

## CRITIQUING THE CRITICS

### *A Brief Response to Critics of Restorative Justice*

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*Restorative justice has been subject to a number of attacks, both empirically and philosophically. This paper attempts to address some of these criticisms and suggests that they stem in part from misunderstandings about what restorative justice seeks to achieve and in part from demanding too much from restorative justice at this stage in its development. Attempts to evaluate restorative justice are also relatively recent. Critics, however, tend to either ignore the available research findings or to present them negatively. Critics also fail to contrast what restorative justice has achieved and may still achieve with what conventional criminal justice systems have achieved. Drawing from research, particularly from New Zealand, which has put restorative justice principles into practice to a greater extent than other jurisdictions, this review suggests that there are reasons to be relatively positive about the re-emergence of restorative justice.*

It is not unusual in the criminological literature to come across claims that ‘reforms’ have had unanticipated and negative consequences (see, for example, Platt 1969; Martinson 1974; Pease 1985; Bottoms 1987) and this claim has been made with respect to restorative justice. Levrant *et al.* (1999: 16), for example, recently described restorative justice as perhaps doing ‘more harm than good’. Similarly, Johnstone (2002: 7) cautions that we ‘need to be alert to the ways in which it [restorative justice] could make things worse’ and details a ‘whole range of deleterious consequences’ which might result from a shift to restorative justice. Johnstone later argues that the proliferation of restorative justice programmes ‘is not the benign development it is often taken to be, but has a much more sinister side to it’ (2002: 25).<sup>1</sup> And Delgrado (2000: 759) asserts that restorative justice renders ‘a disservice to victims, offenders and society at large’.

In a related vein, some writers have also questioned whether or not the values of restorative justice can be translated into practical reality. Levrant *et al.*, for example, described restorative justice as ‘an unproved movement that risks failure’ and claimed that its appeal ‘lies more in its humanistic sentiments than in any empirical evidence of its effectiveness’ (1999: 16). Kurki (2000: 240) argued that ‘there is not yet evidence that the experience yields better results’. And Miers (2001: 88) recently wrote of restorative justice that ‘sceptics have much to be sceptical about’. This paper takes issue with these various claims.<sup>2</sup>

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<sup>1</sup> See also Ball (2000) who argues specifically that referral orders, introduced in England and Wales in the Youth Justice and Criminal Evidence Act 1999 and intended to reflect restorative justice values, are likely to result in outcomes directly the opposite of those intended.

<sup>2</sup> It is perhaps invidious in this introduction to identify certain writers on restorative justice and I may open myself up to challenge by choosing to quote these rather than others. However, these critical works can be taken as ‘representative’. The criticisms in them are ‘typical’ and not individual or idiosyncratic.

I acknowledge that the restorative justice literature is plagued with imprecision and confusion and I do not seek to defend all practices that claim to be restorative justice. These are as diverse as conferencing,<sup>3</sup> victim-offender mediation, sentencing circles, community reparation boards, restitution programmes and much more. I acknowledge also that there is a risk that restorative justice advocates may claim too much. Thus I also try in this paper to make clear what, in my view, restorative justice represents. It seems to me that much of the critique that has emerged is based on fundamental misunderstandings<sup>4</sup> of what restorative justice seeks to achieve, on diluted or distorted applications of the principles of restorative justice<sup>5</sup> or on the misinterpretation of empirical research on restorative justice.<sup>6</sup>

In addition, this paper considers more briefly a very different type of critique: philosophical rather than empirical. Just deserts theorists have argued that the sanctions agreed to within a restorative justice framework may not be proportionate to the severity of the offence and are unlikely to be consistent: offenders involved in similar offending may end up with different sanctions. For example, Ashworth and von Hirsch (1998: 303) complain about the 'absence of safeguards against excessive penalties'. As desert theorists, they affirm the need for proportionality as a limit on sentences and see restorative justice as having substituted 'the wishes of the individual victim' (Ashworth 1992: 8, cited in Cavadino and Dignan 1996: 237) or 'the victim's disposition' (Ashworth and von Hirsch, 1998: 332–3). This paper takes issue with these claims and argues that restorative justice has to be evaluated against the values it represents and not against those it attacks and seeks to replace.

In reviewing these various critiques, I draw mainly from my experience in New Zealand, a country which has gone further than most in implementing restorative justice.<sup>7</sup> Family group conferences, for example, introduced in 1989, are commonly seen

<sup>3</sup> There is also considerable variation within the different types of conferencing. For example, family group conferences in New Zealand operate very differently from restorative conferencing in the Thames Valley Police Authority (Morris and Maxwell 2001; Morris and Gelsthorpe 2000a).

<sup>4</sup> Some examples: Levrant *et al.* (1999: 22) refer to restorative justice involving public shaming. At most, restorative justice processes might involve Braithwaite's (1989) notion of reintegrative shaming (and some examples of conferencing are explicitly based on this) but see Morris (2002: forthcoming) for a critique of the relevance of shaming for conferences in New Zealand. Delgado (2000: 764), who admittedly sees restorative justice only as victim offender mediation, paints the picture of a 'vengeful victim and a middle-class mediator' ganging up on 'a young minority offender'. This is certainly not an accurate picture of conferencing in Australasia (where many of the facilitators are from minority groups) and I doubt very much that this picture reflects current practice in victim offender mediation either where attempts are made to recruit facilitators from local communities. Paradoxically, some commentators paint the opposite picture: they claim that restorative justice is reserved for white middle-class offenders (see, for example, Tracy 1998: 276; Levrant *et al.* 1999; Kurki 2000: 242).

<sup>5</sup> Miers, for example, speaking of Miers *et al.* (2001) acknowledged that not all of the programmes included in the evaluation were really examples of restorative justice (personal communication).

<sup>6</sup> Kurki (2000: 277), for example, refers to data from Maxwell and Morris (1993), which in her view raise concerns and cites as a finding that 31 per cent of victims felt better after conferencing and that one third felt worse. What Maxwell and Morris (1993: 118–9) actually say is that 39 per cent of conferences with victims in attendance had victims who expressed positive views and that, if one looks at the total number of victims rather than at the total number of conferences, the figure expressing positive views rises to 59 per cent. They also say that, although over a third of conferences with victims in attendance had victims who said they felt worse, the figure drops to a quarter if one looks at the total number of victims rather than at the total number of conferences.

