

# **THE PAST, PRESENT, AND FUTURE OF RESTORATIVE JUSTICE: SOME CRITICAL REFLECTIONS**

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## **Abstract**

Restorative justice has burst on the international scene as an umbrella concept and social movement. We review the major streams of activism and social thought that have made restorative justice a popular idea, consider the implications of its popularity as a social movement, and identify ways to move the idea forward. We propose that in order for the field to advance scholars and activists must (1) get beyond oppositional retributive-restorative justice model caricatures, (2) address the relationship of retributivism and consequentialism to restorative justice, and (3) use more precise terms and promise less.

## **Introduction**

“This area is complicated and confused enough as it is.” (Walgrave and Aertsen 1996: 83)

Over the last two decades, “restorative justice” has emerged in varied guises, with different names, and in many countries; it has sprung from sites of activism, academia, and justice system workplaces. The concept may refer to an alternative process for resolving disputes, to alternative sanctioning options, or to a distinctively different, “new” mode of criminal justice organized around principles of restoration to victims, offenders, and the communities in which they live. It may refer to diversion from formal court process, to actions taken in parallel with court decisions, and to meetings between offenders and victims at any stage of the criminal process (from arrest, pre-sentencing, and prison release). It is a process used in juvenile justice, criminal justice, and family welfare/child protection cases. The concept has many aliases: reparative justice, transformative justice, informal justice, among them.<sup>1</sup> Global networks of academics, system workers, and activists have fostered a multinational stew of ideas; as a consequence, key terms can shift in usage and meaning.<sup>2</sup>

Although restorative justice is a capacious concept with multiple referents, there is a general sense of what it stands for. It emphasizes the repair of harms and of ruptured social bonds resulting from crime; it focuses on the relationships between crime victims, offenders, and society. Advocates assume that restorative justice practices will necessitate changes in how state officials work, both what they do and how they do it.

This article offers a highly selective, critical examination of the past, present, and future of restorative justice. The history of restorative justice cannot, of course, be encapsulated in discrete temporal categories. Rather, it contains overlapping layers of thought and activism, some interrelated and others disconnected, as the idea has developed.<sup>3</sup> In Part I, “the past,” we chronicle the activities and practices inside and outside of academia that have worked to make restorative justice a popular idea.<sup>4</sup> In Part II, “the present,” we consider the implications of this popular idea as a social movement.<sup>5</sup> In Part III, “the future,” we identify ways to move the idea forward.

Restorative justice is a commodity in a global justice market. Some proponents have been more interested to “sell” it and its collateral services than to consider its philosophical or political underpinnings or how it would relate to current systems of law and dispute resolution. Our aim here is not to sell restorative justice, although we think it holds some promise for doing justice better. Nor do we want to subject it to sustained critique, although there is much to be skeptical about. In reality, there is not a worked out “it” available for critique. There are instead many “simple techniques,” as Walgrave (1995: 240) suggests, that workers may “insert” into the criminal or juvenile justice system process. Most practices today that might be termed restorative are of a “simple techniques” variety.<sup>6</sup>

We are struck by the enthusiasm of some proponents who see in restorative justice a simple thing. To the contrary, it is a complex enterprise, reaching into longstanding debates about the purposes of punishment, prompting a re-appraisal of the strengths and limits of varied forms of dispute resolution, and provoking a reconsideration of the relationships between citizens, the state, and “the community” in creating justice system policies and institutions. We agree with Walgrave (1995: 240) of the need for “reflection on socio-ethical, philosophical, and legal theory ... to construct a coherent paradigm ... which can serve as a frame of reference ... “. To construct such a paradigm, we propose in Part III that scholars and activists must (1) get beyond oppositional retributive-restorative caricatures of justice models, (2) address the relationship of retributivism and consequentialism to restorative justice, and (3) use more precise terms and promise less.

## **PART I: THE PAST**

Our sketch of the recent past of restorative justice is selective and ethnocentric in that we focus mainly, though not exclusively on developments in North America.<sup>7</sup> In the early to mid 1970s, when the first victim-offender reconciliation programs were set up in Canada and the midwestern U.S., and when few criminologists or practitioners were aware of indigenous justice traditions, the term *restorative justice* did not exist. It subsequently emerged in the writings of Colson and Van Ness (1990), Mackey (1981, 1992), Van Ness and Strong (1997), Wright (1991), and Zehr (1985, 1990).<sup>8</sup> Victim-offender mediation, family group conferences, sentencing circles, victim panels, and other processes that are now called restorative evolved from different groups of people (often unknown to each other), who were experimenting with alternative practices. What prompted this interest, and how did it unfold? We review these streams of activism and thought: social movements of the 1960s, particular practices and programs, and academic research and theories.

### **Social Movements**

Although many contemporary histories of restorative justice in North America begin in 1974 with a victim-offender reconciliation program in Kitchner, Ontario, our history does not. Rather, we view the civil rights and women's movements of the 1960s as crucial starting points. The U.S. civil rights movement was based, in part, on critiques of racism in police practices, in courts, and in prisons. Racial domination by whites was maintained, many claimed, by the overcriminalization and imprisonment of African-Americans and other racial ethnic minority groups. This analysis was central to decarceration actions, including prisoners' rights and alternatives to confinement. In the U.S., Native American challenges to white colonialism also contained a critique of the prison system; indigenous challenges to incarceration occurred in other nations, including Australia, Canada, New Zealand, and South Africa. The women's movement also figured prominently. During the 1970s, campaigns around violence against women were a central element of feminist organizing, and feminist groups were among the first to call attention to the mistreatment of victims in the criminal justice process. Feminist activists were also involved in prisoners' rights campaigns. Social movement activists thus identified overincarceration of offenders *and* an under-appreciation of victims' experiences. Although offenders and victims are often viewed as protagonists in the justice system, they increasingly came to see themselves as having common experiences of unfair and unresponsive treatment.<sup>9</sup>

## Programs and Practices

Since the 1970s, many programs and practices have been implemented that could now fall under the restorative justice rubric. Early efforts focused on moderated meetings between victims and offenders, adapting or drawing from traditional mediation models. Later, these meetings expanded to include family members and friends of both parties, as well as professionals and others with access to community resources. We describe the major kinds of practices and political challenges that have given shape and substance to restorative justice.

