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## CHAPTER 9

### Restorative Justice? A Critical Analysis

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#### Introduction

Attempts have long been made to introduce degrees of informalism into youth justice systems. Such initiatives were especially evident throughout the decades of the 1970s and 1980s. During this period, many youth justice researchers, policy analysts and practitioners - particularly across North America, Europe and Australia – advocated radical alternatives to, or departures from, formal justice. Diversion, decriminalisation, decarceration, deprofessionalisation, decentralisation, delegalisation and, ultimately, decarceration, formed the conceptual foundations for a movement towards less criminalising, more child-centred and more human-rights compliant responses to children in conflict with the law. Such movement was embedded, more generally, within a 'destructuring impulse' relating to 'all parts of the machine' which challenged orthodox 'justice' and the concomitant omnipotence of state, bureaucratic and professional power (Cohen, 1985: 36).

More recently, variants of informalism have been encapsulated within a significantly broader restorative justice 'movement' (McLaughlin et al. 2003: 2):

'Global and regional policy exchange in the field of criminal justice knowledge, information and expertise is not new but its current proliferation and intensification is unprecedented and restorative justice is located at the centre of many of these contemporary exchanges' (ibid: 1)

Indeed, it seems as though virtually everyone with an interest in youth justice believes that restorative justice is beneficial. It is typically presented as a commonsense approach that respects both ‘victims’ and ‘offenders’, and returns the problem of youth ‘crime’ to the community. Similarly, it is claimed that restorative justice takes a social problem away from the state - and its impersonal, bureaucratic processes of dealing with human conflict, harm and pain - and returns it to those most affected. Even the fact that many academics, policy-makers and practitioners employ the acronym ‘rj’ gives it a kind of folksy, feel-good flavour; a theory of justice for the common people. Yet it is precisely this taken-as-given commonsense that begs critical analysis. What precisely is ‘restorative justice’ and do its various claims stand up to rigorous scrutiny?

### **Restorative justice: definitions, origins and contemporary manifestations**

There is no single definition of restorative justice, nor any exhaustive narrative of its foundational principles or constituent elements. Restorative justice covers a range of practices that might occur at various points within criminal justice processes generally, and youth justice processes more particularly. In the youth justice sphere restorative justice is typically expressed via pre-court diversion and restorative cautioning, family group conferencing, various victim-offender mediation initiatives and/or sentencing circles. Beyond youth/criminal justice processes, the technologies of restorative justice can increasingly also be found in workplaces, schools and child welfare/child protection systems and, beyond this, in post-conflict and transitional justice contexts including, as an especially notable example, the South African Truth and Reconciliation Commission (Tutu, 1999).

At a generic level, restorative justice might be defined in a number of ways: as a process; as a set of values, principles and/or goals or, more broadly; as a social movement seeking specific change in the way in which youth and criminal justice systems - and other conflict-resolution processes - operate. Paradoxically, given its well-established presence and widespread application(s), however, there remains contention around *precisely* what ‘restorative justice’ might be taken to mean (Vaandering, 2011). Indeed, Daly and Proietti-Scifoni (2011) have observed that even

the most prominent contributors to both the theory and practice of restorative justice have failed to reach agreement with regard to exact definitions and absolute meanings. Some perspectives even appear to imply that restorative justice embraces almost any 'alternative' approach to conventional 'justice' and, as a consequence, it has developed in a rather incoherent and piecemeal manner, both nationally and internationally.

Perhaps the most frequently cited definition is offered by Marshall (1996: 37) who conceptualises restorative justice as a 'process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future'. Indeed, notions of reciprocity, dialogue, collectivity, community, problem-solving, reparation and future-oriented healing are embedded within much restorative justice discourse. Similar concepts often appear in 'official' government reports and other youth/criminal justice publications. A report published by the Australian Institute of Criminology (Larsen, 2014: viii), for example, states that: 'restorative justice... is about repairing harm, restoring relationships and ultimately, it is about strengthening those social bonds that make a society strong'. Equally, a joint thematic report by Her Majesty's Inspectorates of Constabulary, Probation, Prisons and the Crown Prosecution Service in England and Wales, refers to restorative justice as: 'processes which bring those harmed by crime or conflict, and those responsible for the harm, into communication, enabling everyone affected by a particular incident to play a part in repairing the harm and finding a positive way forward' (Criminal Justice Joint Inspection, 2012: 4). In such ways, restorative justice is presented in an unequivocally positive - even idealised - light; as an exclusively benign and unquestionably progressive mechanism for facilitating inclusivity, reparation, resolution and, ultimately, healing and satisfactory closure.