<sup>7</sup> I need to address briefly here the belief that, even if restorative justice 'worked' well in New Zealand, it could not work in countries with different histories, different political structures, different attitudes towards the criminal justice system, different crime situations, and so on. Experience there, it is claimed, is irrelevant in debates about the more universal use of restorative justice. There is no easy answer to this claim, but I can make a number of points which suggest that New Zealand is not the island paradise outsiders think it is and that, therefore, experience there may be more generally valid than often supposed. First, in the 1992 international crime survey (van Dijk 1992: 35), New Zealand was in the group (along with Australia, Canada, the Netherlands and the United

as an example of restorative justice (NACRO 1997; Dignan 1999) and there are now a number of pilot schemes for adult offenders too (see Morris 2001a for more detail). I have also drawn from evaluations of restorative justice in other jurisdictions and from reviews of empirical research on restorative justice (for example, Braithwaite 1999; Marshall 1999; Latimer and Kleinknecht 2000; Miers 2001).

### *Restorative Justice Values, Processes and Practices*

Although restorative justice values, processes and practices have been around for a long time,<sup>8</sup> there was a resurgence of interest in them internationally in the 1990s (see, for example, Zehr 1990; Van Ness and Strong 1997),<sup>9</sup> in part as a response to the perceived ineffectiveness and high cost (in both human and financial terms) of conventional justice processes and in part as a response to the failure of conventional systems to hold offenders accountable in meaningful ways or to respond adequately to victims' needs and interests. Conventional justice systems see offending primarily (and often even exclusively) as a violation of the interests of the state and decisions about how it should be responded to are made by professionals representing the state. In contrast, restorative justice returns decisions about how best to deal with the offence to those most affected—victims, offenders and their 'communities of care'—and gives primacy to their interests. Thus the state no longer has a monopoly over decision making; the principal decision makers are the parties themselves. In a sense, the state's role—or the role of its representatives—is redefined: for example, they give information, they deliver services and they provide resources. Restorative justice also emphasizes addressing the offending and its consequences (for victims, offenders and communities) in meaningful ways; attempting to reconcile victims, offenders and their communities through trying to reach agreements about how best to deal with the offending; and attempting to reintegrate or reconnect both victims and offenders at the local community level through trying to heal the harm and hurt caused by the offending and through trying to take steps to prevent its recurrence.

Restorative justice also emphasizes human rights and the need to recognize the impact of social or substantive injustice and in small ways address these rather than simply provide offenders with legal or formal justice and victims with no justice at all. Thus it seeks to restore the victim's security, self-respect, dignity and, most importantly, sense of

<sup>7</sup> *continued*

States) with the highest overall victimization rates. (New Zealand has not participated in any of the more recent international crime surveys and so no more recent comparisons are available). Second, New Zealand has a higher imprisonment rate than Australia, Canada, England and Wales, France, Germany, Northern Ireland and Scotland; indeed, when compared with ten OECD countries, only the United States has a higher imprisonment rate. Third, significant sectors of the New Zealand population, and especially children, Maori and people from Pacific Island nations, are living in poverty (Stephens *et al.* 1995). Fourth, some of these groups have highly negative views of the police (Te Whaiti and Roguski 1998) and are deeply alienated from them and from 'society'. And, finally, about a fifth of the police in New Zealand respond differently (negatively) towards certain ethnic groups (Maxwell and Smith 1998) and this has undoubtedly resulted in the discriminatory policing of them.

<sup>8</sup> Consedine (1995) links restorative justice with the traditions of the Celts, Maori, Samoans and other indigenous peoples as well as placing its roots in various religious communities. Braithwaite (1999) grounds restorative justice in the traditions of ancient Arab, Greek and Roman civilizations.

<sup>9</sup> Christie's (1977) key paper on the 'theft' of conflicts by the state from the 'real' parties—victims, offenders and communities—predates this and is much relied on by writers on restorative justice, but he did not use the term 'restorative justice' at that time.

control. And it seeks to restore responsibility to offenders for their offending and its consequences, to restore a sense of control to them to make amends for what they have done and to restore a belief in them that the process and outcomes were fair and just. And, finally, restorative justice encourages cultural relativity and sensitivity rather than cultural dominance.

Thus victims, offenders and communities of care come together and, with the aid of a facilitator, try to resolve how to deal with the offence, its consequences and its implications for the future. Generally, restorative justice offers a more informal and private process over which the parties most directly affected by the offence have more control. This does not mean that there are no rules<sup>10</sup> which must be adhered to or that there are no rights<sup>11</sup> which must be protected, but rather that, within a particular framework, there is the potential for greater flexibility, including cultural flexibility. Thus the procedures followed, those present and the venue are often chosen by the parties themselves.<sup>12</sup> Overall, the intention—or the hope—is to create a respectful and non-shaming environment in which participants can feel comfortable and able to speak for themselves.

The aims of restorative justice meetings are primarily to hold offenders accountable for their offending in meaningful ways and to make amends to victims certainly in a symbolic sense and, where possible, in a real sense too. Restorative outcomes are sometimes viewed as focusing on apologies, reparation or community work, as ways of restoring the property stolen or of compensating the victim for the injuries endured. But, in fact, *any* outcome—including a prison sentence—can be restorative if it is an outcome agreed to and considered appropriate by the key parties. For example, it might be agreed that a prison sentence is required in a particular situation to protect society, to signify the gravity of the offending or to make amends to victims. Neither protecting society nor signifying the gravity of the offending are excluded within a restorative justice system.<sup>13</sup> The difference is that the offender, victim and their communities of care have had some input in to the sentence, some increased understanding of the circumstances and consequences of the offence and, perhaps, some increased satisfaction in their dealings with the criminal justice system. Moreover, discussion of the consequences of the offences is seen as a more powerful way of communicating their gravity to offenders than simply imprisoning them.

