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RESTORATIVE JUSTICE: A NEW PARADIGM?

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ABSTRACT

This paper examines the merits or otherwise of restorative justice within criminal justice systems. The overpopulation of prisons remains a major global issue along with increasing rates of recidivism. In stark contrast to the punitive aims of traditional retributive justice systems that enforce a regime of punishment for offenders, the restorative justice approach promotes the repair of harm caused by an offence. The purpose of this article is to provide an overview of restorative justice in addition to examining potential barriers to its widespread application.*

*I am indebted to Michael King for his valuable suggestions in the preparation of this paper.

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AND JUSTICE FOR ALL? THE STORY SO FAR

The incarceration of offenders for criminal offences is a timeworn approach. While customary, punishment in response to lawbreaking offers little in the way of flexibility. Typically, society views crime as a state violation defined by the breaking of laws and the requisite establishment of guilt in what is a punitive-permissive continuum. Specifically, as suggested by Bowen & Consedine¹ and Wachtel,² the fundamental question is the justification of punishment and the amount of sanction or duration of sentence. Also propounded by Bowen & Consedine³ is the problem of festering recidivism which remains an undesirable effect of imprisonment. Indeed, despite the communal voice of most jurisdictions calling for more prisons (exacerbated by the mass media), research suggests that prisons themselves add to crime by providing an environment conducive to increasing crime. Prisons are known to encourage the process of denial amongst inmates as they provide empowering and comforting forums of defiance within the prison environment. Consequently, remorse for victims amongst offenders remains elusive.

Commentators such as Consedine⁴ draw attention to burgeoning prison populations and ever more concerning projections of further escalations in the future. In spite of the alarming level of incarceration, crime rates continue to increase as does the call for more prisons to incapacitate the offenders. As a consequence, increased recidivism rates in addition to the nurturing of more extreme and brutal offenders will be the most likely result. Within the retributive system, argues Consedine,⁵ the hard labour approach to imprisonment favoured in the early 20th century failed as it engendered much recidivism. Equally unsuccessful was the medical-based corrections approach, which focussed on a therapeutic approach. Indeed, post-modern punishment regimes have generated even more prescriptive methods that focus on public protection rather than offender treatment, such as the so-called super max prisons and politicised/populist crime policies that add further fuel to community expectations on tougher and more extreme approaches to crime. Examples such as the controversial 'three strikes and you are in' policies and 'no frills prisons' amongst others illustrate contemporary political and community attitudes toward criminal justice along with the obligatory staged criminal policy announcements made by politicians in front of prisons.⁶

Moreover, Consedine⁷ argues in favour of the restorative justice approach by questioning whether the astronomical costs incurred in the support of largely inefficient retributive, punitive criminal justice systems may be better directed toward the restorative justice regime of healing, reconciliation, accountability and

¹ H Bowen & J Consedine, 'Making Justice Work' in *Restorative Justice-Contemporary Themes and Practice*, (1998) 18.

² T Wachtel 'Restorative Justice in Everyday Life: Beyond Formal Ritual' (Paper presented at the Reshaping Australian Institutions Conference: Restorative Justice and Civil Society, The Australian National University, February 16-18 1999, 1).

³ Bowen & Consedine above n 1, 23-24.

⁴ J Consedine, 'A Future Paradigm: Restorative Justice in Aotearoa?' in *Restorative Justice, Healing the Effects of Crime* (1995) 171.

⁵ Consedine above n 4, 157.

⁶ H Blagg, 'Criminology, Criminal Law and Public Policy' (Crime Research Centre, The University of Western Australia, 2005).

⁷ Consedine above n 4, 172.

forgiveness. After all, as suggested by Umbreit,⁸ if severe forms of punishment and incarceration were an effective response to ever increasing crime rates, countries like the United States would be an inherently safer environment given the extreme incarceration rates per capita in addition to more intolerant sentencing and the continual use of capital punishment, in comparison to other Western democracies. It is against this backdrop of predominately retributive criminal justice systems⁹ that the merits or otherwise of restorative justice can be examined.

RESTORATIVE JUSTICE DEFINED

Daly & Immarigeon¹⁰ suggest that restorative justice is effectively a fluid concept and includes manifold processes such as meetings between victim and offenders, diversion from traditional court processes and actions taken in conjunction with formal court procedures. The restorative justice model is essentially diversionary in nature and involves those parties with an interest in a crime. Marshall¹¹ describes restorative justice as an active, collective resolution to an offence including the outlining of future implications for all parties with a specific involvement or stake in the crime. Those parties naturally include victims, offenders, family members, community representatives and statutory agencies, amongst others, by making room for the personal involvement of those concerned. Put simply, these parties combine to deal with both the aftermath of the offence and the implications that follow, in addition to allowing a certain flexibility of practice and creativity. Essentially, the principles of restorative justice require an offender to accept responsibility for his or her actions including the impact upon victims and community, and the encouragement of working communities that support victims through financial, material and emotional assistance. Restorative justice also promotes assistance in offender rehabilitation and the prevention of recidivism by encouraging the reintegration of offenders into communities. Restorative justice also can aid in the reduction of ever-increasing legal costs and unnecessary delays.¹²

By eschewing the traditional retribution and punishment regime in favour of a process of repairing the harm caused by the offence,¹³ restorative justice seeks to embed the criminal justice system within social contexts.¹⁴ Restorative justice has its foundation in some pertinent assumptions, such as justice consisting of a balanced approach that denies single objectives, the opportunity to dominate others, and that crime is a

⁸ M Umbreit, 'Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment' (1998) *Western Criminological Review* 3.