A key element of the restorative justice 'story' - as part of its wider appeal for authenticity and legitimacy - derives from its claimed longevity and, in particular, its purported origins within pre-modern indigenous 'justice'. Weitekamp (1999: 93), for example, observes that:

'Some of the new... programs are in fact very old... [A]ncient forms of restorative justice have been used... by early forms of humankind. [F]amily

group conferences [and]... circle hearings [have been used] by indigenous people such as the Aboriginals, the Inuit, and the native Indians of North and South America... It is kind of ironic that we have... to go back to methods and forms of conflict resolution which were practiced some millennia ago by our ancestors'

But just as the unequivocally positive idealisation of restorative justice is open to challenge and critique, the claims that link contemporary restorative approaches to indigenous peoples are also problematic. At one end of a continuum such assertions are trivialising and patronising. At the other end of the continuum, the same romantic contentions not only appear to disavow the complex and corrosive effects of colonialism and imperialism - that at various historical junctures have sought to exterminate, assimilate, 'civilise' and 'Christianise' indigenous peoples in Australia, Canada, New Zealand and the United States through: warfare; the imposition of reservations; the denial of citizenship; forced removal and institutionalisation (particularly of children); the prohibition and problematisation of cultural and spiritual practices; systemic criminalisation and exposure to an externally imposed criminal justice apparatus - but they also disavow the diverse and multifarious nature of indigenous approaches to conflict resolution, by aggregating them crudely within a monolithic construction of 'restorative justice' (for a fuller discussion see Cunneen, 2003; Cunneen, 2010).

Notwithstanding such contested definitions, meanings and origins, however, it is no exaggeration to suggest that what we have seemingly learnt to call 'restorative justice' – in all its heterogeneity – has induced a paradigm shift in global criminal justice (in general) and transnational youth justice (in particular). Restorative justice has become an international business that has, in turn, spawned widespread and multi-faceted policy and practice experimentation, massive research interest and a monumental literature. Of particular note, when considering its contemporary manifestations, is the extent to which the Council of Europe and the United Nations have each offered enthusiastic support for restorative justice in the youth justice sphere.

### **Restorative justice, the Council of Europe and the United Nations**

The Council of Europe has recommended that restorative approaches should be made more available within the territorial jurisdictions of each of its 47 member-states, to cover all stages of the youth justice process. Perhaps more significantly, it further recommends that such approaches should form autonomous mechanisms for conflict resolution and operate independently from conventionally formal means of judicial processing. By way of illustration, the Committee of Ministers has stated that:

‘Alternatives to judicial proceedings such as mediation, diversion (of judicial mechanisms) and alternative dispute resolution should be encouraged’ (Council of Europe, 2010: para. 24)

and the same Committee subsequently observed that:

‘in several member states attention has been focused on the settlement of conflicts outside courts, *inter alia* by family mediation, diversion and restorative justice. This is a positive development and member states are encouraged to ensure that children can benefit from these procedures’ (Council of Europe, 2011: para 81).

Similarly, in 2002, the United Nation’s Economic and Social Council (ECOSOC) formulated a number of foundational universal principles relating to restorative justice, including non-coercive ‘offender’ and ‘victim’ participation, voluntarism and confidentiality. A number of accompanying procedural safeguards - informed by human rights imperatives - were also expressed:

‘6. Restorative justice programmes may be used at any stage of the criminal justice system, subject to national law.

7. Restorative processes should be used only where there is sufficient evidence to charge the offender and with the free and voluntary consent of the victim and the offender. The victim and the offender should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily and should contain only reasonable and proportionate obligations.

8. The victim and the offender should normally agree on the basic facts of a case as the basis for their participation in a restorative process. Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings.

9. Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process.

10. The safety of the parties shall be considered in referring any case to, and in conducting, a restorative process.

11. Where restorative processes are not suitable or possible, the case should be referred to the criminal justice authorities and a decision should be taken as to how to proceed without delay. In such cases, criminal justice officials should endeavour to encourage the offender to take responsibility vis-à-vis the victim and affected communities, and support the reintegration of the victim and the offender into the community' (United Nations Economic and Social Council, 2002: paras 6-11).

Three years later, the Eleventh United Nations Congress on Crime Prevention and Criminal Justice (United Nations, 2005: 3) undertook to 'enhance restorative justice' and urged Member States to recognize the importance of further developing restorative justice polices, procedures and programmes. It follows that numerous variants of 'restorative justice' have proliferated globally with the inevitable effect of both diversifying, and intensifying, multiple and often competing definitions, operational practices and legitimising logics.

Before we begin to explicitly subject such phenomena to critical analysis, we turn first to a brief sketch of the application of restorative approaches within the contemporary youth justice spheres in Australia and in England and Wales.

### **Restorative justice in the contemporary youth justice sphere**

Australia and England and Wales comprise interesting 'case studies' of the application(s) of restorative justice, not least because they encompass jurisdictional sites where restorative approaches have been extensively trialled within the youth justice sphere. Cunneen and White (2011: 355) observe that 'restorative justice approaches have been institutionalised' through the corpora of Australian youth justice law, policy and practice. Similarly, Muncie (2009: 331) alludes to the 'political popularity' of restorative justice in England and Wales, where 'it has been incorporated into several aspects of the youth justice system' (Haines and O'Mahony, 2006: 110)

#### ***Australia***

Perhaps the most significant example of the restorative justice approach in Australia is the Family Group Conference (or juvenile conferencing), originally pioneered in New Zealand following the implementation of the Children, Young Persons and their Families Act 1989. Family Group Conferences comprise the coming together of the child ‘offender’, their family and their ‘victim’ with a view to repairing the harm caused. In addition to juvenile conferencing - which is available ‘for young offenders in *all Australian states and territories*’ (Larsen, 2014: vi, our emphases), victim-offender mediation programmes and circle sentencing are also commonly applied variants of restorative justice (see Richards, 2010, for an overview of the legislative and policy context within which restorative justice is framed in Australia; see Larsen, 2014, for a detailed description of the range of restorative approaches in the contemporary Australian youth justice sphere).

