CONTESTED EMOTIONS: ADVERSARIAL RITUALS IN NON-ADVERSARIAL JUSTICE PROCEDURES

MEREDITH ROSSNER* AND DAVID TAIT**

Non-adversarial justice theories and practices have developed in response to perceived failures of traditional western-style justice processes. However, we argue that while the operations of contemporary court processes might justly be criticised, the philosophical foundations of the common law can provide a framework for understanding non-adversarial justice procedures. Several key features of the adversarial system — lay participation in decision-making, confrontation and representation — are also at the core of many non-adversarial justice processes. This paper explores the ways that non-adversarial approaches, such as restorative justice conferences, indigenous courts and mental health tribunals, embody features of adversarialism in imaginative ways to create effective contemporary justice rituals.

I INTRODUCTION

Adversarialism is associated with verbal jousting between lawyers over irrelevant matters, procrastination and time-wasting, victims being humiliated and intimidated and defendants marginalised. The opposite of this — non-adversarial justice — is said to be more efficient, inclusive and accessible. This can include 'informal justice', where rules of evidence are relaxed, 'therapeutic jurisprudence', where the wellbeing of the participants influences the conduct and outcomes of the proceedings and 'restorative justice', where the decision-making circle is widened to include victims and community members.

While there are many distinct differences in the theory and practice of adversarial and non-adversarial justice,[1] a careful reading of the history of adversarialism suggests that it can provide a useful framework for understanding some of the most innovative contemporary experiments in the justice process. We place this in the context of a ritual analysis of the justice process, focusing on how group interaction, emotions and the balance of power — factors that are integral to a successful non-adversarial process — may have a foundation in adversarial philosophy.

* Dr Meredith Rossner is a Research Fellow in the Justice Research Group at the University of Western Sydney.

** Professor David Tait heads the Justice Research Group at the University of Western Sydney.

1 See Michael King et al, *Non-Adversarial Justice* (Federation Press, 2009) for a thorough discussion of this.

II THE TRIAL AS PERFORMANCE

It is useful to start with an understanding of the trial. The public trial, in Foucault's interpretation, stands in contrast to the private punishment behind the walls of the prison.[2] This represents an inversion of the old order, where the trial was secret, while the violent punishments exacted by the king were carried out in public. As a public event under the new order, the trial can be seen as a performance; a piece of theatre designed to inspire, terrify, subdue or reassure, depending on the occasion. Justice must be seen to be done, not so much in the sense that observers should agree the judge was impartial, but in the sense that the script of the law is enacted by live performers whose actions are visible to the public.[3] The law, according to this analysis, is not to be seen as a formal set of rules that is to be applied to a case according to rational principles, but an encounter between different participants endowed with particular roles, responsibilities and powers. Seen this way, the judicial hearing is not assessed by whether it results in the 'right' decision, but whether it achieves ritual success. This can include, using theatrical metaphors, whether the actors deliver a convincing performance. It also includes whether the interaction or encounter between participants develops shared understandings and recognition of the status and value of others.[4] Does the encounter produce a 'team' — if so, who is in the group and are others produced as scapegoats or outsiders?[5]

This way of thinking about justice processes does not challenge the more 'rational' approach to justice preferred by legal scholarship, in which the quality of arguments is evaluated and the logic of decision-making scrutinised. Nevertheless a ritual analysis does provide a useful framework for thinking about some of the new approaches to justice which quite openly seek to transform the process, change the role of participants and encourage more interaction.

We take a ritual and dramaturgical perspective in this article, examining types of justice interactions that succeed or fail and the ways that adversarialism does or does not work to create strong rituals. We define ritual in a micro-sociological framework, focusing on the way participants become mutually focused and entrained with each other, develop shared meanings and symbols and experience some kind of solidarity or group cohesion.[6] At the heart of this analysis, we emphasise the role of emotions in creating strong rituals and argue that emotional confrontations can be a successful strategy in creating justice between people.

2 Michel Foucault, *Discipline and Punishment: The Birth of the Prison* (Alan Sheridan trans, Penguin, 1977) [trans of: *Surveiller et Punir: Naissance de la Prison* (first published 1975)].

3 Katherine Fischer Taylor, *In the Theater of Criminal Justice: The Palais de Justice in Second Empire Paris* (Princeton University Press, 1993).

4 Erving Goffman, *Interaction Ritual: Essays on Face-to-Face Behaviour* (Anchor Books, 1967).

5 René Girard, *The Scapegoat* (Yvonne Freccero trans, John Hopkins University Press, 1989) [trans of: *Le Bouc Émissaire* (first published 1982)].

6 Emile Durkheim, *The Elementary Forms of Religious Life* (Joseph Ward Swain trans, Free Press, 1965) [trans of: *Formes Élémentaires de la Vie Religieuse* (first published 1912)]; Randall Collins, *Interaction Ritual Chains* (Princeton University Press, 2004).

III THE FEATURES OF ADVERSARIALISM

Adversarialism is a fairly recent addition to the common law, if we ignore the trials by battle that enlivened medieval society. There are different ways of telling the story of the common law; our approach is largely informed by Langbein.[7] We identify three aspects of adversarialism that help to shape the ritual performance of the trial: an oral contest in front of a jury, confrontation between the accused and the accuser and legal representation. We argue that these central and well-established features of the adversarial process provide a suitable framework for analysing non-adversarial justice procedures, albeit in forms more suited to the non-adversarial justice environment.