One of the other hopes of restorative justice is that reconciliation between the offender and victim will occur. This is not always possible—victims may remain angry or bitter; offenders may remain unmoved and untouched. However, there is no doubt that reconciliation can on occasions take place between victims and offenders. Examples observed at family group conferences in New Zealand include invitations by a victim to the offender and his family to join the victim's family for a meal, hugs and handshakes all

<sup>10</sup> In most jurisdictions, facilitators follow guidelines or practice manuals. In some, there are statutory guidelines or regulations to follow.

<sup>11</sup> Again, these will be reflected in practice manuals or in statutory guidelines or regulations.

<sup>12</sup> For example, in New Zealand, family group conferences may be held in a community hall, in the offender's home, on a *marae* (meeting house) or wherever the parties prefer. Conferences may be attended by a large number of people; they may last for many hours; they may begin with prayers; and they may end with the serving of food. They may be facilitated by a *kaumatua* (Maori elder) and they may follow Maori *kawa* (protocol).

<sup>13</sup> For example, in the current court-referred restorative conference pilots in New Zealand, the expectation is that the adult offenders will be sentenced within the normal sentencing range, including prison sentences.

round at the end of the meeting, and victims deciding to attend the court hearing to speak on the offender's behalf.

There is no 'right way' to deliver restorative justice and this paper does not seek to argue that, for example, the New Zealand youth justice system is the 'ideal' form of restorative justice. The essence of restorative justice is not the adoption of one form rather than another; it is the adoption of *any* form which reflects restorative values and which aims to achieve restorative processes, outcomes and objectives. Restorative processes and practices, therefore, should empower offenders and victims by giving them a sense of inclusion in and satisfaction with these processes and practices; they should enable victims to feel better as a result of participating in them; and they should hold offenders accountable in meaningful ways by encouraging them to make amends to their victims. If all these occur, we might then expect the restorative processes and practices to impact on reoffending and reintegration and to heal victims' hurt.

### *Critiquing Restorative Justice*

For ease of presentation, I have grouped what I see as the main criticisms made about restorative justice<sup>14</sup> under the following headings: restorative justice erodes legal rights; restorative justice results in net-widening; restorative justice trivializes crime (particularly men's violence against women); restorative justice fails to 'restore' victims and offenders; restorative justice fails to effect real change and to prevent recidivism; restorative justice results in discriminatory outcomes; restorative justice extends police powers; restorative justice leaves power imbalances untouched; restorative justice leads to vigilantism; restorative justice lacks legitimacy; and restorative justice fails to provide 'justice'. I respond to these criticisms where I can at an empirical level but, on occasions, can really only refer back to restorative justice values to question the validity of the criticisms.

But before that I need to make four preliminary points. First, some of these criticisms do have some validity with respect to some restorative justice processes. Although restorative justice has a long history, its modern format is relatively recent and more time is needed to translate its critical values into good modern day practices. As I made clear in the introduction to this paper, I have no desire to defend poor restorative justice practices or all programmes claiming to be examples of restorative justice. I assess the above criticisms, therefore, not only against current restorative justice practice, but also against those critical restorative justice values which I outlined in the previous section.

Second, a linked point, more time is needed to evaluate examples of restorative justice practice and to measure its effects. There are occasions in this paper when I refer to a criticism which has been made without any empirical basis to support it but when, equally, I am not able to cite rebuttal evidence. All I can do then is to rebut speculation with speculation, but, in doing so, I rely on the values of restorative justice rather than misunderstandings, prejudice or whatever. Researchers evaluating restorative justice

<sup>14</sup> This is not an exhaustive list of criticisms. I have not dealt with, for example, the claim that restorative justice fails to deter and is a 'soft option', that it uses victims to benefit offenders, that it cannot deal with persistent offenders and that it should not deal with men who are violent towards women. For my responses to these criticisms, see Morris and Gelsthorpe (2000b) and Morris and Young (2000). See also Braithwaite (1999) for his responses to various criticisms of restorative justice.

also need time to develop specific research measures to operationalize and quantify the essence and values of restorative justice. Critics and advocates, for example, cannot debate whether or not restorative justice ‘restores’ until there are agreed measures of what ‘restorativeness’ actually means.

Third, there are also issues of emphasis in the interpretation of all research. Research findings can obviously be interpreted in different ways and both positive and negative spins can be put on the same data. This difference in emphasis seems particularly acute in discussions of restorative justice. A general example: let us say that research finds that 30 per cent of participants in a restorative justice programme express some criticisms. This can be presented both positively—‘only’ 30 per cent—or negatively—‘as many as’ 30 per cent. A more specific example is provided by Daly (2001: 76–7). There she states that ‘only half [of the young people in her sample] said that the victim’s or the victim’s representative’s story had an effect on them’. This seems to me a fairly positive finding; it is certainly a far higher figure than one would expect to find in evaluations of conventional criminal justice processes.

Finally, it seems reasonable to me to discuss briefly, where relevant, in the sections which follow, the extent to which conventional criminal justice processes deal with those criticisms aimed at restorative justice. I do not believe that restorative justice should have to meet standards that conventional criminal justice systems are seldom asked to meet, or that restorative justice should be criticized for not solving an issue that has plagued conventional justice systems for years. We have to contrast what restorative justice has achieved and may still achieve with what conventional justice systems have to offer.

*Claim: restorative justice erodes legal rights*

A common criticism made of restorative justice is that it fails to provide procedural safeguards or to protect offenders’ rights. The picture painted is that this failure is promoted by restorative justice advocates in order to obtain more readily offenders’ acceptance of their responsibility for their offending and agreements among participants about how to deal with that offending. But, as the previous section made clear, restorative justice practitioners have to follow certain guidelines or practice manuals and, in some examples of restorative justice, there are statutory guidelines or regulations to follow too.