1. *Prisoner Rights and Alternatives to Prisons.* During the 1970s, some scholars and practitioners felt offenders were victims of societal neglect, impoverished communities, and racial and gender discrimination. Accordingly, advocates hoped to change prison conditions, minimize the use of incarceration, and even abolish jails and prisons. In this context, Fay Honey Knopp (1976) and others (Hull and Knopp 1978) hoped to build “a caring community” that addressed victims and victimizers. During the 1980s, as U.S. prison populations became increasingly bloated, intermediate sanctions gained in popularity and use (Morris and Tonry 1990; more recently, DiMascio 1997). Then and now, neither victim-offender mediation nor restorative justice has featured in the intermediate sanctions literature.
2. *Conflict Resolution.* During the mid- and late 1970s, the development of community justice boards and neighborhood justice centers reflected a desire for greater “access to justice” characterized by more informal processes and greater citizen participation. These methods of conflict resolution (referred also as alternative dispute resolution) reflected a growing disillusionment with adversarial fact-finding and adjudication according to legal principles. Emphasis was given to negotiation, exchange between disputants, and a less central role for legal professionals (see Pavlich 1996: 161, notes 4-6, for references to developments in Britain, the U.S. and Canada during this period).
3. *Victim-Offender Reconciliation Programs (VORPs).* VORPs, which were first introduced in Canada in 1974 and in the U.S. in 1977, were founded on Mennonite principles of exchange and dialogue. They involved meetings between crime victims and offenders, usually after sentencing, in the presence of a neutral third-party. VORPs focused primarily on restoring “the right relationships” that should exist between two parties (Zehr 1990). VORP proponents envisaged a close working relationship with religious principles and institutions (Immarigeon 1984).

4. *Victim-Offender Mediation (VOMs)*. During the last part of the 1970s, victims (and their advocates) increasingly preferred the term mediation rather than reconciliation in developing programs for victim-offender meetings. The program model for VOMs was similar to that for VORPs, although other people affected by an offense could be brought to meetings, particularly when more serious crimes were being addressed.<sup>10</sup> VOMs were introduced to England, Scandinavia, and Western European countries in the late 1970s and 1980s, primarily in the handling of youth justice cases.

5. *Victim Advocacy*. Conservative and progressive voices alike share the view that crime victims have insufficient voice in the criminal process. In the 1970s and 1980s, feminist activists and socio-legal scholars focused attention on making the police and courts more accountable to women and children who had been sexually or physically abused. "Victim's rights" groups focused efforts on restitution for crime, on victims having a formal voice in the court process, and on community safety. In 1982, the Reagan administration issued a task force report on crime victims that stimulated the growth of victim's rights groups. Alliances between victim advocacy groups and criminal justice reform groups began to grow in the 1990s, as members recognized some common interests. The U.S. Office for Victims of Crime has since shown keen interest in victim-offender mediation; a chapter on restorative justice is to be included in a forthcoming revision of the 1982 task force report on crime victims.

6. *Family Group Conferences (FGCs)*. During the decade of the 1980s, New Zealanders began reassessing the Treaty of Waitangi, a constitutional document, and its implications for Pakeha (white) and Maori (indigenous) relations. A report submitted in 1986 by the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare (published in 1988) recommended changes in government policies and practices toward Maori people. Legislation in 1989 established major changes in the handling of youth justice and family welfare matters; this action was taken in response to the overrepresentation of Maori youth in detention facilities and Pakeha-dominated family welfare decisionmaking processes. Youth justice FGCs can be used for nearly all juvenile offenses, although in practice they are applied in the more serious cases (with some statutory exceptions), while the minor cases are handled through police diversion. FGCs differ from VORPs or VOMs because they bring more community people into discussions about the offense, acknowledge a wider range of victimized people, and emphasize participation by the family members of offenders (Maxwell and Morris 1993; Umbreit and Zehr 1995-96).

FGCs were first introduced into Australia in 1991 as part of police operations in one jurisdiction (the “Wagga” model of diversionary conferences in New South Wales). Police-run conferences were also established in the Australian Capital Territory, and on a trial basis in other states and the Northern Territory. Conferencing was established legislatively in the handling of juvenile cases in South Australia and Western Australia in 1993-94, where non-police professionals convene and run conferences. Legislation has recently passed in New South Wales and Queensland to employ conferencing in juvenile cases; and it is being used in schools in Queensland. The conferencing model has been introduced in other countries, including Canada, the U.S., and England (Hudson et al. 1996).

**7. Sentencing Circles.** Sentencing circles emerged in Canada during the 1980s as part of First Nation groups’ ways of responding to offenders. Ross (1992) observes that the objectives are conflict resolution, restoration of order and harmony, and offender, victim, and community healing. Sentencing circles are a consensus process (Stuart 1997), which involves “a broad holistic framework [that includes] crime victims and their families, an offender’s family members and kin, and community residents in the response to the behavior and the formulation of a sanction which will address the needs of all parties” (Griffiths 1996: 201).<sup>11</sup> Sentencing circles are now being tried by non-Aboriginal groups in Canada and the U.S., including African-Americans in Minnesota.