### ***England and Wales***

In 2010, an ‘Independent Commission on Youth Crime and Antisocial Behaviour’ published a major report in which it subjected the youth justice system in England and Wales to a level of analytical scrutiny (Independent Commission on Youth Crime and Antisocial Behaviour, 2010; Goldson, 2011). During the course of its inquiries the Commission consulted with, and/or received ‘evidence’ from, over 170 individuals and organisations. At the conclusion of their investigations, the Commissioners detected the need to make a ‘fresh start’ in responding to youth crime and delivering youth justice in England and Wales. More significantly, for present purposes, they placed significant emphasis on restorative justice. In his Introduction to the report, the Chairperson of the Commission stated:

‘At the heart of our intended reforms are proposals for a *major expansion of... restorative justice...* Our recommendation is that restorative justice should become the *standard means* of resolving the majority of cases’ (Salz, 2010: 5, our emphases)

and, the Commission itself explained:

‘Our principles, objectives and the evidence we have studied... have drawn us increasingly towards the concept and practice of restorative justice’ (Independent Commission on Youth Crime and Antisocial Behaviour, 2010: 55)

The extent to which the ‘Independent Commission’ itself directly influenced the direction of subsequent youth justice policy is a matter for conjecture. What is more clear is that not long after the Commission published its findings, ‘official’ reports and government policy statements appeared to echo its recommendations. For example, a joint thematic report by Her Majesty’s Inspectorates of Constabulary, Probation, Prisons and the Crown Prosecution Service in England and Wales, referred to a ‘renewed focus on restorative justice’ (Criminal Justice Joint Inspection, 2012: 4). Similarly and in the same year, the Parliamentary Under-Secretary of State and Minister for Prisons and Rehabilitation stated that restorative justice will ‘be accessible at *every stage of the criminal justice process*... this action plan sets out a series of actions which the Government will drive forward... to bring about *real change in the delivery and provision of restorative justice* across England and Wales’ (Wright, 2012: 1, our emphases). Such pledges were accompanied by additional funding and, in 2013, the Government announced that ‘at least £29 million is being made available... to help deliver restorative justice... a further £10 million will be made available for 2014-15... [and] in 2015-16 at least £14 million has been set aside’ (Ministry of Justice, 2013, np).

Indeed, since the implementation of the Youth Justice and Criminal Evidence Act 1999 - that provided for the near mandatory application of (a variant of) restorative justice (via the Referral Order) (Goldson, 2000) - more recent policy and practice developments including: the Youth Restorative Disposal (Rix et al, 2011), Restorative Youth Cautions (Ministry of Justice and Youth Justice Board, 2013) and Pre-Sentence Restorative Justice (Ministry of Justice, 2014) have served to deepen the penetration and widen the reach of restorative approaches within the youth justice sphere in England and Wales.

## **A critical analysis of restorative justice**

### ***The victim-offender binary***

The contemporary popularity of restorative justice - and both its political and policy attraction - derives, in large part, from its promise to enable moral clarification and deliver moral pedagogy (see Bottoms, 2003). This is particularly resonant in the youth justice sphere, given the widespread belief that children and young people are



especially impressionable and responsive and, as such, most likely to benefit from moral pedagogy. What this requires, however, at least in its 'pure' form, is the union of an 'ideal victim' (a representative subject and model citizen who has been victimised by a, preferably unknown, 'offender' engaging in a predatory and acquisitive offence such as a robbery, car theft or house burglary) and an 'ideal offender' (a child or young person who readily acknowledges culpability and guilt, regrets their offence to the point of remorse, and who is readily susceptible to remoralisation). If this borders on caricature, it also exposes a major theoretical problem with restorative justice: its fundamental claim to universalism. Indeed, such universalism reaches down into the very concepts of 'victim' and 'offender', abstracted and essentialised constructs devoid of particularised socio-economic circumstances and stripped of individualised identities and unique biographies. To put it another way, 'victim' and 'offender' are effectively conceptualised as uncomplicated and homogeneous categories of self: universal classifications that appear to subsume all other possible identities. In this way, and not unlike the wider corpus of criminal law, restorative justice narratives tend to construct subjectivity with reference to a 'victim'-'offender' binary. In fact, the capacity to articulate a particular narrative - a scripted role - as a 'victim' or as an 'offender', is fundamental to the restorative process. The ascription of such 'fixed or singular meanings' (Stubbs, 2010: 974) and their abstraction from social reality is deeply problematic, however.