Overall, there is nothing in the values of restorative justice which would lead to a denial or erosion of offenders’ legal rights (through their broad emphasis on human rights). However, different examples of restorative justice have translated the protection of offenders’ rights into practice in different ways. For example, in South Australia, young people participating in conferences can consult with lawyers prior to admitting the offence and prior to agreeing with the proposed outcome though lawyers tend not to be present at the conference itself. In Real Justice conferences in the United States, lawyers at conferences have a watching brief and they can interrupt proceedings if they feel that the young person’s legal rights are being breached (Paul McCold, personal communication). And, in New Zealand, if facilitators at a family group conference have any concerns about young offenders’ legal rights, they may request the appointment of a lawyer (paid for by the state). In addition, young people referred to a conference by the Youth Court can have their court appointed lawyers (youth



advocates)<sup>15</sup> with them during the family group conference, as can adult offenders involved in the court referred restorative justice pilots.<sup>16</sup>

And so it is difficult to accept, either with respect to the values of restorative justice or empirically with respect to these examples at least, the claim that restorative justice erodes offenders' rights.<sup>17</sup> What restorative justice does is place a different priority on the protection of offenders' rights by not adopting a procedure whereby offenders' lawyers are the main protagonists or spokespersons and their primary purpose is to minimize the offender's responsibility or to get the most lenient sanction possible.

And, of course, it is quite farcical for critics of restorative justice to imply that, in contrast, conventional criminal justice systems adequately protect offenders' legal rights. It is uncommon for young offenders in the United States to be legally represented in the juvenile court (they tend to waive this right) and most cases in the adult criminal courts are dealt with through plea-bargaining. This is not the place to discuss plea-bargaining in any detail. Suffice to say that its principal objective is not to protect offenders' rights. Concerns have also been raised about the quality of justice provided by lawyers in English courts (McConville *et al.* 1993; Darbyshire 2000).<sup>18</sup>

*Claim: restorative justice results in net-widening*

It is commonly claimed that restorative justice processes widen the net of social control because they tend to focus on minor offenders at low risk of reoffending (presumably offenders who would otherwise be warned by the police or otherwise diverted) and because they tend to result in these minor offenders being given more incursive penalties than they would otherwise receive. This is not a claim made exclusively of restorative justice, of course: it has been made about the introduction of a whole raft of diversionary practices (including with respect to the expansion of police warnings in England and Wales in the 1970s and the introduction of various alternatives to custody). The key issue in testing the validity of this claim, therefore, is the type of offenders a particular restorative justice practice is aimed at.

In New Zealand, restorative justice processes are used not for relatively minor offenders but rather for the most serious and persistent offenders in the youth justice system and for relatively serious offenders in the adult criminal justice system. Family group conferences are held for about 15–20 per cent of youth offenders; the rest are simply warned or diverted by the police. Some examples of the kinds of offenders dealt with in family group conferences there (taken from Maxwell and Morris 1993) include a boy who broke into a house and raped a young woman; a group of school children who

<sup>15</sup> These lawyers are specially selected for their personality, cultural background, training and experience as being suitably qualified to represent young people. They provide the young person with legal advice generally, represent him or her in court, and can attend the young person's family group conference.

<sup>16</sup> A quite different issue not explored in this paper is how lawyers should act in restorative justice processes. In a survey by Morris *et al.* (1997), a few of the youth advocates who attended conferences seemed to act in a way which was at odds with the principles of the restorative justice (for example, they spoke for the young persons rather than allowing or encouraging them to speak for themselves).

<sup>17</sup> In some jurisdictions too, judges play a role in protecting offenders' rights. In court-referred family group conferences and in the court-referred restorative justice pilots in New Zealand, judges receive recommendations from the conferences and it is up to them to decide whether or not to accept them.

<sup>18</sup> Again, this is not the place to discuss offenders' interactions with the police, but, in my view, this is a key area for the erosion of offenders' rights and obviously it is one which precedes both restorative justice and conventional court processes.

set fire to and destroyed an entire school block; a boy whose victim was beaten over the head during the process of a robbery; and a boy whose victim barely survived the assault and was left with permanent brain damage. As for the restorative justice pilots for adults, Maxwell *et al.* (1999) document that the two schemes in that evaluation dealt with aggravated robbery, threats to kill, driving causing death, driving with excess alcohol as well as the more 'routine' offences of wilful damage, theft and burglary. In the first year of the operation of the court-referred restorative justice pilots, all property offences with maximum penalties of two years' imprisonment or more and other offences with maximum penalties of one to seven years are eligible for referral to a restorative conference by the judge. Some other jurisdictions (for example, South Australia and New South Wales) also aim their restorative justice processes at medium serious juvenile offenders.

However, some examples of conferencing—particularly those which operate as part of police diversion—do focus on more minor offences and it is possible that net-widening occurs here. Young and Goold (1999) certainly raised this concern with respect to restorative conferencing in the Thames Valley Police area at that time (see also Young 2001). On the other hand, Maxwell and Morris (1993) specifically examined net-widening in their research on family group conferences in New Zealand and found no evidence of it. Also, in the evaluation of the community panels in New Zealand, most offenders in the pilot groups experienced less incursive penalties than their matched controls who were dealt with solely in conventional criminal courts (Maxwell *et al.* 1999).

To repeat the point made earlier: the validity of this claim depends on the focus of particular examples of restorative justice and it certainly does not apply to all. Also, many advocates of restorative justice believe that restorative justice processes should be aimed at the more serious and persistent offenders given the practicality of limited resources and the potential in such cases for victims, offenders and communities to receive considerable benefits (in terms of having a better understanding of the offences and their consequences and of providing more opportunities for healing and reintegration).

*Claim: restorative justice trivializes crime*

This claim is most frequently mentioned with respect to violence against women. Critics tend to see restorative justice processes as decriminalizing men's violence against their partners and as returning it to the status of a 'private' matter. Morris and Gelsthorpe (2000b) have already fully discussed this and I repeat here only the gist of their response to this criticism. Their main point is that the use of restorative justice processes does not signify the trivialization of any crime: the criminal law remains as a signifier and denouncer. In addition, however, restorative justice advocates believe that the offender's family and friends are by far the most potent agents to achieve this objective of denunciation. In the context of men's violence against their partners, denouncing the violence in the presence of the abuser's family and friends means that the message is loud and clear for those who matter most to him.

More broadly, restorative justice arguably takes crime more seriously than conventional criminal justice systems because it focuses on the consequences of the offence for victims and attempts to address these and to find meaningful ways of holding offenders accountable. Crime, on the other hand, is trivialized by processes in which victims have



no role (apart, in some situations, as witnesses) and in which offenders are not much more than passive observers.