**8. Other Practices.** Other practices emerging in the 1980s and 1990s fall under the restorative justice umbrella. In Vermont, Reparation Boards are composed of community members who fashion penalties for juvenile offenders; the penalties are typically community service and occasionally victim-offender mediation. Victims are not normally present at these meetings. Another practice is victim impact panels, originally established by Mothers Against Drunk Driving. These panels allow victims and their families to express their feelings about the consequences of drunk driving to those offenders who have been court-ordered to attend. Unlike many restorative justice practices, victim impact panels are not voluntary. These panels may bring an important element of victim-offender contact into the process, one that is missing in traditional proceedings. Some argue, however, for the importance of distinguishing between a victim’s rights to *services* and a victim’s *procedural rights in the criminal process*. Whereas the former should be provided, the latter may be inappropriate (Ashworth 1994: 34-37).

## Academic Research and Theories

Paralleling social movement activism and the emergence of alternatives to traditional justice system practices was academic research and theories. Some commentators suggest that the practice of restorative justice came first, born of the exigencies of needing to do justice differently, and that the theory came later (Marshall 1996). In fact there was a good deal of theoretical work undertaken by socio-legal and critical legal scholars in the 1970s and 1980s; this fell under the rubric of informal justice.

1. *Informal Justice*. Socio-legal scholars (e.g., Abel 1982 and contributors; Harrington 1985; Henry 1983; Matthews 1988) have conducted empirical research on informal and formal justice in Western industrialized societies and in tribal, agricultural-based societies. Matthews (1988: 1) notes that “less than a decade after the emergence of the first wave of optimism it was overshadowed by an equally forceful wave of pessimism.” There appears to be renewed interest in informal and community justice as critical legal and socio-legal scholars acknowledge the tensions between the transformative potential of legal pluralism and the impossible “goal of attaining justice through law” (Lacey 1996: 135). Works by Merry and Milner (1993), Pavlich (1996), and the contributors to the special issue of *Social and Legal Studies* (Santos 1992) are indicative of this trend.

2. *Abolitionism*. During the 1970s and 1980s criminologists in Norway, The Netherlands, and elsewhere (e.g., Mathieson 1974; Bianchi and Van Swaaningen 1986) called for the abolition of prisons. Their work dovetailed with the alternatives to prison and decarceration activities during this time period. Few people today would argue for a complete ban on prisons, although many take a strong stance of a minimal use of prisons (Carlen 1990; de Haan 1990). Some restorative justice initiatives, e.g., diversion from court and pre-sentencing conferences, can be used as alternatives to confinement.

3. *Reintegrative Shaming*. John Braithwaite (1989) introduced the term reintegrative shaming to argue for an integrative rather than stigmatizing response to crime. His analysis focused on the positive benefits of informal methods of social control (e.g., social disapproval that inculcates feelings of shame) in regulating social order. Braithwaite’s ideas were put into practice as “the theory” behind the model of conferencing in Wagga Wagga, New South Wales (Australia). In the Antipodes, it was only in Wagga (and a handful of other police departments), and now in the Australian Capital Territory, that shame has featured as an element in the FGC. It has not

been part of FGCs in New Zealand, nor in the Australian states of South Australia, Western Australia, and Victoria. To date, it has primarily been the Wagga model that has been exported to the U.S. and England. In the Antipodes, there is considerable debate over whether “shame” should be made a central feature of the conferencing process, especially in cases involving Aboriginal offenders (Blagg 1997).<sup>12</sup>

4. *Psychological Theories*. In further refinements of the Wagga model and applications of shaming theory, some advocates have added affect and script theories to describe the micro-dynamics and sequences of experienced emotions (Moore 1993). Attention has also been given to disputants’ senses of procedural justice in the legal process (Tyler 1990).

5. *Feminist Theories of Justice*. A substantial body of feminist work has emerged in moral theories, building in part from Carol Gilligan’s (1982) construct of “care” and “justice” in moral reasoning and decision-making. In criminology, some have found the “ethic of care” useful (e.g., Harris 1987; Heidensohn 1986) whereas others are more skeptical (Daly 1989). An ethic of care approach is being applied to family group conferencing of domestic violence cases in Canada (Pennell and Burford 1994).

6. *Peacemaking Criminology*. The criminology of peacemaking, according to Pepinsky and Quinney (1991: ix), is “a criminology that seeks to alleviate suffering and thereby reduce crime.” Peacemaking criminology draws on different traditions, including spiritualism and feminism. For peacemaking criminologists, crime and criminal justice are violence. “Crime is suffering,” Quinney notes. “The ending of both suffering and crime, which is the establishing of justice, can only come out of peace, peace that is spiritually grounded in our very being” (Quinney 1991: 11).

7. *Philosophical Theories*. Philosophical arguments for alternatives to traditional justice system responses have been made by Braithwaite and Pettit (1990), Cragg (1992), and Fatic (1995). In different ways these authors call for restricting the use of penal sanctions and for non-retributivist modes of response. Retributivist oriented (or desert-based) philosophers and legal theorists have been critical of Braithwaite and Pettit’s (1990) republican theory of criminal justice (see exchanges, discussed below, between Ashworth and von Hirsch, and Pettit and Braithwaite).

8. *Religious and Spiritual Theories*. Although restorative justice requires managerial, mediating, and organizational skills, its practices have also been animated — in Canada and the U.S. at least — by religious and spiritual theories. The first VORPs came from Mennonite traditions; and Aboriginal,



First Nation, and Native American peacemaking processes merge spiritual and cultural elements. In addition to Mackey, Van Ness and Strong, and Zehr, other religion-based writers (primarily Christian) include Boers (1992), Burnside and Baker (1994), and Consedine (1995).

