-vexatious grievance that a prosecutor's or judge's conduct contributed to their fate. That should be a structured opportunity, mandated as a matter of legal professional ethics and judicial ethics, where those who suffered the injustice have an opportunity to confront the judge or the prosecutor with their view of why the officer of the court behaved unprofessionally or unjustly. Current structures of justice put excessively kingly powers in the hands of judges (such as the law of contempt which, according to a republican theory of justice should not be a criminal offence but a matter of regulatory enforcement)¹⁹ and puts insufficient tools in the hands of citizens who are dominated by lawyers during trials.

At this point in US history, there is a special need for restorative justice. The integrity of US justice has eroded in some major ways during the past decade, especially in the military justice system. If the US is to re-establish the international reputation it once had as a pre-eminent rights-respecting democracy, it has to look Guantanamo Bay in the eye. A shrug of the shoulders, and a "that's democracy" comment are not good enough when even a President elected on a platform of shutting down an institution designed to corrupt the spirit of the US Constitution is not allowed by the political system to deliver on that commitment.²⁰ That is not democracy. No community of citizens can be a democracy when it settles for such a result. We know now that Guantanamo Bay is not quite as bad as other prisons in Afghanistan, Iraq, and other countries, effectively run by the US government, where torture has been widespread for non-combatant civilians from many countries, including citizens of countries such as the UK and Australia that have been front-line US allies in its wars on terror.²¹ We now know much about the people who have been confined without trial during the past decade in Guantanamo Bay and other off-shore

¹⁸ Louis Andrews, *Visiting Judge Raises Jury Concerns*, CANBERRA TIMES, July 4, 2011 (Austl.), available at <http://www.canerratimes.com.au/news/local/news/general/visiting-judge-raises-jury-concerns/2214640.aspx>.

¹⁹ JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 94–95 (1990).

²⁰ Chris McGreal, *Barack Obama Abandons Guantánamo Closure Plan After Congress Veto*, THE GUARDIAN (Jan. 20, 2011, 13:21 PM EST) (U.K.), available at <http://www.guardian.co.uk/world/2011/jan/20/barack-obama-guantanamo-congress-veto>.

²¹ See generally AHMED RASHID, DESCENT INTO CHAOS: THE UNITED STATES AND THE FAILURE OF NATION BUILDING IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA 293–316 (2008); PHILIPPE SANDS, TORTURE TEAM: DECEPTION, CRUELTY AND THE COMPROMISE OF LAW (2008).

War-On-Terror prisons, or endured military trials.²² Some were murderous and dangerous people. Others were decent folk, often simple ones, who had committed no crime, or were even members of the Taliban who had tried to work with the US to prevent the terrorism and the resultant war that left all sides in pain and despair.²³ Thankfully, today such people are at least in dialogue with those in Afghanistan backed by western powers. At the same time, some of the US military lawyers involved in Guantanamo Bay cases were inspiring international emissaries for US Constitutional values.²⁴ Their tenacity on behalf of a rights culture as an alternative to a culture of legal denial offers a clue to how the judicial branch and the legal profession might struggle to restore republican democracy to the US when the executive and legislative branches cannot or will not.²⁵ The US legal profession could show a new kind of international leadership in access to justice by granting a right to a restorative justice conference for people who can prove that they were held for years without trial, or after an unjust trial when they had committed no crime.

Is there a way for innovators of the US legal profession to push for making lawyers vulnerable to the injustice complaints of incarcerated innocents as a matter of basic professional ethics for a lawyer (in this case a lawyer serving in the military justice system)? Here is where the inspiring ethical leadership of some of the US military lawyers captures the imagination. A restorative justice forum would give them a better opportunity than they currently have, along with the victims of War-On-Terror injustice, to prick the conscience of the US justice system, to mobilise both domestic and international publics to put pressure on the Obama Administration and Congress to restore nobility to the justice of the US Constitution.

CONCLUSION

Restorative justice is not simply about better processes that work more effectively in delivering justice for victims, improving the ethics of the legal profession, and the like. It is much more opinionated than mediation about justice values and the values of republican democracies. Restorative justice has

²² Some have written biographies. See e.g., Abdul Salam Zaef, *MY LIFE WITH THE TALIBAN* (2010); DAVID HICKS, *GUANTANAMO: MY JOURNEY* (2010) (Austl.); MAMDOUH HABIB WITH JULIA COLLINGWOOD, *MY STORY: THE TALE OF A TERRORIST WHO WASN'T* (2008).

²³ John Braithwaite, *Conclusion: Hope and Humility for Weavers with International Law*, in *THE ROLE OF INTERNATIONAL LAW IN REBUILDING SOCIETIES AFTER CONFLICT: GREAT EXPECTATIONS*, at 270–89 (Brett Bowden, Hilary Charlesworth & Jeremy Farrall eds. 2009), (referring to the attempts of the former Taliban Foreign Minister to warn the U.S. about Al Qaeda in 2001 and negotiate independent legal proceedings); see also ZAEF, *supra* note 22, at 101–22 (biography of the Taliban Ambassador to Pakistan in 2001).

²⁴ See Leonard Doyle, *Guantanamo Military Lawyer Breaks Ranks to Condemn 'Unconscionable' Detention*, *THE INDEP.* (Oct. 27, 2007) (U.K.), available at <http://www.independent.co.uk/news/world/americas/guantanamo-military-lawyer-breaks-ranks-to-condemn-unconscionable-detention-398033.html>; see also Neil A. Lewis, *Military lawyers prepare to speak on Guantanamo*, *N.Y. TIMES*, at 14, available at <http://www.nytimes.com/2006/07/11/washington/11jags.html>.

²⁵ See generally BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010).

a vision for deepening the furrows of republican democracy. Many of the important elements of that vision are well captured in the Brown and Wolf essay. While the social movement for restorative justice has much in common with the social movement for a more deliberative democracy—a shared vision of institutionalizing a deeper valorization of citizen voice—restorative justice differs from it in seeing the judicial branch as the front-line of struggles to deepen democracy, rather than the legislative branch. Or perhaps the education system (restorative justice for citizens to learn to be democratic in schools, in confronting problems like bullying)²⁶ is an even more important front-line for this generation. Transforming educational institutions with the wisdom of Brown and Wolf might hold hope that our grandchildren will lead democracy to a world without Guantanamo Bays, or even the wars that make some think they are necessary.

²⁶ BRENDA MORRISON, RESTORING SAFE SCHOOL COMMUNITIES: A WHOLE SCHOOL RESPONSE TO BULLYING, VIOLENCE AND ALIENATION 73–95 (2007).