A slightly different but important point for questioning the legitimacy of this claim that restorative justice processes decriminalizes men's violence against their partners is that, for a range of reasons, only a few of the women who experience violence at the hands of their male partners rely on the law, police or courts to deal with it, at least in the first instance (Mirrlees-Black 1999).<sup>19</sup> The introduction of restorative justice processes in such cases, on the other hand, at the very least would increase women's choices and, through this involvement of friends and families, might well result in increasing women's safety. In this way, arguably, restorative justice could empower women.<sup>20</sup>

*Claim: restorative justice fails to 'restore' victims and offenders*

By definition, we would expect restorative justice to 'restore' and it has to be accepted that there is some haziness in the restorative justice literature about what precisely this means. But, as noted earlier, for victims, I take it to mean restoring the victim's security, self-respect, dignity and sense of control. There is no doubt that research shows that victims who have taken part in restorative justice processes have high levels of satisfaction with reparative agreements, have reduced levels of fear and seem to have an improved understanding of why the offence occurred and its likelihood of recurrence (for empirical detail, see Daly 2001; Strang 2001; Umbreit *et al.* 2001). It is true, as some critics allege, that full monetary restoration is not always achieved as many offenders have limited resources. However, if we as a community take restorative justice seriously, this type of restoration could, and perhaps should, be a community (state) responsibility. But, more importantly, research consistently suggests that monetary restoration is not what victims want: they are much more interested in emotional reparation than material (Marshall and Merry 1990; Umbreit *et al.* 1994; Strang 2001). Now, of course, emotional reparation also does not always happen. But it seems to happen more often in restorative justice processes than it does not. And it certainly happens more often there than in conventional criminal justice processes. Overall, Latimer *et al.* (2001) concluded, on the basis of their recent meta-analysis of 22 studies, which examined the effectiveness of 35 restorative justice programmes, that victims who participated in restorative processes were significantly more satisfied than those who participated in the traditional justice system.

For offenders, again as noted earlier, I take restoration to mean restoring responsibility to them for their offending and its consequences, restoring a sense of control to them to make amends for what they have done and restoring a belief in them that the process and outcomes were fair and just. The evidence seems clear that this can occur. Maxwell and Morris (1993), for example, showed that young offenders felt reasonably involved in the decisions being made in family group conferences in New Zealand. More recent data (Maxwell *et al.* 2001) on just over 300 young people who were involved in family group conferences in New Zealand in 1998 shows, after preliminary analysis, that

<sup>19</sup> Morley and Mullender (1994) estimated that the 'average' victim was assaulted 35 times before calling the police.

<sup>20</sup> In practice, violence by men against their female partners is often excluded from restorative justice pilots (as in the current pilots in New Zealand) but there are a few examples of the use of restorative justice processes in family violence cases and these seem to have been viewed positively by communities (as in Hollow Water—see Braithwaite 1999 for more detail—and in areas of Newfoundland—see Burford and Pennell 1998 for more detail).

over half said they felt involved in making decisions; that more than two thirds said they had had the opportunity to say what they wanted to; that over 80 per cent said that they understood the decision; and that two thirds said that they agreed with the decision. Recent Australian research refers to young offenders seeing conferencing as fair and being satisfied with both conference processes and outcomes (Palk *et al.* 1998; Cant and Downie 1998; Strang *et al.* 1999; Trimboli 2000; Daly 2001).

However, I also take 'restoring' to mean redressing the harms caused both by and to the offender. This means that action needs to be taken to address both the factors underlying their offending in the first place and the consequences of that offending. A process, no matter how inclusionary, and an outcome, no matter how reparative, is not likely to magically undo the years of social marginalization and exclusion experienced by so many offenders (see also Polk 2001) or remove the need for victims to receive long-term support or counselling. Restoration requires an acceptance by the community more generally that the offender has tried to make amends and the provision of programmes that address drug and alcohol abuse, the lack of job skills and so on.<sup>21</sup> It also requires effective help and support for victims. And so here the critics of restorative justice may have a valid point to make—restorative justice is not 'restoring' offenders if they cannot access such programmes and is not 'restoring' victims if they cannot access what they need. However, the critics are aiming at the wrong target. Good programmes addressing the reasons underlying offending and effective support for victims need to accompany good restorative justice processes and practices, but providing (or at least funding) them is a state responsibility.

*Claim: restorative justice fails to effect real change*

Most critics of restorative justice are sceptical about what it has achieved. Of course, most examples of restorative justice have not been in existence for long enough to track the extent to which the kinds of transformations envisaged by advocates have actually occurred. The New Zealand youth justice system—implemented in 1989—is an exception. The implementation of restorative justice there has resulted in significant and real changes: fewer young offenders now appear in courts,<sup>22</sup> fewer young offenders are now placed in residences<sup>23</sup> and fewer young offenders are now sentenced to custody.<sup>24</sup> This all, of course, had to result in considerable cost savings. The two restorative justice pilot schemes evaluated by Maxwell *et al.* (1999) also showed significant savings over those

<sup>21</sup> There is no reason why restorative outcomes should not seek to do this. Section 4 of the Children, Young Persons and Their Families Act 1989 in New Zealand states that young offenders should be given the opportunity to develop in 'responsible, beneficial and socially acceptable ways' and preliminary analysis of more than 650 cases dealt with by family group conferences there in 1998 (Maxwell *et al.* 2001) shows that just over a quarter of the young people agreed to get involved in some kind of programme (mainly counselling) and that almost a quarter agreed to some kind of education or training.

<sup>22</sup> For example, the number of young people appearing in courts in 1999 represented a marked reduction (of more than two fifths) over the 1989 figure (Spier and Norris 1993; Spier 2000).

<sup>23</sup> Dalley (1998: 316) reports that the number of young offenders admitted to social welfare residences declined from 1295 in 1989/90 to 655 in 1992/93. On 4 October 2001, there were 75 young offenders in social welfare residences (Child, Youth and Family Services National Office, personal communication).