## II. THE PRESENT

With these strands of thought and activism coming from within and outside academia, it is not surprising that commentators will refer to restorative justice as “a movement.” For example, Braithwaite (1996: 8, 23-24) suggests that restorative justice “has become the slogan of a global social movement” and that it will become a “profoundly influential social movement throughout the world” in the twenty-first century.

Like restorative justice, the term *social movement* resists easy definition. The term is used loosely, perhaps too loosely, in describing human endeavors. However, it can be helpful to analyze restorative justice as a social movement, in addition to reflecting on what its principles and practices might be as a “coherent paradigm.” In so doing, we can become more aware of the reasons for its popularity, and we can analyze its politics, including an ability to anticipate sources of conflict.

We draw from Jan Pakulski’s (1988) discussion of “new social movements.”<sup>13</sup> Restorative justice has elements associated with new social movements, including these:

- A value orientation (rather than just an instrumental orientation) that is idealistic. Although the goals and values are secular, the new social movements “engender a spirit of moral crusade that resembles religious causes” (p. 249).
- A diffuse, non-programmatic character and an anti-organizational orientation. New social movements do not “commit supporters to any single program, tactic, or strategy; they have no single ideological orientation ... no obligatory platform” (p. 250).
- An inclusive, amorphous structure. New social movements have “an open, public character; they reject the notion of membership, organizational division of roles, and functional hierarchy. The emphasis is on broad egalitarian participation and unselfish dedication ...” (p. 250)

If new social movements do not have “well-articulated goals, ideologies, strategies, or constituencies” (p. 251), what unites them? The unifying thread is a stance *against*, rather than *for*: “an opposition and hostility to some

crucial elements of the dominant political-administrative system and the normative order this system engenders” (p. 251). The “absence .. of ideological-programmatic unity” is a strength and a weakness. The strength lies in increased numbers of people associated with a movement; at the same time, a movement will lack political effectiveness unless it shifts from an anti-systemic to a pro-systemic orientation, that is, unless it adopts a goal and strategy. Once a mass movement begins to turn in this direction, however, it is likely to “alienate large sections of supporters, followers, and sympathizers” (p. 252).

With this brief sketch of social movements, we can begin to see why restorative justice has “caught on,” why it resonates.<sup>14</sup> It is based on a new, idealistic conception of justice,<sup>15</sup> one that sets itself against traditional justice practices; its proponents have varied ideological stances, including liberal, radical-critical, feminist, and abolitionist; its strategies are varied; its membership is open and permeable; and there is not one (or several) organizations uniting its members, although there may be conferences that bring together researchers and activists. By seeing restorative justice as a social movement, we may anticipate several conflicts and developments.

1. *Conflict over Goals.* As a social movement, restorative justice has a heterogenous set of players, including people living in different countries, members of majority and minority groups, and those with secular and religious orientations. Although diversity may be viewed as a strength, we should expect conflicts to emerge over principles and goals. This will intensify when there is a shift from a stance *against* to a stance *for*, that is, when there is a shift to a more focused set of policies and strategies, or when, as Alan Harland (1996) suggests, participants begin to “sell” restorative justice to policy makers.<sup>16</sup> In addition to conflicts arising over what restorative justice is and could be, the character of the diversity itself may impart a disheveled appearance to those in the mainstream.

2. *State Devolution and the Rise of Justice Entrepreneurs.* With the dismantling of the state’s social welfare functions, middle-class professionals are now identifying new roles for themselves. Restorative justice practices and programs offer opportunities for members of this professional class to work as brokers between “the state” and “civil society.” Restorative justice as a social movement often sets itself against current state practices in the administration of criminal justice. However, it is surely not “anti-statist”: many advocates are employed by governments. Thus, movement members are acting both inside and outside of state entities. We should expect to see

conflicts among legal and non-legal professionals over who “owns” the emergent broker roles. And we should expect to see a proliferation of private justice outlets, as justice entrepreneurs seek to sell their services.

3. *The Mixed Ideological Bag.* Restorative justice as a social movement can embrace both “neo-liberalism,” with its focus on economic rationality, entrepreneurial activity, and concern to “empower the consumer” (Garland 1997: 182-4), and grass-roots forms of democratic socialism (Sullivan and Tift 1997).

Restorative justice can accommodate both “law and order” and “progressive” responses to crime. It is sobering to realize that, as Braithwaite (1996: 24) notes, “some of the most savvy conservative governments in the world, [those] most imbued with the imperatives for fiscal frugality — New Zealand and Singapore — [were] early movers in embracing restorative justice.” It may surprise some people to know that fiscal conservatism was a key reason for the New Zealand government’s support of family group conferences (Cody 1991).

Like the earlier critics of informal justice in the 1980s (e.g., contributors to Abel 1982), critics of restorative justice today are suspicious of how elements of “the new” will be grafted onto the clunky, often repressive machinery of the criminal process. Such grafting and absorption has occurred largely through the efforts of restorative justice entrepreneurs. Walgrave (1995: 138) suggests that such efforts have produced a “miscellaneous profusion, an odd assortment of good intentions, opportunism, and clear visions,” and that such efforts “threaten [] the replacement value of the restorative approach before it has truly developed.” The irony is, then, that as bits of restorative justice are successfully marketed and sold, its transformative potential may be dissipated and displaced.