The reality is that most children in conflict with the law - young 'offenders' - are also, at one and the same time, 'victims'. On one hand, and wherever we may care to look in the world, youth justice systems typically sweep up children and young people who are routinely 'victimised' by their exposure to profound and myriad social injustices and harms. For such children and young people - especially those most deeply embroiled in youth justice processes - the fabric of life invariably stretches across poverty, family discord, public care, drug and alcohol misuse, mental distress, ill-health, emotional, physical and sexual abuse, self-harm, homelessness, isolation, loneliness, circumscribed educational and employment opportunities, 'hollowed-out' communities and the most pressing sense of distress and alienation. On the other hand, child 'offenders' are often also 'victims' of conventional 'crimes', as evidenced by systematic crime victimisation surveys (see, for example, Muncie, 2009: 165-169).

Indeed, the child's 'offender self' and 'victim self' are invariably intrinsically intertwined in complex forms that deny neat compartmentalisation and dichotomised classification. Thus, restorative justice is ultimately trapped by its own variant of 'binary and foundational thinking' (Cook et al, 2006: 6; see also Walklate, 2006). If the 'offender' in one situation is a 'victim' in another, 'restorative' processes effectively require the child to be one person and its 'opposite' at the same time; a curious duality of identity and self that is not only conceptually flawed but also raises pressing questions with regard to natural justice. To what extent, for example, might it be considered 'just' to require a child to assume an 'offender' identity in a formal 'restorative' process whilst harbouring knowledge of the same child's 'victim' status (often chronic) in their wider milieu? And, if the 'offender-victim' child is subjected to 'shaming' rituals how certain can we be that such processes will produce 'reintegrative' (positive) as distinct from 'disintegrative' (corrosive) outcomes? Rather than offering resolution and 'healing', as imagined within restorative justice discourse, therefore, such processes might just as readily be conceptualised as abusive and harmful.

### ***The inclusive community***

Fundamentally restorative justice is underpinned by, and rests upon, an imagined consensual and inclusive community and civil society that enables benign, mutually engaged and balanced processes; a coming together of remorseful child 'offenders' and receptive (often adult) 'victims', each keenly engaged in discourses of moral pedagogy and repair. Cook (2006: 110) explains:

'First, empowering participants to express themselves authentically is one piece of elegant genius behind restorative justice... Second, restorative justice ideally encourages remorse and shame from the offender and social integration... Gestures of remorse... are, it is hoped, embraced with gestures of connection and reconciliation. Third, ideally, restorative justice breaks down barriers between victims, offenders and the community by encouraging all to participate equally in developing resolutions to the harms done'

But, in reality, communities - with their multiple and contested meanings - are contingent, fluid and unstable entities. Furthermore, they evolve in relation to - and are constructed by - historical, social, economic and political conditions that reflect, maintain and reproduce conflicts, inequalities and differentiated distributions of

power. The defining imaginary of the inclusive, consensual and readily forgiving community, that lies at the core of restorative justice, therefore, not only sidesteps the prospect of profound - and potentially unreconcilable - inter-generational and inter-personal tensions between 'victims' and 'offenders' but, more fundamentally, it airbrushes-out the antagonistic structural divisions (particularly those deriving from class, 'race', gender, generation) that give rise to deep contradictions in the social order (inequality, poverty, social and economic injustice). The same divisions and contradictions are played out through the infrastructure of everyday life and the (disfigured) relations that they forge define the lived realities of 'community'. But by privileging a largely unrealised 'nirvana story' (Daly, 2002: 70), restorative justice overlooks the likelihood of it becoming precisely what it claims to oppose: a practice that excludes individuals because they are without community or without the *right* community. Ultimately, restorative justice relies upon a communitarian ideal that is the stuff of fiction and, in so doing, it simulates something that has never really existed: a kind of hyper-reality of the inclusive community and the wider consensual civil society and, more specifically, a youth justice system that is fair and equitable and offers redemption for all, where 'offenders' are free agents who are now contrite and where 'victims' are engaged civic personalities who forgive and forget.

Exposing the apparently naive domain assumptions that inform restorative justice discourses, also invokes questions concerning the relation of restorative justice technologies to broader impositions of coercive state power. In many western jurisdictions, for example, restorative justice initiatives are situated within the legislative and administrative architecture of youth justice systems that also embrace deeply problematic - and overtly anti-restorative - practices and routinely violate children's human rights (Goldson, 2009; Goldson and Muncie, 2012). The key point here, is that any comprehensive analysis of restorative justice requires that it be situated within the broader operational frameworks of youth justice with which it co-exists, including recognisably coercive and punitive dimensions.

The centrality of the police in restorative justice practices is particularly interesting, especially as it has evolved in tandem with significant legislative extensions of police powers in a range of other areas, from anti-social behaviour orders and increased stop-and-search mandates, for example, through to the raft of

interventions provided by surveillance, ‘security’ and ‘anti-terrorist’ legislation. Policing and the youth justice system have a determining role in constituting identifiable groups of children and young people as problematic threats and in reproducing a society built on racialised (Webster, this volume), gendered (Sharpe and Gelsthorpe, this volume) and class-based injustices (White and Cunneen, this volume). In other words, the processes of criminalisation play a significant part in the reproduction of social marginalisation and the intensification of exclusion. In this respect, increased police powers, public order interventions over minor transgressions, the discriminatory application of stop-and-search, targeted surveillance and a consolidating spectre of suspicion based on ‘race’, are as much part of the fabric of policing as restorative justice. It follows that ‘racial’, ethnic and indigenous minorities may have good reason to be sceptical about any claims that the police act as independent arbiters in restorative justice processes. Indeed, the empirical evidence shows that specific groups of minoritised children and young people are much less likely to be dealt with via diversionary options such as restorative justice, and are significantly more likely to be processed via the most punitive avenues available (Cunneen and White, 2011; Webster, this volume).