The first, and most ancient, aspect of adversarialism is the presentation of contesting cases by the parties to lay decision-makers. Instead of the rational enquiry led by a professional, occasionally facilitated by torture, England relied on ordinary members of the gentry to listen to the 'altercation' between the parties to decide major criminal and civil cases. The parties would present their cases in oral proceedings and the petit (trial) jury would effectively decide whether the accused would live or die, since there was for the most part no choice of penalty. By the mid-19th century, juries in many countries were drawing on a wider section of the population, including, in at least one case, bystanders awaiting trial in other matters.[8] Juries, until about the mid-18th century, could actively take part in proceedings by disputing evidence, challenging witnesses and using personal knowledge of the case.[9] Only with the rise of the lawyering profession did juries begin to take a backseat during the trial process.[10]

There are several issues that arose from lay participation in decision-making: the presence of juries required the evidence to be provided in oral form, the trial involved a public contestation between two (or more) speakers and the decision was based on who could convince the lay jury rather than according to a rational calculus of weighing proofs.

A second aspect of adversarialism, developed to counter the imbalance in favour of the Crown, was confrontation.[11] Until 1696, defendants did not have the right to bring their accuser to court and test the evidence against them.[12] The right

7 See John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003); John H Langbein, 'The Criminal Trial Before the Lawyers' (1978) 45 *University of Chicago Law Review* 263, 311–14; John H Langbein, 'The Historical Origins of the Privilege against Self-Incrimination at Common Law' (1993) 92 *Michigan Law Review* 1047, 1066–71.

8 Albert W Alschuler and Andrew G Deiss, 'A Brief History of the Criminal Jury in the United States' (1994) 61 *University of Chicago Law Review* 867, 881.

9 David Lemmings, 'Criminal Trial Procedure in Eighteenth-Century England: The Impact of Lawyers' (2005) 26 *Journal of Legal History* 73, 77–9.

10 Ibid 75–6, 79–82.

11 One of the clearest histories of the right to confronting one's accusers is provided in a seminal US Supreme Court decision written by Justice Scalia in *Crawford v Washington*, 541 US 36 (2004)**.** See also Randolph N Jonakait, 'The Origins of the Confrontation Clause: An Alternative History' (1995) 27 *Rutgers Law Journal* 77, which argues that the Confrontation Clause in the *United States Constitution* basically assures the accused the right to challenge evidence, rather than to physically confront the accuser.

12 *R v Paine* (1696) 5 Mod 163; 87 ER 584.

to confront one's accusers became a fundamental principle of the common law, enshrined in the Confrontation Clause of the *United States Constitution*.[13] According to this principle, witnesses can be questioned and challenged about their evidence by the accused. By the 19th century, not only did the accused have the right to confront his or her accusers, it was up to the accuser — or rather the prosecutor who was increasingly taking over the case — to prove the claims made in the indictment.

The issues arising from confrontation which are relevant to this discussion include: the contest between accuser and accused becoming a central feature of the judicial hearing and the decision increasingly turning on testing the claims made by the accuser. These claims were tested in public 'in the presence of all mankind'[14] and particularly the jury.

A third aspect of adversarialism that developed in the 18th and 19th centuries was the right to representation.[15] It should be noted — a point highly relevant to the discussion of restorative justice — that increasing representation of victims was part of this process.[16] Confronting an accuser could require rhetorical skills and technical knowledge beyond the grasp of many defendants, so a professional class of lawyers developed to meet this demand at the same time as prosecutions became increasingly managed by the Crown. With the right to representation (and the changed onus of proof with the prosecution now required to prove their case) came a right to silence, specifically the right to avoid self-incrimination.[17] This could lead to the marginalisation of the accused from the trial performance, as the centre of the stage was occupied by legal professionals. So whereas the first aspect of adversarialism (verbal contest before a lay jury) involved greater lay participation, greater use of representation both in the defence and prosecution could lead to ritual exclusion from the trial of both defendants and victims.

The implications of representation for our argument include: shifting the balance away from the state towards a more equal process, the 'professionalisation' of justice and changing participation opportunities for victims and defendants.

These three strands of adversarialism have evolved into the current incarnation of common law criminal justice, which has been widely criticised for failing to deliver just outcomes.[18] The important role of lay participation in justice, as well as confrontation between accuser and accused, has been minimised, as the notion of a factual and evidentiary competition between lawyers has moved to the forefront of contemporary justice procedures. This adversarial system is described by King et al

13 *United States Constitution* amend VI.

14 Sir William Blackstone, *Commentaries on the Laws of England* (1768) Book 3, ch 23, 373.

15 Lemmings, above n 9, 73–82; John H Langbein, 'The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors' (1999) 58 *Cambridge Law Journal* 314, 318.

16 John M Beattie, 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries' (1991) 9 *Law & History Review* 221, 229.

17 Langbein, 'The Historical Origins', above n 7.

18 Sir Richard Eggleston, 'What Is Wrong with the Adversary System?' (1975) 49 *Australian Law Journal* 428, 429; King et al, above n 1.

as one that has 'adopted the pragmatic view that observance of law, rather than the attainment of justice, is a more realistic and achievable goal for any community.'[19]

However, the original features of the modern adversarial system are key components of a variety of justice encounters, most notably in the recent rise of non-adversarial justice approaches. We argue that the features that are distinctive about non-adversarial justice are precisely its adversarialism, specifically the way these approaches use adversarial features to create strong rituals, emotions and social bonds.