### **PART III: THE FUTURE**

The current play of restorative justice contains a multitude of practices and programs, coupled with a popularity that comes with “the new.” It does not yet have a coherent paradigm, but at this early stage, we should not expect to see one. Nor should we expect to see a coherent paradigm that could supplant traditional justice practices. “Justice has been fragmented,” as Pavlich (1996: 41) suggests. There are “different calculations of justice” coexisting today, and these reflect varied “idioms [within] which different rationalities of silenced disputants can be articulated” (p.39). These “different calculations” also feature in the work of restorative justice advocates

[compare, e.g., Walgrave (1995) with Bazemore and Umbreit (1995) on the goal of “rehabilitation” in justice system practices]. In addition, when debating the merits of restorative justice and the tradeoffs between retributivism and consequentialism, theorists appear to talk past each other (e.g., the debates between Pettit and Braithwaite, and Ashworth and von Hirsch). We consider these and other areas that need to be addressed if research and discussion on restorative justice is to advance.

1. *Move Beyond Oppositional Caricatures of Justice Models.* A common analytical device, used by restorative justice advocates, is to draw contrasts between “retributive,” “rehabilitative,” and “restorative” justice models (see Bazemore 1996; Walgrave 1995; Zehr 1990).<sup>17</sup> These models are respectively associated with punishing the crime, treating the offender, and repairing the harm. In deploying these contrasts, restorative justice advocates demonstrate the superiority of their model over the other two, and especially over the retributive model.<sup>18</sup> Such contrasts are not only self-serving (i.e., everything in the “retributive” column seems nasty and brutish, whereas everything in the “restorative” column seems nice and progressive), they also foreclose a discussion of the merits of each, of how the principles of each might be ranked in a hybrid model, or of how each could operate along side each other in a criminal justice system.<sup>19</sup>

Part of the problem lies in the different understandings of the term retribution. This term is used by philosophers to compare retributivist (backward-looking) and consequentialist (or utilitarian, forward-looking) justifications for punishment. Furthermore, there are several types of retributivist arguments (Duff and Garland 1994: 7): positive retributivism, which holds that “the guilty must always be punished, to the full extent of their desert,” and negative retributivism, which holds that “only the guilty may be punished, and then only to the extent of their desert.” Consequentialist arguments, on the other hand, justify punishment “by its contingent, instrumental contribution to some independently identifiable good” (Duff and Garland 1994: 6), most often to prevent crime and to change someone’s behavior. There are also hybrid justifications for punishment that combine elements of retributivism and consequentialism.

Associated with a retributivist justification for punishment is the goal of just deserts, where punishment is in response to the offense harm and in proportion to other harms. There can be other goals associated with retributivism; one is to compensate a harm (a form of restitution). Associated with a consequentialist justification for punishment are the goals of rehabilitation

and treatment, general and special deterrence, and incapacitation. In all such cases using consequentialist justifications, the aim is to prevent or reduce future crime in some way.

In the last decade, a noted retributivist, Andrew von Hirsch, has modified his position. He no longer justifies “hard treatment” with a “benefits-and-burdens” argument (also termed “righting-of-the-balance”; von Hirsch 1985). Rather, his analysis centers on the censuring element of criminal law (“reprobation”) with a secondary emphasis on the “prudential disincentive” that hard treatment affords (prevention of crime) (von Hirsch 1993: 9-14). Although von Hirsch is one philosopher among many, his ideas have been influential, and his work is frequently cited by restorative justice advocates.

With this background, we may now note problems in how some restorative justice advocates draw contrasts between justice models. First, advocates unify the punishment goals of just deserts, incapacitation, and deterrence under one heading of the “retributive” model. This is inappropriate and misleading. Second, advocates do not describe the punishment justification for restorative justice. Is it consequentialist, retributivist, a combination? Third, advocates seem unaware of changes in retributivist ideas. For example, retribution is understood as “channeling revenge” (Walgrave 1995: 236), the assumption being that “incarceration [is] the primary means of sanctioning offenders” (Bazemore 1996: 50). These views are not held a leading retributivist, who says that “a decent society should seek to keep the purposeful infliction of hurt to a minimum” and who is interested in how fines and community service might be scaled on desert grounds (von Hirsch 1993: 4).

Perhaps advocates are arguing for a third position that combines elements of retributivism and consequentialism? This would not be difficult: one could devise a desert-based structure to community service hours, as was done in the 1980s in New York City under the auspices of the Vera Institute of Justice (McDonald 1986) and, more recently, the Center for Alternative Sentencing and Employment Services (Singleton 1990). Walgrave and Aertsen (1996: 82) argue for a desert-based approach to community service when they say, “the obligation to restore allows the introduction of a form of proportionality. The reference to the harm caused provides an indication of the extent to which a restriction of freedom is permissible through imposed restoration.”

Zedner (1994) asks whether it is possible to reconcile reparation and retribution. After analyzing the purposes and principles of state punishment, her answer is a qualified “yes,” although she thinks that “accommodat[ing] reparative justice to the rationale of punishment” could easily “strip it of much of its original

appeal,” [especially] its commitment to repairing ruptured social bonds.” Zedner’s careful consideration of the points of overlap and difference, drawing from the *legal* literature, is reinforced by *empirical* study of what occurs in those practices (or ceremonies) that may be termed “restorative.”

From observations of family group conferences for admitted juvenile offenders in Australia, one of us (Daly) finds that when conference participants talk about the offense and its impact, why the offense came about, and the ways an offender can restore the harm, elements of censure, paying back the victim, and helping the offender to reform are all invoked. That is to say, practices termed “restorative justice” are capacious: they can include discourses of blame and censure, repair, and promises for good works in the future. Consider too that the theory of reintegrative shaming calls for censuring of the act, followed by gestures of love and affirmation toward offenders by those close to them. And in practice, during family group conferences, participants do shift from discussions of offender responsibility for an act and the censuring of the act, to efforts to assist an offender in the future.