<sup>24</sup> Six per cent of young offenders sentenced in (all) courts were given custodial sentences (corrective training or imprisonment) in 1999 compared with 3 per cent in 1989 ((Spier and Norris 1993; Spier 2000). However, the actual number given custodial sentences in 1999 was much lower: 105 compared with 193 in 1989. The most recent penal census (1999) showed that only 12 male prisoners and 1 female prisoner were under the age of 17 (Rich 2000).

matched offenders dealt with entirely by the criminal courts: fewer offenders in one pilot were returned to court for sentence and fewer offenders in the other pilot received custodial penalties when compared with their matched controls.

The major claim made by critics here, however, is that restorative justice has failed to reduce reoffending. It could reasonably be argued that reducing reoffending is not really an objective of restorative justice; its focus is holding offenders accountable and making amends to victims. However, it can also be reasonably argued, at least in principle, that if a particular process reflects restorative values and achieves restorative outcomes then we might expect reoffending to be reduced. Thus, if the offender accepts responsibility for the offending, feels involved in the decision about how to deal with that offending, feels treated fairly and with respect, apologizes and makes amends to the victim and takes part in a programme designed to deal with the reasons underlying his or her offending, then we could at least predict that s/he will be less likely to offend again in the future.

Critics of restorative justice feel otherwise, principally, it seems, because the assumed features of restorative justice do not coincide with the principles of effective treatment (as outlined in, for example, Andrews and Bonta 1994; Gendreau 1996). I need to make three points in response.

First, it is quite possible for the parties to reach an agreement, after a restorative process, which would involve a rehabilitative outcome based on the principles of effective treatment (as well as or instead of a reparative or, for that matter, a punitive outcome). I referred to this earlier in the discussion about 'restoring' offenders.

Second, critics seem to have confused here restorative justice processes and restorative outcomes and to have ignored the possibility that both may impact on reoffending. There is now some evidence of the importance of process in shaping attitudes and behaviour. Maxwell and Morris (1999), for example, found that a number of restorative justice related factors were predictive of young people who had been involved in family group conferences in New Zealand not being reconvicted some six years later. These were: feeling remorse;<sup>25</sup> not being made to feel a bad person; feeling involved in the decision making; agreeing with the outcome; and meeting the victim and apologising to him/her<sup>26</sup> (see also Tyler 1990 and Paternoster *et al.* 1997 for the importance of process).

Third, and more importantly, there is now a considerable amount of research which suggests that restorative justice processes and outcomes can reduce reconviction.<sup>27</sup>

<sup>25</sup> Feeling remorse was constructed from a number of variables: feeling sorry for what one had done and showing it; feeling that one had repaired the damage; completing the tasks agreed to; and reporting that the conference was a memorable event.

<sup>26</sup> Current ongoing work (Maxwell *et al.* 2001) is examining whether or not these findings hold good for a larger sample of young offenders dealt with in family group conferences in 1998. Interviews conducted so far show that three quarters of the young people interviewed said that they could understand how the victim felt; two thirds said they felt really sorry for their offending and more than two thirds said that they had showed the victim that they were really sorry and that they could see the victim's point of view. In all, more than three quarters said they were able to make up for what they did and most also felt treated fairly and with respect. Half, however, said that the way that they were dealt with had made them feel that they were a bad person and more than half felt that they had been treated as though they were a criminal. These findings have not yet been related to whether or not the young person was subsequently convicted in the adult criminal courts.

<sup>27</sup> See, for example, Umbreit *et al.*'s (1994) comparison of four victim offender mediation programmes in the United States compared with non-mediated and non-referred offenders; the meta-analysis by Bonta *et al.* (1998) of programmes using community service, restitution and mediation compared with programmes without these elements; McCold and Wachtel's (1998) evaluation of young offenders randomly assigned to conferences or to courts; Maxwell *et al.*'s (1999) comparison of 200 participants in two restorative justice pilot schemes in New Zealand with a matched sample of offenders who were dealt with solely through the criminal courts; and Sherman *et al.*'s (2000) comparisons of young people randomly assigned to conferences or to courts.

Indeed, Latimer *et al.*'s (2001) meta-analysis concluded that, on average, restorative justice programme had lower reconviction rates than conventional criminal justice approaches. Compared to comparison or control groups, offenders who participated in restorative justice programmes were significantly more successful at remaining crime free during the follow up periods.<sup>28</sup> And, importantly, there are no studies that I am aware of that found that restorative justice processes actually increased recidivism rates.

*Claim: restorative justice results in discriminatory outcomes*

Critics here claim that affluent communities are more likely to have the resources to develop restorative justice alternatives and that restorative justice reinforces existing race and class biases in the criminal justice system by excluding certain types of offenders from restorative justice processes.<sup>29</sup> The validity of this claim again depends on how (and where) the restorative justice process is implemented. It is certainly *possible* for restorative justice programmes to be set up on an ad hoc and selective basis. But this is not the result of endorsing restorative justice principles or values and so this criticism cannot be made with respect to restorative justice generally.

To again take New Zealand as an example: conferencing for young offenders there operates on a statutory basis, nationwide and, in certain circumstances, referral to a family group conference is mandatory. In many Australian states, restorative justice processes are also based in statute and operate state-wide. Referral to a conference, however, tends to be discretionary and there are suggestions that certain categories of offenders (Aboriginals) are under-represented in conferencing in some Australian states and are more likely to be referred directly to courts (Blagg 2001; Daly 2001).

In contrast, Maori (the indigenous people of New Zealand) are over- rather than under-represented in New Zealand restorative processes (because they are over-represented in the youth justice and criminal justice systems).<sup>30</sup> However, on the basis of a recent analysis of young people referred to family group conferences in 1998, there is no evidence that Maori young offenders are dealt with differently from non-Maori offenders (Gabrielle Maxwell, personal communication). Apparent differences are satisfactorily explained by differences in the extent, nature and seriousness of offending by Maori. And, of course, restorative justice processes were specifically introduced in New Zealand to make the youth justice system more culturally appropriate and more culturally sensitive, something which conventional criminal justice systems have found virtually impossible to achieve.<sup>31</sup>

<sup>28</sup> This contrasts with Miers *et al.*'s (2001) findings with respect to a number of restorative justice schemes in England. It is not clear, however, that all of these schemes really met the core values of restorative justice.