IV ADVERSARIAL RITUALS IN NON-ADVERSARIAL JUSTICE

We now take these three principles of adversarialism and show how they can provide a useful way of describing what happens in the ritual performances of select non-adversarial justice processes, including restorative justice, indigenous courts and mental health tribunals. We present several examples where highly adversarial contests resulted in what we term 'ritual success' and may also have resulted in longer-term outcomes considered successful by more traditional measures.

A *Lay Participation in Decision-Making*

1 *Restorative Justice Conferences*

Involvement of *lay* participants is an important feature of restorative justice conferences, as it is in jury trials.[20] The type of lay participants and the role they play in the process is, however, quite different in the two forms of judicial procedures.[21]

Lay participants on a jury are strangers both to each other and the accused — indeed one qualification for becoming a juror is that the potential juror does not know the accused or witnesses. A further requirement is that she or he has either no knowledge of the case, or has formed no firm views about it.[22] A restorative justice conference, in contrast, brings together people who know the offender or the victim — friends, family, teachers or religious leaders and other community members. The conference attendees are expected to have prior

19 King et al, above n 1, 1.

20 For the sake of brevity, restorative justice in this article will refer to practices that include a wide range of stakeholders, such as restorative justice conferences, family group conferences, etc.

21 Jane Goodman-Delahunty and David Tait, 'Lay Participation in Legal Decision-Making in Australia and New Zealand: Jury Trials and Administrative Tribunals' in Martin F Kaplan & Ana M Martin (eds), *Understanding World Jury Systems Through Psychological Research* (Psychology Press, 2006) 47.

22 Vicky L Smith, 'When Prior Knowledge and Law Collide: Helping Jurors Use the Law' (1993) 17(5) *Law and Human Behavior* 507, 508.

knowledge of the offender and their life circumstances and personal experience of the offence in question.[23]

In a jury, members remain silent during a trial, participating actively only at the deliberation stage as they try to reach a verdict. They listen as professionals provide evidence to them through examination of witnesses. Restorative justice conferences, meanwhile, expect lay participation from the outset — in identifying the harm, describing the motivations and social context of the offender and developing a plan for addressing restitution and offending behaviour.

While to a first-time observer, restorative justice conferences might seem to be more unpredictable and less structured than a jury trial, in fact they tend to follow well-established routines. Generally, an offender is first asked to recount the incident, including the events leading up to and after the actual criminal act. They are asked to explain how they or others might be affected by this act. The victim will then describe the events from their perspective, focusing on the emotions that were experienced at the time as well as the ongoing impact of the incident. The victim's supporters, or family and friends, will then explain how they have been affected and give additional insight into the victim's experience. Following that, the offender's supporters will explore how the incident has impacted them, perhaps providing some additional background on specific circumstances, issues, needs, or hardships that the offender faces. Finally, all parties engage in a debate about what the offender can do to 'repair the harm', to the victim, the community and themselves.

What lay participation means in practice can be seen by considering one UK case concerning fraud and theft.[24] The offender was a manager at a retail store and over the course of a year had stolen £23,000 from her employer, who was also a friend. The conference, convened by a trained facilitator, took the form of a pre-sentence hearing rather than a diversionary hearing. The offender, her manager, the security manager and her co-workers (who had been close friends) took part. The conference was described as a very 'emotional' event, in which the offender's co-workers vividly explained how they had been affected. A few had been suspected of the fraud and expressed their anger at the stress this had created. During the hearing they also provided support, listening sympathetically as the offender reported her fear, embarrassment and shame. She apologised several times and participants accepted that her remorse was genuine. She agreed to pay back as much money as she could and also to not commit suicide, something she admitted to considering when facing the prospect of prison. The participants expressed anger at the offender for suggesting suicide, effectively making the case that her life was too good to end.

23 All data on restorative justice conferences is from interviews with British Police facilitators conducted by Meredith Rossner. See Meredith Rossner, *Why Emotions Work: Restorative Justice, Interaction Ritual and the Micro Potential for Emotional Transformation* (PhD dissertation, University of Pennsylvania, 2008).

24 Ibid.

While conferences typically involve expressions of remorse, apology and forgiveness,[25] this case highlights the way that lay participants can work together to actively produce a satisfactory outcome. In examining the success of a conference as a ritual, we can also look at the development of shared understanding and group solidarity.[26] In this example, we see that the other participants came together around the offender to support her, by providing reasons for her to stay alive, thus creating a group-level focus on her redeeming qualities. Due to the circumstances of this conference, the line between victim and supporter was blurred. As the conference progressed, their specific role became less important than the outcomes they were collectively trying to achieve. As they contributed to the conference, they actively participated in the decision-making process by identifying ways the offender could repair the harm to the victim and the community and also prevent further harm to herself.

Conferences of this type are frequently experienced by the participants as something they control, a quintessential example of 'the deliberative control of justice by citizens'.[27] Such democratic behaviour does not develop by accident. Conferences tend to follow a script, with form and timing of participation by each contributor following an established pattern. Participants are briefed on how to conduct themselves. Collaboration emerges from careful planning and management by professionals, including social workers and facilitators. It requires considerable skill and patience to entice victims and supporters to come to a conference at all and to listen to the offender's side of the story and participate in the outcome agreement. In highly charged situations, where participants may become agitated — even threatening suicide as in the case above — the stakes of failure may be high. So while the conference takes the form of a 'lay' gathering, its success depends to a considerable extent on the professional skills of the facilitator.