### ***The imputation of responsibility***

We have noted the tendency for restorative justice seeks to universalise legal subjects with certain attributes of individual responsibility, accountability and civic obligation. Furthermore - and despite the rhetorical constructions of restorative justice that privilege notions of reciprocity, inclusivity, reparation, resolution, healing and closure - much official policy discourse reconfigures such meanings and presentations in ways that emphasise responsibility and responsabilisation. To take two examples from England and Wales.

First, in the introduction to the report published by the Independent Commission on Youth Crime and Antisocial Behaviour (2010), the Chairperson of the Commission states:

‘we recommend an approach that will encourage young offenders to *face up to the consequences* of their actions and *accept responsibility* for them... At the heart of our intended reforms are proposals for a major expansion of... restorative justice... Young offenders themselves acknowledge just how tough

it [is] to have to *face up to the harm and misery they have caused* their victims, their families and the community' (Salz, 2010: 5, our emphases).

Second, similar responsabilising logics appear in the Ministerial Foreword to the Government's 'Restorative Justice Action Plan' (Ministry of Justice 2012):

'For many victims, seeing the perpetrator punished for their crime helps to bring closure, enabling them to get on with their lives. For others, the judicial process is not enough. Rather than relief, victims may feel frustrated that they were not able to describe the hurt, stress and anxiety caused by the crime to the one individual who needed to hear it most; the offender. Restorative justice can help in this respect... I want restorative justice to become something that victims feel comfortable and confident requesting at any stage of the criminal justice system. But this process has to be led by the victim and be on their terms. If it doesn't work for the victim, then it should not happen. Restorative justice is not an alternative to sentencing; a way of an offender getting a lighter sentence by expressing insincere remorse. *I'm very clear that restorative justice will not lead to offenders escaping proper punishment...* Restorative justice has the potential to break the destructive pattern of behaviour of those that offend by *forcing them to confront the full extent of the emotional and physical damage they have caused to their victims*' (Wright, 2012: 1)

In such respects restorative justice is framed not as 'an escape from proper punishment' but rather as a form of punishment: as a compensatory mechanism for the perceived shortcomings of the 'judicial process' and the means by which the 'frustrations' that 'victims may feel' might be rectified by imposing responsibility on the 'offender' to 'confront the full extent of the... damage they have caused'.

The imputation of unmitigated responsibility not only betrays the more benign and progressive imperatives with which restorative justice is conventionally associated, it also raises serious questions with regard to the legitimacy of such responsabilising strategies. This is particularly problematic in jurisdictions where criminal responsibility is ascribed to children at a young age. In Australia and in England and Wales, for example, the minimum age of criminal responsibility stands at 10 years. This implies fundamental incoherence regarding the manner in which the legal personality of the child is constructed and social rights and responsibilities are statutorily assigned. Rightly or wrongly, the law serves to mediate the transition from 'childhood' to 'adulthood' whereby rights and responsibilities tend to accumulate incrementally with age. The legitimacy of such legal regulation is open to debate, but

if its defence rests with notions of maturational process then it is difficult to claim legitimacy for statutorily responsabilising children in criminal proceedings - via restorative justice or any other means - when, in many other areas of civil law, social responsibilities (and rights) are reserved exclusively for adults (Goldson, 2013).

A further problem associated with the responsabilising impulses of restorative justice relates to the question of communication. It goes almost without saying that effective reciprocal communication is crucial if restorative processes are to operate in the form that is desired. It follows that child 'offenders' need to be able to articulate reflective narrative accounts of their offending and their remorse. But the evidence suggests that children and young people, in particular, encounter difficulties in this respect: low levels of confidence and self-esteem, educational deficits, learning and other disabilities, mental health issues and patterns of drug and alcohol misuse are all likely to impact negatively on the child's ability to adjust communicative styles to meet differing contexts (Cunneen, 2010). Such difficulties are only likely to be compounded in an unfamiliar social context where the overarching tone emphasises child-responsibilisation. These problems can be exacerbated further still, if the restorative justice programme is in a language other than the first language of the 'offender', or if the 'offender' speaks a dialect of the programme language. As noted with Aboriginal children and young people, for example, problems communicating in what linguists refer to as 'standard English' can result in silence which, in turn, might be interpreted as sullenness, disregard, disrespect and/or an unwillingness to recognise and assume responsibility. The end result is that the 'victim' feels anger and the 'offender' feels alienated (Dodson, 1996). We are not arguing that traditional court processes provide more effective opportunities for 'offenders' or 'victims' to provide narrative accounts of youth crime and its context. What we are contending, however, is that the claim that restorative justice processes offer opportunities for 'dialogic encounters' in the youth justice sphere is overstated. Although both 'offenders' and 'victims' may get to tell their stories, there are also various impediments that might just as readily serve to compromise the capacity for either party to participate effectively. Some of these factors will relate to communicative competencies. Others will derive from the institutional setting, the expectations of a set script, the role of key operational players such as convenors and police officers. Neither will be assisted by any determination to impute responsibility by 'forcing

[children and young people] to confront the full extent of the emotional and physical damage they have caused to their victims’.