<sup>29</sup> The way in which this criticism is framed, of course, reinforces that it is already acknowledged by critics of restorative justice that conventional criminal justice systems operate in a discriminatory way.

<sup>30</sup> Maori make up about 15 per cent of the New Zealand population but almost two fifths of known offenders and more than a half of prisoners.

<sup>31</sup> Restorative justice processes for adult offenders in New Zealand also reflect the values of cultural sensitivity. For example, in one of the early pilots that have been evaluated (Maxwell *et al.* 1999), the meetings took place on a *marae*, the police did not attend the meetings and those making the decisions were *kaumatua*. This was viewed as quite acceptable by the Maori offenders involved in this pilot.

*Claim: restorative justice extends police powers*

This criticism seems aimed primarily at the experiments in Australia, England and Wales and the United States with restorative conferencing located as part of police diversion. There, to the extent that the police dominate outcomes, it could be argued that police powers have been extended because they virtually become ‘sentencers’ as well as prosecutors (Young and Goold 1999; Young 2001). However, because of this, not all commentators see these examples of conferencing as meeting restorative values (Morris and Gelsthorpe 2000a). The earlier comments on net-widening are relevant to these conferences too.

On the other hand, family group conferencing in New Zealand can be seen as *curtailing* police powers. The police there cannot refer young people who have not been arrested directly to the Youth Court. They must first refer the young person to a family group conference. If the conference feels it can resolve the matter without it going to court, then that is the end of it. Thus, again, this criticism is valid only to the extent that particular programmes are not based on restorative justice principles or values—the empowerment of the key participants—and is not, therefore, valid with respect to all examples of restorative justice.

*Claim: restorative justice leaves power imbalances untouched*

A common argument against the use of restorative justice is the imbalance between supposedly powerless offenders and supposedly powerful victims. However, neither the category ‘offender’ nor the category ‘victim’ is as clear cut as this: contrast, for example, the case of a middle-class conman and an elderly pensioner who is defrauded of her life savings; the case of a woman abused over many years by her partner; the case of the 14-year-old immigrant boy beaten by the white racist; the female shoplifter who steals some baby-food from a large chain store to feed her hungry baby; and the drug addict who steals money from his mother. The power relationship between the victim and the offender in each of these examples is very different. But that is not the main point that I want to make here.

Within a restorative justice framework, power imbalances can be addressed by ensuring procedural fairness, by supporting the less powerful, and by challenging the more powerful. Thus restorative justice processes can provide a forum in which victims can make clear to offenders and, importantly, to their friends and families the effects of the offence on them but it can also provide a forum in which offenders can give victims some insight into the reasons for their offending.<sup>32</sup> Facilitators of restorative justice processes have a responsibility to create an environment that ensures that both victims and offenders can freely participate, by whichever way is necessary. In contrast, power imbalances between defendants and professionals are entrenched in conventional criminal justice systems and the image of an adversarial struggle between two lawyers of equal might is a fiction (McConville *et al.* 1993).

<sup>32</sup> In the above examples, we might not think it appropriate to give all offenders an equal voice and this would have to be taken into account in trying to achieve a balance. With respect to men’s violence against women, for example, Braithwaite and Daly (1994) refer to the fact that in some Maori tribes an accused male abuser would have no right to speak and that statements would have to be made by others on his behalf.

*Claim: restorative justice encourages vigilantism*

Restorative justice is sometimes equated with community or popular justice, which is, in turn, equated with vigilantism.<sup>33</sup> It is true that some forms of community justice can be repressive, retributive, hierarchical and patriarchal. But these values are fundamentally at odds with the defining values of restorative justice and cannot, therefore, be part of it. That is also why 'community' involvement in restorative justice processes needs to be defined quite narrowly and in such a way as to exclude the attendance of 'representative' members of geographical or social communities (except where it would be culturally appropriate to do so, as in North American sentencing circles). Also, if there are concerns about communities taking over this process for non-restorative purposes, checks could be introduced—for example, courts could provide some oversight of restorative justice outcomes for the purposes of ensuring that the outcomes are in accordance with restorative justice values. Finally, of course, vigilantism does not require the introduction of restorative processes to emerge. Abrahams (1998) provides many examples of vigilantism from modern day Britain (and elsewhere), which seem rather to have been reactions against the failings of conventional criminal justice processes and sanctions. The spectre of vigilantism in debates on restorative justice, therefore, is something of a red herring.

*Claim: Restorative justice lacks legitimacy*

Tyler (1990) found that citizens treated with respect and listened to by the police were likely to see the law as fair; conversely, when they were treated without respect and were not listened to they were likely to see the law as unfair. He distinguished between 'process control' and 'outcome control' and concluded that 'having a say' (that is, process control) was more important than determining the outcome of a decision. Tyler's research, however, was based in a context in which decisions were made by third parties (judges). To this extent, his conclusions about priorities may not be as relevant for restorative justice processes, which are premised on consensual decision making.

The same point can be made with respect to the elements subsequently identified by Paternoster *et al.* (1997) as providing legitimacy. These included: representation (playing a part in decision making), consistency, impartiality, accuracy (the competency of the legal authority), correctability (the scope for appeal) and ethicality (treating people with respect and dignity). Restorative justice embodies some of these principles—particularly with regard to respect for victims and offenders. However, it does not meet others. To my mind, this is not problematic because Paternoster *et al.*'s notion of legitimacy is again derived principally from conventional criminal justice values. Restorative justice involves different values and its legitimacy must derive from these. Important elements, therefore, in providing legitimacy for restorative justice are the inclusion of the key parties, increased understanding of the offence, and its consequences, and respect. Much of the evidence I have cited so far would support restorative justice's claims for legitimacy. And, again, one has to be sceptical about the assumed legitimacy of conventional criminal justice systems, at least for those groups that are marginalized, alienated and socially excluded.

<sup>33</sup> Ashworth and von Hirsch (1998: 303) certainly justify conventional criminal justice practices on the grounds that they displace vigilantism and prevent people from taking the law into their own hands.



*Claim: restorative justice fails to provide 'justice'*

As noted earlier, just deserts theorists argue that the sanctions agreed to within a restorative justice framework may not be proportionate to the severity of the offence and are unlikely to be consistent. Such criticisms can be responded to in a number of ways. First, judges in conventional criminal justice processes do not always deal with like cases alike. However, that is hardly an adequate response.