The 'informal' setting is as carefully planned as the 'spontaneous' interactions. The room is typically plain and unadorned with symbols of state authority, distinguishing it in participants' minds from courtrooms. Participants sit on plain chairs drawn in a circle, though the seating arrangements are carefully thought about by the facilitator beforehand. Facilitators sit in the circle, without a desk or other marker to set them apart, and they tend to dress in casual or civilian clothes, rarely wearing a suit and tie for example. It can thus be seen that a successfully staged restorative justice conference requires a complicated choreography of people and spaces.

To suggest that the lay participation and 'informal' setting of the hearings is a product of careful management is not to suggest that participants are somehow being manipulated by cunning puppet-masters. On the contrary, effective rituals — whether royal weddings or simple tea ceremonies — generally do result from

25 Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford University Press, 2002).

26 Meredith Rossner, 'Emotions and Interaction Ritual: A Micro Analysis of Restorative Justice' (2011) 51 *British Journal of Criminology* 95.

27 John Braithwaite, 'Restorative Justice and a Better Future' in Eugene McLaughlin et al (eds), *Restorative Justice: Critical Issues* (Sage Publications, 2003) 54; see also Joanna Shapland et al, 'Situating Restorative Justice within Criminal Justice' (2006) 10 *Theoretical Criminology* 505.

well-designed practices overseen by competent practitioners. Restorative justice facilitators have particular skills in preparing participants for the hearing in advance and creating a space in which victims, offenders and supporters feel able to share strongly felt and sometimes deeply personal emotions.

To return to the comparison with juries, conferences involve lay participants in all aspects of the hearing, whereas juries are active mostly after all the evidence is presented. Participants in conferences ask questions, offer opinions, draw conclusions and contribute to outcomes. This supports the claim of restorative justice proponents that they are particularly 'democratic'. On the other hand, the careful staging of conferences shows that they are not 'amateur' events and that professional guidance helps to elicit and organise the participants' contributions. Like juries, lay participants in restorative justice conferences are professionally managed.

2 *Indigenous Courts*

Indigenous courts provide another model of lay participation in justice. While they take a variety of forms in Australia, New Zealand and elsewhere,[28] the most common forms are sentencing courts and circle sentencing. The offender, as in restorative justice conferences, has already conceded culpability for the offences for which they are charged. Unlike restorative justice processes however, a legal professional — magistrate or judge — has formal control over the proceedings,[29] whilst elders are typically given an advisory role.

This might be interpreted as Aboriginal people being co-opted to participate in 'white' justice — the laws being applied are European not indigenous and the (usually white) magistrate keeps the 'real power' to pass sentence. Alternatively, the presence of elders might be seen as an attempt to make the process more credible or authentic, in a context in which the regular criminal justice system is powerless to influence the behaviour of young indigenous people. Further, while the magistrate may formally announce the sentence, the participation of elders as active participants ensures that most decisions from the hearing are based on consensus.

This shared authority is communicated in the physical layout of the courtroom.[30] Two flags are often displayed — the Australian flag with its small Union Jack in the corner, betraying its colonial origins, and the Aboriginal flag with its yellow sun joining the black people to the red land. In a Koori, Nunga or Murri court (depending on which state in Australia these take place) the elders typically flank

28 Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review* 415.

29 Ibid 421.

30 See David Tait, 'Popular Sovereignty and the Justice Process: Towards a Comparative Methodology for Observing Courtroom Rituals' (2001) 4 *Contemporary Justice Review* 201.

the magistrate at the Bar table, across from the offender, seated alongside friends and family.[31]

While authority is symbolically shared, there is clear physical indication of a separation between those who seek justice and those who deliver it. The decision-makers sit on one side of a table while the other parties are arrayed on the other side. This might be seen as less 'formal' than having the magistrate sitting at an elevated Bench, although on the other hand, the greater numbers on the decision-making side of the table tends to lend an air of solemnity to the proceedings that is generally lacking in magistrates' courts. Meanwhile, participants in circle sentencing forums, like restorative justice conference participants, sit in a circle, but, unlike in conferences, they have a legal professional presiding.

The two-sided Bar table, sometimes softened into an oval shape, signifies two sides of a contest, even if both sides are less well defined than in a traditional court setting. In contrast, the circle symbolically suggests all participants belong to the same team, or permits the development of multiple groupings. In particular, it gives more place and voice to victims.

Elders have an ambiguous role as lay participants. As far as the 'white' law is concerned, they are non-professionals who bring in a community perspective but have no specialist legal knowledge. For other Aboriginal people, they may have traditional authority and command respect in a way that non-indigenous magistrates may not be able to. Their lay status is somewhere between that of the jury (without prior knowledge of the person or the case) and the restorative justice participants (with often detailed knowledge of the person and the case). Elders may know the person and their family, they will almost certainly be familiar with the traditions of the people from which the Aboriginal offender comes and, unlike a jury, they directly interact with the person. The very concept of 'elder' indicates one way in which those denoted by the term are not peers of the offenders — they are older and presumed to be past the years at risk of offending.

As in conferences, there is often expression of strong emotions. This can be the case particularly in circle sentencing, where victims are given a more prominent role in the hearing. Supporters (friends and family) of the offender are also welcome to contribute to the process. However, there tends to be a more didactic character to these hearings than to conferences, with elders providing instruction to the offender about what they consider appropriate behaviour.