A final concern here relates to the sex of the ‘offender’. A great deal of discussion of the ‘victim’-‘offender’ relationship in restorative justice tends to rest on the assumption - which is valid in the majority of cases - that the ‘offender’ is male. However, what implications are raised when the ‘offender’ - the subject of the (responsibilising) restorative justice process - is a girl or young woman? It is well-established that girls’ behaviour is judged, controlled and disciplined through gendered scripts in the youth justice sphere (Sharpe and Gelsthorpe, this volume). Can we be confident that processing girls and young women through restorative justice programmes will necessarily be more benign? What, if any, grounds are there for supposing that ‘informal’ restorative processes will be any less likely than ‘formal’ court interventions to operate within circumscribed and gender-defined contexts within which limited visions of what is appropriate behaviour for girls prevail (Alder, 2003)? Cook (2006: 121), for example, concludes that class, gender and ethnicity are prisms through which restorative justice conferences operate and, for the most part, the ‘socially constructed categories of difference are not eliminated but instead are used as subtle devices of domination’.

### *Alternative justice*

It is not unknown for restorative justice to be presented as a replacement discourse. Indeed, if framed within the more radical traditions of abolitionist (Christie, 1986) and peacemaking (Pepinsky and Quinney, 1991) criminologies, restorative justice might be imagined as a form of alternative justice; as a means of displacing - if not completely replacing - conventional modes of adversarial and retributive justice. Such imaginaries are nowhere to be found within contemporary youth justice systems, however. It is more common to hear the claim that an expansion of ‘restorative youth conferencing... would reduce the need for conventional prosecutions, court proceedings and sentencing, but it would not remove it entirely’ (Independent Commission on Youth Crime and Antisocial Behaviour, 2010: 71).

The first part of this claim - the promise of reducing the need for ‘conventional’ justice - comprises a speculative and, almost certainly, over-optimistic reading. There

can be no guarantee that incorporating restoration into an otherwise retributive youth justice system will serve to reduce recourse to ‘conventional prosecutions, court proceedings and sentencing’. In fact, quite the opposite is, at least, just as likely. To apply restorative justice as a non-exclusive technique - one intervention among many - implies a form of ‘spliced justice’ (Daly, 2002: 64); a bifurcated approach whereby restorative interventions are reserved for low-level child ‘offenders’, the ‘respectable’, the readily compliant, those deemed to be ‘deserving’, whilst the more conventional retributive apparatus remains open for the ‘heavy-enders’, the recalcitrant, the persistent and those judged to be ‘undeserving’ (decision making processes that, as stated, are mediated through the structural relations of class, ‘race’ and gender).

The second part of the same claim - the acceptance that restorative justice, however rigorously applied, does not ‘remove’ the need for parallel processes of retributive justice - is widely recognised and explicitly stated within numerous official youth justice policy statements. By way of illustration, a report published by the Australian Institute of Criminology - a government agency - states:

‘In the two decades since youth conferencing was first used by the NSW [New South Wales] Police Service in Wagga Wagga, restorative justice has *largely been incorporated into existing criminal justice systems*. As the Justice and Community Directorate states in relation to the ACT [Australian Capital Territory] Scheme, “it [restorative justice] *augments the criminal justice system without replacing it*”.... Across the country, *restorative justice processes now run alongside existing criminal justice responses*’ (Larsen, 2014: 5, our emphases)

Similarly, in England and Wales, the Government’s stated imperative is to ‘embed’ restorative justice *within wider youth/criminal justice processes*:

‘Through this action plan we are seeking to establish the necessary levers to enable *RJ to be embedded*... This action plan acknowledges that there are evolving strategies for restorative justice across the National Offender Management Service (NOMS), the Youth Justice Board, the police forces... The actions underpin and support those strategies *in considering how RJ can be integrated within existing systems*’ (Ministry of Justice, 2012: 5, our emphases)

This is not a recipe for alternative justice, therefore, but rather an invitation for net-widening, system expansion and the co-existence of diversified (but interdependent) technologies of criminalisation, control and, ultimately, punishment. In other words,



the restorative is subsumed by the retributive, it becomes nested within a pre-existing architecture of repressive ‘justice’.