At issue is not *only what gets discussed, but the forum of discussion*. Many practices termed “restorative” do not take place in public, formal sites; instead, they are understood to be “private,” that is, outside public view and with limited presence of a legal authority. Restorative justice advocates need to be clear about *what* actions and conversations are taking place in public or private settings (that is, what actions are part of formal and informal justice). For example, when Braithwaite and Mugford (1994) illustrate the “conditions of successful reintegration ceremonies,” drawing from observations of family group conferences, they ignore both a difference and a similarity in the conditions of “degradation” and “reintegration” ceremonies. They overlook the fact that a “degradation” ceremony (as described by Garfinkel 1956 with reference to court proceedings, primarily sentencing) is a public ceremony in a court, whereas a “reintegration” ceremony is a private ceremony (confidential, only for the participants involved) in a non-court setting. [Walgrave and Aertsen (1996: 78-81) also identify this problem; they argue that “shaming” may be acceptable in an informal setting, but public shaming could easily degenerate into a degradation ceremony.] At the same time, Braithwaite and Mugford (1994) ignore a similarity in what occurs during the two ceremonies: the act is denounced and the offender is expected to take responsibility for it.<sup>20</sup>

There are important differences in what can be said and achieved in a courtroom and a conference ceremony. In the latter, for example, victims can be heard and those close to the offender can also express their affection

and desire to reintegrate the offender. The point is that strong contrasts that analysts may wish to draw between “retributive” and “restorative” models of justice or of “degradation” and “reintegration” ceremonies do not reflect points of similarity; they may also neglect other points of difference.

2. *Address the Relationship of Retributivism and Consequentialism to Restorative Justice.* We have already noted differences between those who justify punishment on retributivist and consequentialist grounds. We shall not detail the protagonists’ positions here, but we do wish to clarify certain features of the debate. First, there is an unfortunate history to the exchanges in the “just deserts” (e.g., von Hirsch 1985; von Hirsch and Ashworth 1992; Ashworth and von Hirsch 1993) and “not just deserts” (Braithwaite and Pettit 1990; Pettit with Braithwaite 1993, 1994) matter. Braithwaite’s (1989) theory of reintegrative shaming, which he now incorporates in the republican theory of criminal justice and which he views as a form of “restorative justice,” is a consequentialist theory. The critical reaction by von Hirsch and Ashworth to the sentencing component of the republican theory is aimed primarily at the problems inhering (as they see it) in consequentialist justifications, not to restorative justice per se.<sup>21</sup> One can imagine a restorative model could be retributivist, consequentialist, or a combination of the two.

A second problem is that each side of the debate does not keep up with the concessions the other has made. For example, as we have noted, von Hirsch’s position has now shifted away from a benefits-and-burdens justification; he has added a consequentialist justification for “hard time,” argued strongly for parsimony in punishment, and considered ways to devise desert-based criteria for non-custodial sanctions. Pettit with Braithwaite (1993, 1994) now concede that setting clear upper bounds on sentencing is essential.

These scholars do differ on key points: among them, how much discretion should be permitted in deciding sanctions, and the interrelated criteria of fairness, consistency, and proportionality in the imposition of sanctions. But, to date, they have largely been engaged in defending the superiority of retributivism or consequentialism. It would be helpful to know how these scholars would conceptualize practices and principles in informal and formal settings, and how they would consider fairness and consistency to both offenders and victims. Although there has been some discussion along these lines (Ashworth 1993), more could be entertained.

3. *Use More Precise Terms and Promise Less.* A major challenge posed by restorative justice is whether we are able to even “speak” about it or implement bits of it within the dominant punishment- or welfare-oriented justice

frameworks. Probably not, or not very well. An added problem is how advocates may try to persuade politicians, policymakers, and members of the general public of its merits. The following statements illustrate these themes. They show the difficulties of describing restorative justice in general terms, using a vocabulary that is familiar and reassuring to policymakers and citizens.

From Bazemore and Umbreit (1995: 304, 311):

Neither punitive nor lenient in its focus,  
restorative justice gauges success in sanctioning not  
by how much punishment was inflicted or treatment  
provided but by how much reparation, resolution, and  
reintegration was achieved.

Restorative justice .. has implications for  
enhancing and building support for a more empowering,  
holistic, and effective reintegrative approach to  
rehabilitation ... and for defining a new role for  
juvenile justice professionals in enhancing the  
safety and security of communities.

And these statements from van Ness (1993: 264, 266):

The overall purpose of restorative justice is  
to resist crime by building safe and strong  
communities.

The challenge is to prioritize restorative  
outcomes over procedural goals. The test of  
any response to crime must be whether it is  
helping to restore the injured parties.

For the first statement, one sees why desert theorists are concerned with the ideas put forward by some restorative justice advocates. Can “success in sanctioning” be gauged by the amount of reparation? Although the achievement of resolution and reintegration are laudable aims, can or should these be the focus of *sanctions*?

For the second, desert theorists may again look askance. The language of “more effective rehabilitation” and “enhancing the safety of communities” promises both “therapy and restraint” (von Hirsch 1985), raising again the specter of wide-ranging discretion. Moreover, there appear to be differences between advocates over the role of “rehabilitation” in a restorative justice model. Whereas Bazemore and Umbreit (1995) seem to support the idea, Walgrave (1995: 244) does not, at least not as part of the formal (or judicial) framework of justice.<sup>22</sup>



For the third, crime could best be resisted (arguably) by abolishing criminal law, and even in “safe and strong communities,” there will be harms inflicted. Might the author be promising too much for restorative justice?

For the last statement, what is the relationship between procedural and substantive justice in a restorative justice model? In “restoring the injured parties,” is priority given to offenders or to victims with respect to fairness? Or by “restoring,” is the author referring to reconciling their interests or, perhaps, to their reconciliation?