Like other forms of non-adversarial justice, social workers and other non-legal professionals may play a role, both in interpreting the background of the offender and in actively seeking useful services or training that the offender could take advantage of.[32]

31 Kate Auty and Daniel Briggs, 'Koori Court Victoria: *Magistrates Court (Koori Court) Act* 2002' (2004) 8 *Law Text Culture* 7.

32 Ibid 32.

There are a variety of styles of lay participation in justice,[33] with different ways of operationalising who 'lay' people are and what constitutes 'participation'. Two of these have been selected for this discussion; other issues would be raised in considering other legal forums. 'Lay' participation in terms of restorative justice conferences means involving ordinary community members who have special knowledge of the offender or the victim. Indigenous courts, meanwhile, involve responsible members of the community, while juries comprise citizens with no stake in the case they are asked to judge. We have suggested that 'lay' does not equate to 'amateur' and that the two forms of justice we have considered involve considerable levels of professional management.

'Participation' for conference attendees can involve taking part as 'status equals' in every stage of the proceedings, including reporting harm, expressing feelings and contributing to decisions on outcomes. Elders in indigenous courts contribute to discussing context and outcomes, albeit, compared to restorative justice conferences, from a position of authority. Jurors, meanwhile, do not contribute to eliciting information or offering contributions in a public setting; jury participation is largely confined to the private space of the jury room where jurors discuss the evidence and reach a decision. One feature of both restorative justice and indigenous justice procedures (particularly circle sentencing) is the opportunity for participation by victims, something that had been characteristic of regular court processes before the Crown took over prosecutions. Both these 'newer' forms of justice also provide a forum in which emotion can be expressed. This can be seen as permitting fuller participation by people who may need to express to each other anger or remorse about the offence in order to start building mutual respect and reconciliation.

B *Confrontation*

1 *Restorative Justice Conferences*

Confrontations are important parts of many justice rituals. In a jury trial, the highlight might be a confrontation between a defence lawyer and a Crown witness, or between the prosecutor and the accused. In both cases the purpose of the confrontation is to test or confirm the Crown's case. While the interaction can involve high drama, the confrontation is primarily about producing evidence and establishing facts.

Restorative justice conferences, on the other hand, involve a different kind of confrontation. The key confrontation in many restorative justice conferences is an emotional confrontation between victim, offender and supporters. This is most likely to occur where the offence involves individual victims, like theft or violence, and more difficult when the victim is harder to define, as in cases of

33 Goodman-Delahunty and Tait, above n 21.

drink driving or damaging public property.[34] But the purpose of the confrontation is not to establish facts — the offender has already conceded culpability as the price for admission to the conference. Rather, the confrontation is about exploring the impact of the offence on all parties, though there may be information sharing taking place at the same time. Thus, whereas the classical legal confrontation is between accused and accuser, the restorative justice confrontation is between victim and victimiser. This is a major shift in the mentality of justice rituals.

There is also a second, equally important, shift. In the mainstream justice system, emotional interactions are regarded as annoying distractions from the 'real' business of doing justice; in restorative justice conferences they are, it can be argued, key to its success. There has been much discussion about the role of emotions in restorative justice, mostly focusing on the dynamics of shame, guilt, remorse and empathy.[35] We take the line that identifying particular emotions present at a given conference is less important than exploring the mechanism by which emotions transform the interaction from conflict to consensus. To tease this out, we examine how emotions impact the ritual dynamics of a conference. Strong emotions are more likely to produce successful rituals.[36] The intensity of the emotion in some contexts has more impact on the success of an encounter than whether it is negative or positive.[37] This is a radical claim and deeply controversial when applied to restorative justice conferences. It suggests that highly charged confrontations in which angry participants shout at each other might be more effective than polite exchanges which avoid conflict. This formula works for TV ratings.[38] There is some evidence it can also work for restorative justice conferences.[39]

To examine this, we consider the role of emotion and confrontation in two cases. In the first, the facilitator describes the first few minutes of a conference that led to a dramatic (and ultimately productive) confrontation between victim and offender:

34 Of course, not all restorative justice conferences will involve direct conflict between victim and offender. We use the term confrontation to represent the competing narratives and emotions that are present when victim and offender are brought together. Our data suggests that the more conflict and confrontation that participants bring to the table, the more potential for strong, positive outcomes.

35 Nathan Harris, Lode Walgrave and John Braithwaite, 'Emotional Dynamics of Restorative Justice Conferences' (2004) 8 *Theoretical Criminology* 191; Eliza Ahmed et al, *Shame Management through Reintegration* (Cambridge University Press, 2001); Suzanne M Retzinger and Thomas J Scheff, 'Strategies for Community Conferences: Emotions and Social Bonds' in Bert Galaway and Joe Hudson (eds), *Restorative Justice: International Perspectives* (Criminal Justice Press, 1996) 315; Gabrielle Maxwell and Allison Morris, 'The Role of Shame, Guilt, and Remorse in Restorative Justice Processes for Young People' in Elmar G M Weitekamp and Hans-Jürgen Kerner (eds), *Restorative Justice: Theoretical Foundations* (Willan Publications, 2002) 267; Bas Van Stokkom, 'Moral Emotions in Restorative Justice Conferences: Managing Shame, Designing Empathy' (2002) 6 *Theoretical Criminology* 339.