Second, and related to the above point, the different reasons for these inconsistencies are crucially important. Inconsistencies on the basis of gender, ethnicity or socio-economic status *per se*—which is what research on conventional criminal justice systems (Hood 1992; Hedderman and Gelsthorpe 1997) points to—can never be right.<sup>34</sup> Inconsistencies between outcomes which are the result of genuine and uncoerced agreement between the key parties, including victims, may be.

Third, restorative justice is premised on consensual decision making. It requires all the key parties—the victims, offenders and their communities of care—to agree on the appropriate outcome. The state continues to remain a party to decision making through its representatives—for example, the police or the judiciary—depending on the location of the particular restorative justice process in the criminal justice system. But what is different is that these representatives are not the ‘primary’ decision makers.

Finally, consistency and proportionality are constructs that serve abstract notions of justice. Ashworth and von Hirsch (1998: 334) refer to desert theory providing ‘principled and fair guidance’. But there are a number of criticisms that can be made of this: in particular, the oversimplification of the gradation of offences (see Tonry 1994 for more details). There are some writers on restorative justice who refer in similar terms to ‘uniformity’, ‘fairness’ and ‘equity’ as means of ensuring that outcomes for offenders are not disproportionate to their culpability (see, for example, Van Ness 1993; Bazemore and Umbreit 1995). But, in my view, uniformity or consistency of approach (as opposed to uniformity or consistency in outcomes) is what is required and this is achieved by always taking into account the needs and wishes of those most directly affected by the offence: victims, offenders and their communities of care. Specifically from a restorative perspective, desert theory does not provide outcomes that are meaningful to them. Indeed, desert theory is silent on why equal justice for offenders should be a higher value than equal justice (or, indeed, any kind of justice at all) for victims.

*Conclusion*

There is nothing wrong with critiques *per se*: I agree with Schiff and Bazemore (2001: 329) that they can serve a positive function in that they are part of restorative justice’s evolutionary process. But critics need to have a good understanding of the essential values of restorative justice and to aim their criticisms at applications that reflect these values. They also need to acknowledge what restorative justice is struggling to combat and replace. After all, as Tracy (1998: 276) writes, we have experienced hundreds of years of the harmful consequences of a retributive justice system that has ‘handed down a

<sup>34</sup> I acknowledge that desert theorists would not support such inconsistencies either, but I prefer to respond to their criticisms of restorative justice by referring to how sentencing ‘is’ empirically rather than how it ‘ought’ to be ideally.

legacy of oppression against women, people of colour, and impoverished people'. And Delgado (2000: 771) describes the (American) criminal justice system as 'perhaps the most inequalitarian and racist structure in society'. Schiff and Bazemore (2001: 309) are surely right when they state that 'it is one thing to point out that after ten years of full implementation, restorative justice has failed to resolve pervasive justice system problems . . . It is quite another to *blame* such longstanding problems on restorative and community justice' (emphasis in the original).

More specifically, this review points to four main conclusions. First, although restorative justice has a long history, its modern format is relatively recent and more time is needed to translate its critical values into good modern day practices. New Zealand is the only country which has legislated for a nationwide mandatory system of restorative justice and, even there, implementing restorative justice values is not unproblematic. Maxwell and Morris's (1993) early research pointed to deficiencies in the practice of family group conferences and, more recently, Morris (2001b) has questioned some aspects of practice there now. In most other jurisdictions, restorative justice has so far played a less significant role; however, the same issues arise. Daly (2001), for example, recently highlighted gaps between theory and practice in conferencing in South Australia. In addition, there are too many schemes which claim to be examples of restorative justice but which fail to meet its key values. The label 'restorative justice' must be treasured; otherwise poor practices will continue to provide ammunition for critics to undermine it.

Second, programmes claiming to be an example of restorative justice must be evaluated so that we can continue to collect information that will either fuel or silence the critics. There are still too many gaps in our knowledge base and these are readily filled by critics' speculations and half-truths. Researchers in the area of restorative justice also need to continue to work on how best to operationalize, measure and quantify the essence of restorative justice. Van Ness and Schiff (2001) have already attempted to unpick what we mean by 'satisfaction' and Daly (2002) has begun some interesting exploratory work on how to measure 'restorativeness'. The point I am stressing here is that restorative justice values should not be rejected until we have good evaluations of fully implemented restorative justice systems.

Third, this review suggests that both positive and negative spins can be put on the same data. I used earlier the difference between saying 'only' 30 per cent and 'as many as' 30 per cent. The language chosen in this example colours and shapes the significance of the 'evidence' presented and, probably, the conclusions reached. It is quite likely that advocates of restorative justice are as guilty of this as its critics. This means that readers need to be very wary of relying on the interpretations and conclusions of others and that they should attempt wherever possible to evaluate themselves the data provided.

And, fourth, this review suggests that we have to contrast what restorative justice has achieved and may still achieve with what the alternative has achieved. At the very least, restorative justice offers us a new mode of thinking about crime and justice and a way of challenging conventional justice systems to address its failings. However, it offers much more. There is strong evidence that, at a general level, restorative justice offers more to victims than traditional criminal justice processes—they have high levels of satisfaction with reparative agreements; they have reduced levels of fear; and they seem to have an improved understanding of why the offence occurred and its likelihood of recurrence. There is also strong evidence that, at a general level, restorative justice expects more of

offenders than traditional criminal justice processes—they feel involved in the process; they have the opportunity to say what they wanted to; they understand and agree with the decisions made about how best to deal with the offending; they see restorative justice processes and outcomes as fair; and they are satisfied with both these processes and outcomes. Research has also shown that restorative justice processes and outcomes can result in fewer people appearing in the criminal courts and fewer people being sentenced to residential or custodial sentences. This consequently results in cost savings. In addition, research has shown that restorative justice processes and outcomes can impact on reoffending when compared with matched offenders dealt with solely in the criminal courts. Thus, there are many reasons to feel encouraged. Now it is time to present a challenge to the critics of restorative justice: what have conventional criminal justice systems achieved in the last ten years or so? I doubt it is as much.

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