In these ways, ostensibly informal and restorative processes might do more to re-legitimise rather than to challenge formal adversarial and retributive systems of youth justice. Indeed, in many jurisdictions, restorative justice has been widely articulated and applied at precisely the same time as youth justice has taken a decidedly punitive turn. This poses pressing questions regarding the popularisation of restorative justice in tandem with consolidating modes of neo-liberal governance. Developments in late modern states have witnessed a decline of welfarism and a diminished focus on the social context of youth ‘crime’, together with a corresponding emphasis on individual, familial and community responsibility and accountability. In Europe where, as we have seen, the Council of Europe has pushed for the development of restorative approaches within each of the territorial jurisdictions of its 47 member-states, Bailleau et al. (2010: 8-9) observe:

‘Social intolerance in various States is rising against a backdrop of a drift to hard-line law-and-order policies and practices. The deviant youth is perceived first and foremost as a social problem... to the detriment of a vision that saw the “child in danger” as someone whom society also had to protect... a greater tendency to hold the youth’s ‘entourage’ accountable for his/her actions by shifting responsibility to his or her family and the local community (either the geographic community or cultural or ethnic community)... There has also been a shift in the State’s orientations and strategies in the public management of youth deviance... The main consequence of this new orientation is the increased surveillance of young people and families by a host of entities and the extension of criminalisation to include certain types of behaviour that used to be considered to be mere deviations from the norm and/or petty delinquency’.

It follows that the emphasis on actuarialism and the prediction of risk (Case and Haines, this volume), is not necessarily contradictory to the simultaneous development of restorative justice initiatives; rather, the two can be seen as complementary strategies within penal regimes. Indeed, risk assessment becomes a fundamental technology for dividing child and youth populations, between those who

are deemed to deserve the benefit of restorative justice and those who are conceptualised as undeserving and/or unsuitable and, as a consequence, are channelled through more retributive (read punitive) processes. Risk assessment instruments apply a veneer of science to the categorisation and classification of children and young people. The focus on individual factors such as the age of the ‘offender’ at first conviction, offence record and compliance with court orders, is used to predict the likelihood of future offending. Various familial and socio-economic factors are also indexed into such assessments including household composition, education and employment status. Through the miracles of science and statistics, the most disadvantaged, distressed and marginalised children and young people are invariably deemed to present the greatest risks; the ‘problem cases’ unlikely to respond to the opportunities offered by restorative justice and, consigned instead, to more restrictive and coercive interventions. There is no alternative for such children.

### ***Effectiveness and impact***

To conclude our critical review of restorative justice we turn to the pragmatic question: does it ‘work’? Many politicians, policy makers and restorative justice ‘evangelists’ incline towards hyperbole in addressing this matter. For example, in 2012 the then Parliamentary Under-Secretary of State and Minister for Prisons and Rehabilitation in the UK stated:

‘The benefits of restorative justice are well known by those working within the sector. 85% of victims who go through restorative justice conferences find it helpful. For offenders who take part in restorative justice, there is a 14% reduction in reoffending rates’ (Wright, 2012: 1)

Whilst no sources were cited to substantiate this statement, the available research literature provides strong grounds for doubting its validity. On the matter of ‘victim satisfaction’, surveys may well reveal some positive outcomes but the reality is that levels of ‘victim’ participation in restorative processes within the youth justice system are often exceptionally low (see, for example, Crawford and Newburn, 2003). Concerning the specific question of ‘reoffending rates’, Larsen (2014: viii) notes that ‘the evidence for restorative justice remains mixed’ and that ‘the ability of restorative justice to reduce reoffending is still contested’ (ibid: vii).

Restorative justice initiatives have been applied extensively in Northern Ireland:

‘A wide range of groups now employ restorative justice approaches in Northern Ireland, using a wide range of techniques – conferencing (including both youth conferencing and family group conferencing), mediation, circles, restitution, community service and other processes. Restorative justice is deployed systematically in Northern Ireland’s youth justice system. Aside from diversionary disposals, youth conferencing is the means by which a large proportion of young people’s offending is dealt with, either through a diversionary youth conference directed by the prosecutor for less serious offences or through a court-ordered conference. Each year youth conferencing services receive around 1,800 referrals (15 per cent of all young offenders), of which about half come from the prosecution service’ (Muir, 2014: 6-7)

Notwithstanding this, it is important to acknowledge that the ‘evidence’ available is limited, incomplete and ambiguous. Even Jacobson and Gibbs (2009: 18) - in their optimistic, schematic and methodologically suspect report - concede: ‘it is too early to reach definitive conclusions about the effectiveness of youth conferencing’. Moreover, whilst the most detailed study available (Campbell et al, 2006) provides a range of interesting and important insights into implementation ‘process’ issues and the varied experiences of participants, it offers little with regard to ‘hard outcomes’ beyond observing that: ‘as the system of youth conferencing develops it will be interesting to consider [its] impact on recidivism’ (ibid: 144).

The most nuanced qualitative messages with regard to youth restorative conferencing in Northern Ireland can be drawn from the relatively small-scale study undertaken by Maruna and his colleagues, provided that, as the researchers themselves (wisely) advise, the findings are ‘treated cautiously and sweeping generalisations are avoided’ (Maruna et al, 2007: 8). The research team report that ‘many of the post-conference “outcomes”... are positive’ and in ‘relatively rare, best-case scenarios, reparative conference plans actually led to... a new direction in a young person’s life’ (ibid: 2). But the research also communicates contrary messages:

‘A number of the conferencing outcomes were less than positive... In some of these cases, the conferencing experience might have simply had no impact at all. In others, however, the young person’s self-reported conferencing experiences were so negative that they might have exacerbated... problems through either labelling or provoking defiance... several interviewees... felt that

they were being expected to accept complete blame and responsibility for the crime... This insistence that the offender be held entirely responsible for criminal conflicts appears to further their sense of resentment and anger' (ibid: 3).