We do not wish to single out these authors and their ideas as “deviant.” Their aspirations and claims for a better form of justice are the norm, especially in the U.S. literature. It is this norm, with its set of promises, that we wish to challenge.<sup>23</sup>

The rhetorics in crime and justice pull us toward simple understandings of “good” and “evil,” whether in academia or popular culture. Some liberal and critical criminologists today may find it seductive to challenge the “evils” of escalating repressive punishment, especially increasing rates of imprisonment, which are claimed (wrongly) to have been caused by policies anchored in just deserts.<sup>24</sup> They may see in restorative justice a “good” to supplant this “evil.” But in trying to persuade others of its potential goodness, perhaps too much is being promised. In a political climate where citizens and policymakers may demand proofs of the efficacy of restorative justice, advocates may not be able to deliver. They may have set expectations too high.

Modest aims and strategies may prove more successful. One imaginative “action-research” project is the Mediation for Reparation Project in Leuven, Belgium (Peters and Aertsen 1995). The project does not offer diversion from court; mediation staff run victim-offender meetings in parallel with prosecutorial investigation, the expectation being that the outcome of the mediation may affect the sentence. The project requires discussions between prosecutors and members of the mediation staff in selecting and going forward with cases. This permits “a forum for permanent reflection and re-thinking of the existing approach within the system. ... [It provides a way to make] members of the judiciary more effectively committed to the new, restorative paradigm” (Walgrave and Aertsen 1996: 76).

The Leuven research can reveal how forms of restorative justice may be able to work alongside current practices, and it may suggest ways in which traditional legal practices in criminal or juvenile courts can be informed, and perhaps changed by, restorative justice ideas. Many legal actors resist restorative justice,

seeing in its predominantly mediation form, a second-class form of “justice.” (So too for crime victims, offenders, and others.) Legal actors, especially judges, magistrates, prosecutors, and police officers, may disparage restorative justice as a “soft option” that does not send “strong signals” proscribing illegal conduct. Exhortations about the evils of prison and the goodness of compensation and community service are not likely to persuade members of the legal establishment. But if some members see the ways that restorative justice can work, and with what kinds of cases, then some change is possible.

## **CONCLUSION**

Restorative justice has burst on the international scene as an umbrella concept and social movement. As a concept, it means many things and contains varied practices at different sites of decision-making. For the juvenile and criminal justice systems, it is viewed as a set of alternatives to formal justice, as a way to hive off less serious cases, to divert young offenders from court, to provide opportunities for victims and offenders to meet and perhaps to make amends, and to reduce a reliance on prison. As a social movement, its members are against current justice system practices, especially the overuse of prison, on both ethical and economic rationalist grounds. As a concept and social movement, restorative justice has captured the imagination of growing segments of practitioners, academics, and policymakers for its promise to “do justice” differently and better. Can it? And how will that be done?

In moving from good intentions, strong metaphors, and compelling stories of victim-offender relationships, to a reflection on ethical, legal, and philosophical theories, the work becomes harder, the political and professional challenges more intense. Debate will emerge over principles and practices, as it should.

We have argued against the wisdom of opposing retributive and restorative models of justice, and we have proposed that greater conceptual clarity be brought to bear on what is being compared and evaluated. Greater attention should be paid to the practices that may be optimal in formal and informal sites, to how decisions in formal and informal sites might be linked, and to the tradeoffs between consequentialist and retributivist justifications. For some time to come, restorative justice will operate as “shadow justice” (Harrington 1985), its advocates gaining a foothold “through the stealth of disquiet and enterprise rather than ... the force of open defiance” (Pavlich 1996: 42). Practices will largely be contained by formal state justice, although not entirely.

We worry that advocates of restorative justice may be promising too much: of repairing social bonds, of offenders making reparations to the community, of the reintegration of offenders into communities, of victims receiving compensation, of victims being satisfied with the process, and on and on it goes. We should remember that justice is elusive, “an experience of the impossible” (Pavlich 1996: 37, quoting Derrida 1992). Restorative justice, already “complicated and confused enough as it is,” may do well by reducing its excess of promises.

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## Notes

- <sup>1</sup> Tony Marshall reports hearing these terms used in referring to new justice modes: restorative, communitarian, neighborhood, progressive, reintegrative, situational, accessible, informal, reparative, holistic, green, real, soft, negotiated, balanced, true, positive, natural, genuine, restitutive, relational, community, alternative, constructive, participatory, problem-solving, and transformative. “Whatever the term,” he notes, “the tendency is to bring in everything” (Marshall 1997: 2).
- <sup>2</sup> Our epigram comes from Walgrave and Aertsen’s (1996) discussion of the utility of the term, “restorative shaming,” which had been suggested informally by John Braithwaite. They argue that while “reintegrative shaming” and “restorative justice” may be seen as “complementary concepts, [they] should not be fused together.” They explain why: “The area is complicated and confused enough as it is.”