36 Collins, above n 6, chs 1–3.

37 Ibid.

38 Laura Grindstaff, *The Money Shot: Trash, Class, and the Making of TV Talk Shows* (University of Chicago Press, 2002).

39 Rossner, above n 23.

> It was just like a boiling pot. It was just bubbling. It was something almost tangible. It was really weird. I wasn't prepared for it. I could just tell that there was a lot of anger, a lot of fear. I could tell that people were bursting to speak, people wanted to speak. Because I had said to him [the offender], 'This is your chance. Show this person that you are not the bag of shit that he thinks you are'. And to the victim I said, 'This is your time to explain what this person has done to your life, what he has done to you'.[40]

The facilitator lays the groundwork for the encounter in his preparatory interviews with the participants. He encourages them to tell their story and explore their feelings in meetings prior to the conference, to aid them in articulating it on the day. The conference described above related to a violent robbery, where the victim had to be hospitalised due to his injuries. The victim's wife was furious; in interviews prior to the conference, the facilitator got the impression that '[s]he wanted to rip this guy's lungs out through his backside.'[41]

At the conference, she was openly hostile from the moment she walked into the room. She continually interrupted both the offender and her husband and her comments were 'full of anger'. About halfway through the conference, the facilitator asked her to speak directly about the impact on her:

> Facilitator: And she said, 'Before I met you, I wanted to kill you.' And she slammed her fist into her hand. The offender moved back. She slowly and in order told of all the effects. The effects on her son, her family, her work, her eczema. I don't think he expected such an outpouring, or for it to be so descriptive. She went into it. A day or two afterwards she found out about the crime and that her husband had been to the hospital, and the scarring. Her eczema flared so much in the night that she woke up and some of her clothing was stuck to her body, where the eczema had seeped. So she had to get into the bath, and peel her pyjamas off. Shocking.
>
> Interviewer: She told that story in the conference?
>
> Facilitator: yeah. It kind of stopped him. There was a bit of a pause, and then his mother turned to the victim's wife and said, I'm so sorry I'm so sorry, and both women held hands at that point. Both women reached across and touched each other's hands. Reached across the space in the middle of the circle.[42]

As this happened, the facilitator watched her words 'sink into him.' Prior to this, he described the offender as 'slightly cynical' and that he did not 'embrace the gravity of what he was going to do [in the conference].' He explained, 'I prefer people like that. Because they walk in cynical, thinking, "it's something to do." And they get thumped with all this hurt and anger, and I think it was wonderful. I think it was a fantastic thing.' Powerful emotions lead to powerful confrontations, increasing the chances of a ritually successful conference.

40 Ibid 42.
41 Ibid 61.
42 Ibid 62.

In this case, the offender was confronted viscerally with the effects of his actions. The victim's wife, whose eczema had flared up at the conference, was literally purple with anger. This conference was full of negative emotions: anger and hostility, cynicism and pain. Bringing these emotions to the surface in a dramatic encounter worked to draw the offender into the ritual dynamic of the conference. While he was cynical at first, and perhaps not very engaged with the process, he could not ignore the confronting image and language used by the victim's wife. The other participants created a narrative of pain and anger that drew him into the interaction. He went on to express remorse to the victims and his family and continued to engage with them for the rest of the conference.

Confrontational emotions do not necessarily guarantee a powerful ritual. As with lay participation, conference facilitators must work hard to ensure a balance of power in the interaction. Otherwise, emotional outbursts could have no, or counterproductive, effects. A similar case of robbery with an irate victim resulted in quite a different outcome. In this conference, the victim constantly interrupted and challenged the offender. After a number of failed attempts to speak, the offender eventually sat back, put his head down and disengaged from the interaction. When confronted and not given a chance to speak, he withdrew from conversation and remained in that state for the rest of the conference. The facilitator hypothesised that this was because he had no one there to support him and did not feel empowered to stand up for himself. How widely this pattern applies elsewhere is a matter for future research.

Confrontation in a restorative justice conference involves an altercation between individual parties, particularly the victim and offender, rather than their representatives. Successful confrontations also involve the expression of strong emotions, frequently resulting from careful planning by the facilitator.

C *Representation*

1 *Restorative Justice Conferences*

Legal representation in the 18th and 19th centuries developed, in part, to redress the advantage enjoyed by the prosecution in criminal trials, creating in the process a fairer contest between the parties. Defence lawyers spoke on behalf of their clients, matching the legal expertise and rhetorical skills of the prosecutor. Equality of arms, as it became known, is equally important in restorative justice conferences, but it takes a radically different form.

A conference appears to be a representative-free zone. The main protagonists — victim and offender — meet each other directly in the circle without the mediation of lawyers. However, a more detailed reading of the procedure suggests that several forms of representation are present, all of which may contribute to providing equality of arms. Further, participants may play different roles during the course of the hearing.

Despite the formal absence of a prosecutor, the state is usually represented in at least one form. A police officer, sometimes present at hearings, is familiar with the case and the offender, summarising for the conference the relevant information from the police file. Most states of Australia have police officers — mostly without legal qualifications — acting as prosecutors in lower level magistrates' courts, so this role in assisting judicial processes is not unusual for them. 'Community representatives', used in some jurisdictions, take on the role of denouncing the offending behaviour by stressing the implications for the wider community of the sorts of behaviour involved in a particular case. One of the roles played by the facilitator is as a representative of the welfare arm of the state, enabling the offender to access services for drug rehabilitation, anger management or education. Restorative justice rhetoric implies that decisions are made by the community, rather than 'the judge' or other agents of state power, but in fact the state is present in a number of guises.