And, with explicit regard to the question of 'desistance':

'... most of those who avoided offending entirely after the conference had not been involved in much serious delinquency prior to the conference itself, and many were first-time offenders. It could be argued that a good number of these would have desisted regardless of the conferencing experience' (ibid: 24).

In other words, restorative conferencing is no silver bullet. At the heavy-end, the available evidence suggests that over-zealous modes of responsabilisation may serve to consolidate 'antisocial' responses from 'persistent young offenders', whilst at the light-end restorative conferencing might, at best, produce neutral outcomes.

Restorative justice is also widely applied in New South Wales in Australia where there is a very well-developed system of restorative conferencing for children and young people. It is established in legislation. It has a dedicated team of conference managers and local conference convenors. There are clearly articulated legislative and administrative procedures for the use of conferences. The system has been in place since the later 1990s, developed after various trials of restorative justice in the youth justice sphere that date back to the early 1990s. But, after two decades, what has been the net outcome? Depending on the year, between 2 and 4 per cent of police interventions involving children and young people result in referral to a youth justice conference. Police prefer all other forms of intervention, including police warnings, cautions, infringement notices (on-the-spot fines), summons to appear in court, or legal process by way of arrest and charge. In hindsight, while a small army of criminologists has been discussing and arguing the merits of restorative justice, police have decided that the most efficient way of dealing with 'young offenders' is simply to write out a ticket and enforce a monetary payment. At the other end of the legal process - the courts - restorative justice has not fared any better. For every one young person who appears in a restorative justice conference, about 15 appear in court, and the great growth area in court has been an expanding use of child imprisonment, both for those sentenced and those held on remand (Cunneen, 2010).

Such examples are not uncommon. At best, the international ‘evidence-base’ is inconclusive. In providing what is probably the most comprehensive and systematic review of the restorative justice ‘effectiveness’ literature currently available, Sherman and Strang (2007: 15) note that the ‘short answer’ to the ‘why restorative justice works when it does work’ question is: ‘we cannot tell much from the available evidence’. Similarly, informed by her wide-ranging and long-term research project on restorative initiatives within youth justice systems, Daly (2002: 71, original emphasis) concludes:

‘The conference effect everyone asks about is, does it reduce reoffending? Proof (or disproof) of reductions in reoffending from conferences (compared *not only to court*, but to other interventions such as formal caution, other diversion approaches or no legal action at all) will not be available for a long time, if ever. The honest answer to the reoffending question is “we’ll probably never know”’.

Furthermore, when the evidence is presented more conclusively it is not encouraging. Returning to New South Wales, Smith and Weatherburn (2012) reviewed a range of studies that compared the impact of reoffending amongst children and young people who were referred to youth conferencing with those who only appeared in Children’s Court, together with studies that compared restorative conferencing with other responses including cautions, mediation and orders to pay restitution. Following their rigorous analysis, the authors concluded that there was ‘little basis for the confidence that conferencing reduces re-offending at all’ (ibid: 6). They also identified a range of design problems and methodological flaws in various research studies on conferencing, including a failure to adjust for differences between control and treatment groups, small sample sizes and restricted definitions of reoffending. In order to rectify such methodological shortcomings Smith and Weatherburn applied propensity score matching to compare patterns of reoffending between children and young people participating in restorative conferences with those who were eligible for a conference but were nonetheless processed through the Children’s Court. The researchers found no significant differences between the two groups regarding: the proportion who reoffended; the length of time to first (proven) reoffence; the level of seriousness of reoffending or; the number of proven offences

and concluded that restorative conferencing ‘is no more effective than the NSW [New South Wales] Children’s Court in reducing juvenile offending among young person’s eligible for a conference’ (ibid: 1).

## **Conclusion**

In concluding our critical analysis of restorative justice it is important to recognise that many progressive activists within both the youth justice sphere and the broader human rights arena - particularly minority and indigenous groups - conceptualise restorative justice as an infinitely preferable alternative to the adversarial and retributive nature of conventional youth justice. Whilst we share a sense of enthusiasm for the restorative justice that *might be*, we are profoundly sceptical of the restorative justice *that is*, however. In this sense our analysis centres restorative justice within a context of unfulfilled possibilities. As it is currently constituted within the contemporary youth justice sphere, there is little, if anything, inherent to restorative justice that prevents it from co-existing with, being accommodated by and, ultimately lending legitimacy to, repressive youth justice systems and youth crime control strategies.

Salz (2010: 5), along with many others, claims that ‘restorative justice is an approach whose time has come’. But perhaps Blagg’s (2008) suggestion that restorative justice was a good idea ‘whose time has gone’ is more fitting? We remain alive to the prospect, indeed the necessity, of ‘re-imagining’ (Goldson, 2015) the delivery of justice for children and young people, but the project requires substantially more than existing variants of restorative justice appear able to provide.

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