- <sup>3</sup> Walgrave (1995: 245) suggests that restorative justice “is ... an ideal of justice in an ideal of society.” Thus, it is not simply a new way of “doing justice,” but depends for its ultimate success on “a change in social ethics and a different ideology of society.”
- <sup>4</sup> Part I excerpts from and revises Immarigeon and Daly (1997).
- <sup>5</sup> Part II excerpts from and expands on a paper given at the “Justice Without Violence” conference, Albany, New York, June 1997 (Daly and Immarigeon 1997).
- <sup>6</sup> At issue is whether a new practice merely accommodates itself to existing criminal justice practices or challenges and changes existing practices. In criminal justice reform (or any reform, perhaps), differences arise between what is sold and what is later practiced. Some practitioners (and the organizational and political contexts within which they work) are better positioned than others to implement the complexities of proposed reforms. As “simple techniques,” restorative justice practices can easily become more of the same rather than something “new.”
- <sup>7</sup> National and regional variation is evident in the overviews and collections by Abel (1982), Galaway and Hudson (1996), Messmer and Otto (1992), and Matthews (1988).
- <sup>8</sup> Some attribute the origin of the term restorative justice to Albert Eglash (1976), who wrote about the need for “creative restitution.” Eglash developed his perspective through reading autobiographies of lawbreakers. The “restorative approach” he proposed redefined the past responsibility of an offender in terms of the damage (or harm) done to victims, and the present responsibility of an offender in terms of a capacity for constructive action. Eglash saw himself as offender-oriented. “For me,” he once said, “restorative justice and restitution, like its two alternatives, punishment and treatment, is [sic] concerned primarily with offenders. Any benefit to victims is a bonus, gravy, but not the meat and potatoes of the process” (Eglash 1976: 99).
- <sup>9</sup> In the last two to three decades in the U.S., crime offenders and victims have gained some important “rights,” and prisoner’s and victim’s rights movements have achieved a visibility previously unknown to them. Being visible in a courtroom or legal brief as a plaintiff may not be adequate for either party. Restorative justice offers a process by which the desires of (some) victims and offenders to face and confront each other can be met.
- <sup>10</sup> We are uncertain why this shift in terms occurred, from VORP to VOM. One reason might have been to allay victim concerns about “reconciling” with offenders. Another is that mediation can be used in victim-offender encounters at early stages of the criminal process.
- <sup>11</sup> There are problems in how sentencing circles can be used in cases intra-racial violence involving Aboriginal women as victims. See Razack’s (1994) critique of Ross (1992), and more generally, Stubbs’s (1995) critique of Braithwaite and Daly (1994) on using restorative justice methods in family and sexual violence cases.
- <sup>12</sup> In an otherwise incisive analysis of the Orientalist appropriation of Maori culture in the service of “white justice,” Blagg (1997) gives the misleading impression that the Wagga model, with its associated component of inducing shame, is the norm in Australia.

- <sup>13</sup> The social movements literature is large, but commentators suggest two general approaches are taken: “resource mobilization,” associated with U.S. research, and “new social movements,” associated with European research (Tarrow 1996).
- <sup>14</sup> Restorative justice is similar to the idea (or ideal) of community; the two are often linked by advocates of restorative justice. As Lacey (1996: 118) suggests, community can serve “to infuse ... the rational-instrumental space of the legal with something affective and committed.” Terms such as “healing” and “repairing” the community evoke romantic notions of an imagined past.
- <sup>15</sup> Advocates point out that restorative justice is not new at all, but evident in Western legal codes and biblical texts from as early as 1700 B.C. (see Van Ness 1993: 252-57).
- <sup>16</sup> While we argue that restorative justice advocates take a position that begins with a critique of the failures of extant practices, they may not state what they are against precisely. Still others may claim that restorative justice is a good in itself, without regard for how the idea may fit with current (or previous) theories or practices in the criminal/juvenile justice system. Our characterization of stances against and for is broad-brushed and draws from a selective reading of the advocacy literature. Ideas and positions are fluid; they can be difficult to represent accurately.
- <sup>17</sup> The number of “R’s” in this area is, well, remarkable: repair, recognition, reconciliation, reassurance, recompense, rectification. Some critics suggest that the “mnemonic attractiveness of the ... R’s is not matched by the persuasiveness of the theory on which they are based” (Ashworth and von Hirsch 1993: 11, in criticizing Braithwaite and Pettit’s republican theory of criminal justice).
- <sup>18</sup> When these comparisons are made, it is often not clear what is being compared nor what to call the categories. For example, it would be more sensible to compare retributive and consequentialist punishment justifications, with the various punishment goals (deserts, rehabilitation, deterrence) falling within those categories. At present, authors seem to be conflating justifications and goals in their tables. If the aim is to compare punishment goals, then there should be more than three categories.
- <sup>19</sup> Some authors challenge the opposition of formal and informal (or state and popular) justice, suggesting that both share “common mythical figures” of an “individual’s autonomy” and of “pre-existing community” (see Pavlich’s 1996 at 83-87 for a discussion of Peter Fitzpatrick’s work).
- <sup>20</sup> See also Zedner (1994: 248) on these two points of similarity in retributive and reparative models of justice: assumption of individual autonomy and a harm-based notion of response. We note that from time to time in a family group conference, some participants may accept partial responsibility for the offense, and not focus on the offender’s culpability alone.
- <sup>21</sup> We are not aware of a direct exchange between the protagonists on the merits of the republican theory that includes a restorative justice component; however, Ashworth (1993) has replied to van Ness’s (1993) challenges of restorative justice, and Fatic (1995) has analyzed the relationship of “restorative crime handling” to the Braithwaite and Pettit (1990) republican theory.

- <sup>22</sup> Walgrave (1995: 244) says: “The function of justice in a society is not to treat its citizens, nor to make them happy. ... Rehabilitation must take place outside the justice system. Restorative justice must (and can) ensure that extra-judicial rehabilitative approaches are not precluded by its actions.”
- <sup>23</sup> In fairness, Bazemore and Umbreit reflect on problems of implementing restorative justice practices within a traditional justice system, and van Ness argues that it is important “to test new ideas thoroughly ...”
- <sup>24</sup> It was not the “just deserts” punishment goal that caused prison populations to increase. Rather, it was the political popularity/demands of “more punishment” that set penalty levels high, coupled with the crime control concerns for sentencing enhancements and mandatory sentences, all of which are based on consequentialist principles. Zedner (1994: 231, fn.17) suggests, however, that “desert theory is particularly susceptible to [strong law-and-order] pressures.”

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