While police officers might appear to simply be representatives of state authority, in practice their role is more complex. In several cases observed, the police officer 'talked down' victims who were demanding more stringent punishments for minor acts of delinquency, by pointing out the normal sentence an offender might receive from a court. Where necessary, police officers may discourage conference participants from trying to impose sanctions on offenders for offences for which they have not been charged. In these situations, police officers could be seen as taking on a role more akin to defence counsel or prosecutor.

One other feature that distinguishes conferences from regular common law criminal processes is the special status accorded to the 'victim' and the opportunity for the victim both to participate personally and to be accompanied by supporters. With offenders also bringing their support teams, there are at least three parties represented — the state (in its various forms), the victim and the offender.

In the 'ideal' conference, support teams — particularly if properly coached by the facilitator — do not take over the central place of the victim and offender in the proceedings. Instead they provide encouragement for the offender or victim to find their own voice. They may prompt, recall, clarify a point, provide additional information or simply provide acknowledgement for what the main protagonists have said. The representatives in this situation do not stand 'in place of' the person, as a lawyer tends to do in a regular legal procedure; they can be said to 'stand alongside' them. Their presence, like that of elders in indigenous courts, may also lend some authority to the decision and provide a sense of gravity to the occasion.

Successful conferences tend to include representatives of all the relevant interests. When experienced facilitators were asked to identify their subjectively defined 'successful' and 'unsuccessful' conferences, their 'successful' conferences had an average number of 6.4 people in the room (2.3 offender supporters and 2 victim supporters), while their relatively 'unsuccessful' conferences had 4.6 people present (1.9 offender supporters and 0.8 victim supporters).[43] As one facilitator puts it: 'I do prefer to have at least two on each side, it takes the pressure off the

43 Ibid 58.

victim and the perpetrator. And also it adds a little more honesty to the conference.' The more people who are present, the more likely the full story will come out, the better the confrontation and the better the ritual or 'transformation'.[44]

Lack of balance in the conference can result in either the offender or victim becoming a scapegoat. Equality of arms requires competent representatives on all sides; not just to produce and interpret relevant evidence — the justification for this principle in a criminal trial — but also to ensure emotions are handled sensitively. As can be seen in the previous example of an offender threatening suicide, emotions can be very raw.

Pre-hearing preparation for the facilitator includes identifying suitable representatives for each side and ensuring that they turn up. During the conference, facilitators may be able to step in to counter unfair advantages experienced by one side, but their standing as a credible mediator may become compromised if they intervene too often to address power imbalances.

2 *Protective Tribunals*

Guardianship and mental health tribunals are forums with responsibilities relating to the making of decisions about adults with decision-making disabilities or mental illnesses. Both types of tribunal seek to balance liberty, protection and care considerations. They provide an example of one of the other variants of non-adversarial justice, therapeutic jurisprudence.[45] Legal representatives rarely appear at these kinds of tribunal hearings. Indeed, the role of legal representation can become problematic in situations where clients may be incapable of giving instructions. However, as with restorative justice conferences, distinctive forms of representation have developed and when lawyers do appear, they sometimes adjust their lawyering style to the needs of the jurisdiction.

Guardianship tribunals have their origins in the Courts of Chancery, royal procedures within the king's *parens patriae* jurisdiction that operated independently of the common law courts and followed inquisitorial rules.[46] They were charged with protecting the rights of vulnerable adults, particularly in property and inheritance issues. In the Australian colonies, these roles were given to state supreme courts, but, in the 1970s, more accessible procedures emerged that focused on the consent and views of the person, avoided unnecessary interventions and provided a streamlined mechanism for substitute decision-making.

Mental health tribunals emerged from the shadow of the asylum, regulating detention in psychiatric facilities and compulsory treatment in the community.[47]

44 John McDonald and David Moore, 'Community Conferencing as a Special Case of Conflict Transformation' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Civil Society* (Cambridge University Press, 2001) 130.

45 King et al, above n 1, 149.

46 Terry Carney and David Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Federation Press, 1997).

47 Terry Carney, David Tait and Fleur Aileen Beaupert, 'Pushing the Boundaries: Realising Rights through Mental Health Tribunal Processes?' (2008) 30 *Sydney Law Review* 329.

In the mental health arena, decisions about whether detention is required are made largely by medical professionals following established guidelines. Tribunals, which vary somewhat between the different jurisdictions in Australia and New Zealand, are mostly review bodies, charged with reviewing detention (and some discharge) decisions, reviewing some treatment plans and making orders for compulsory treatment for patients living in the community.

Three distinctive styles of representation have developed in these jurisdictions. Firstly, the tribunal itself, or members of it, take on an advocacy role. Protective tribunals are able to operate in an inquisitorial manner, seeking written reports, obtaining oral evidence from participants and following up missing information with phone calls during or after the hearing. The tribunal may confront professionals responsible for the care of the person, scrutinising decisions and enquiring about: treatment plans, levels and durations of drug therapies, accommodation options or evidence about the person's capacity to make decisions or give consent. Having a range of skills represented on a panel makes this more feasible, with psychiatric members of mental health tribunals often being senior members of the profession (with more experience than the treating practitioners) and with community members often having a good knowledge of community services. In one case observed at the Victorian Mental Health Board, the community member questioned the treating psychiatrist about why no attempt had been made to investigate why a patient — who had evidently suffered trauma in refugee camps — was carrying out acts of self-harm. The doctor defended his position that as long as drug therapies controlled the symptoms it was unnecessary to investigate the causes.

Secondly, lay advocates may participate. The Victorian Office of the Public Advocate sometimes provides advocates to appear before the Guardianship List of the Victorian Civil and Administrative Tribunals, formerly the Guardianship Board. A range of other advocacy organisations, as well as family members and friends, also appear before tribunals and may contribute both to producing relevant evidence and challenging written reports tendered at hearings. Lay advocates contribute to providing a balance between the different perspectives presented in the hearing. For example, in a guardianship hearing, the tribunal might be leaning towards avoiding or delaying intervention, keeping an elderly person at home as long as possible, while family members might provide evidence why they think more secure accommodation is required.

Thirdly, advocates, whether lay or professional, may assist the tribunal by checking that legal rules and processes are complied with, pushing medical professionals to explain and justify their reports and identifying gaps in the evidence. They also 'push the boundaries', using the framework of the law to further therapeutic objectives like ensuring that a patient has a safe place to live on discharge.[48] Of course, not all hearings are ritual successes in this jurisdiction any more than in other forms of judicial process. However, for an inquisitorial process with no

48 Ibid.

requirement for legal representation, tribunal hearings do provide distinctive styles of representation.

V CONCLUSION: THE KEYS TO RITUAL SUCCESS

Effective justice rituals are promoted by processes which are characterised by the three features of adversarialism we have identified. Active lay participation in the process is important, although professional preparation and support is also valuable. Confrontation between the parties may lead to mutual recognition and respect, but this is unlikely to occur without a balance of power existing between participants. Representation takes many forms, but rather than sidelining participants, tends to give them a stronger voice.

Lay participation changed the face of justice processes by requiring evidence to be oral and presented in public. A jury of ordinary citizens needed to be presented, in public, with relevant evidence by the Crown and then decide whether to believe it. Non-adversarial justice processes take this feature one step further by engaging lay participants at additional stages of the justice process — in investigating the impacts or social contexts of a crime, by allowing for scrutiny of decisions by medical professionals and by allowing for wider involvement in deciding on outcomes.

The right of the defendant to confront his (or her) accuser is a feature of the traditional judicial hearing, with contestation typically centred on facts — the reliability of evidence and witnesses. In non-adversarial approaches, such as restorative justice conferences, emotions are more explicitly engaged. Facts are important but they are facts about harm, or risks associated with continued offending. Contests may involve several parties, not just two sides, and the composition of the 'teams' can change over the course of the conference.

Representation in judicial hearings developed to promote equality of arms, protecting the defendant from the unfair advantage given to the state. While this tended to redress the balance for the accused, victims were ironically excluded from the process as part of this development of legal 'professionalisation'. Non-adversarial justice processes allow for representatives to support victims, offenders and other interested parties, allowing for a more comprehensive understanding of the issues, and solutions that can bring together several perspectives.

A common undercurrent running through these types of justice encounters is the explicit role of emotions. Emotions in criminal justice have recently experienced a surge in popularity, both in the academic literature and with the general public.[49] Affective models of justice are welcomed for providing a more holistic response to legal problems, paying greater attention to social outcomes like reintegration,

49 Susanne Karstedt, 'Emotions and Criminal Justice' (2002) 6 *Theoretical Criminology* 299; Arie Freiberg, 'Affective Versus Effective Justice: Instrumentalism and Emotionalism in Criminal Justice' (2001) 3 *Punishment and Society* 265, 274.

respect and co-operation.[50] Increasingly, judicial officers in mainstream settings are developing expertise in the management of emotion as they seek to meet the diverse needs of their consumers.[51]

While 'emotionally intelligent' justice is encouraged in criminal justice circles, how emotions can be harnessed to provide effective justice rituals is not well-understood. Well-managed 'spontaneous' confrontations, whether in the circle of a conference or in court before a judge, can provide the basis for understanding and agreement. The expression of strong emotions in justice encounters — even negative ones — is more likely to produce successful outcomes than procedures where participants are disengaged. Extensive lay participation in 'informal' (but routinised) processes is likely to increase the chance that participants will become committed to the process and to the group, particularly when there is a balance of power between the different interests. Meanwhile, permitting a variety of forms of representation may encourage people to share feelings and experiences in a supportive environment.

We have produced evidence from a variety of case studies to support these claims, but there will no doubt be occasions when the rituals fail, perhaps disastrously. The type of confrontation that might encourage a minor delinquent to realise the consequences of his actions in a restorative justice conference could lead a psychotic patient in a mental health hearing to lose faith in his doctor. The extensive victim participation and representation that works in a restorative justice setting might undermine the principle of victim equality if applied in sentencing hearings.

Justice rituals are as diverse as some of the types of procedure we have examined. Despite this variety, the three features of adversarialism we have identified provide a useful framework for comparing the different models, especially for identifying some of the emotional and ritual dynamics. Adversarialism — at least as we have interpreted it — rather than being a weakness of the common law, can be seen as evidence of its resilience.

50 Michael S King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *University of Melbourne Law Review* 1096, 1119.

51 Sharyn Roach Anleu and Kathy Mack, 'Magistrates' Everyday Work and Emotional Labour' (2005) 32 *Journal of Law and Society* 590.