⁹ Fortunately, there are restorative justice initiatives already in place in many jurisdictions. Western Australia for example has established the Aboriginal Community Court and a number of diversionary measures such as the Pre-Sentence Opportunity Program in addition to other more appropriate ways to address offending including the Drug Court, Family Violence Court and alternative sentencing regimes.

¹⁰ K Daly & R Immarigeon 'The Past, Present and Future of Restorative Justice: Some Critical Reflections' (1998) 1 *Issues in Criminal, Social and Restorative Justice, Contemporary Justice Review* 21.

¹¹ T Marshall, 'Criminal Mediation in Great Britain' (1996) 4(4) *European Journal on Criminal Policy and Research* 37; T Marshall 'Restorative Justice. An Overview' *British Home Office, Research Development and Statistics Directorate* (1999) 5.

¹² T Marshall 'Restorative Justice. An Overview' *British Home Office, Research Development and Statistics Directorate* (1999) 6.

¹³ Blagg, above n 6.

¹⁴ Marshall, above n 12, 5.

derivative of communal relationships and social conditions. Other assumptions include that justice measures be sufficiently flexible to enable appropriate responses to personal needs and exigencies, and that the aftermath of crimes cannot be fully resolved unless and until parties provide their personal involvement. Finally, cooperation between justice agencies and communities is considered essential to ensure optimal effect and efficiency.¹⁵ Effective restorative justice interventions, argues Wachtel,¹⁶ encourage the fostering of awareness in offenders by enlightening them as to the ramifications of their offences and the avoidance of patronising or lecturing which can lead to defensiveness and disassociation with victims' feelings. Restorative justice interventions should also actively involve offenders, encouraging accountability for their actions. This differs markedly from retributive methods where offenders are passive. It also important to accept that some form of ambiguity may occur in disputes between parties, which can make fault unclear and actively separate the deed from the doer by disapproving the offence rather than the offender. Of paramount importance is the requirement to view each instance of wrongdoing as an opportunity to turn negative incidents into positive or constructive outcomes.

RESTORATIVE JUSTICE: A POTTED HISTORY

Marshall¹⁷ draws upon community justice particularly amongst non-Western cultures as the inspiration for the restorative justice movement. Essentially, he argues that New Zealand Maori and American Indian cultures have long embraced the concept of community justice which generated the idea of family or group conferencing in response to a crime. Further contributors to the development of restorative justice were victims' rights movements, informal justice movements and the victim-offender movements of the 1970s and 1980s that featured predominately in the North American setting. Examples include 'victim-offender reconciliation' and 'victim-offender mediation' programs¹⁸ that assembled offenders, victims and neutral third parties together to seek appropriate repair for damage caused by crime.¹⁹ Daly & Immarigeon²⁰ suggest that a number of different processes and practices have given shape and definition to the concept of restorative justice. These include (during the 1970s) an increase in the acceptance of prisoner rights including alternatives to prison, alternative conflict resolution and greater citizen participation in both community justice boards and neighbourhood justice centres that emphasised less formal legal representation and more negotiation between disputants, in addition to victim-offender reconciliation programs (incorporating neutral third parties) that prescribed meetings between offender and victim usually after sentencing. In the late 1970s and the 1980s, the emergence of victim-offender mediation programs which included other parties affected by the offence in meetings also gained prominence.

The 1980s also witnessed the rise of victim advocacy movements that in particular voiced concerns on the treatment of women and children crime victims and family

¹⁵ Marshall, above n 12, 6.

¹⁶ Wachtel, above n 2, 3-4.

¹⁷ Marshall, above n 12, 7.

¹⁸ K Daly & H Hayes, 'Restorative Justice and Conferencing in Australia' (Working Paper No 186 *Trends and Issues in Crime and Criminal Justice*, The Australian Institute of Criminology, 2001) 1.

¹⁹ Daly & Immarigeon, above n 10, 25.

²⁰ Daly & Immarigeon, above n 10, 24-26.

group conferencing that incorporated an even more diverse range of parties affected by offences. The family group conference included a wider representation of the community and encouraged greater input from the offender's family members. Family group conferences remain a significant restorative justice component. Another restorative justice model is the so-called repatriation boards that allow appropriate juvenile crime penalties to be formulated by the community. 'Victim assistance' programs support victims during the recovery stage and 'victim-offender panels' assemble groups of unrelated offenders and victims who share and work through the aftermath of a common type of crime. Moreover, 'victim impact panels' are not voluntary but do allow affected victims and supporting family members to express their feelings regarding the aftermath of an offence²¹ to offenders that have been ordered by courts to attend proceedings.²²

Also prominent during the 1980s was the introduction of sentencing circles, which incorporate a variety of parties that represent victim, offender, family members and community participants in a consensus-based forum to enable the development of appropriate penalties for the offender. The sentencing circles encourage healing and harmony and are influenced by the theme of community healing and require significant citizen participation to achieve the binary goals of conflict resolution and improvement of social conditions.²³ By the 1990s, family group conferencing was the topic of much debate in the Australian jurisdiction. Indeed, by the mid-1990s most of the states and territories had introduced legislation (at least in relation to juvenile offending) that established conferencing as a response to juvenile crime. This followed much controversy over the mechanics and philosophy of the conference. Essentially, the debate concerned the so-called Wagga or police-run model as compared with the non-police facilitated New Zealand model. The Wagga model places much emphasis on reintegrative shaming which is a concept developed by John Braithwaite that invokes remorse in the offender and has attracted much attention in addition to being very influential in the restorative justice movement. While Braithwaite went to great lengths to distinguish stigmatisation from reintegrative shaming, he has been criticized for ignoring social structures and important cultural differences²⁴ between those who shame and the parties that are shamed²⁵ such as with Aboriginal offenders in the Australian jurisdiction. The New Zealand or non-police-run conference emphasises healing and the mending of broken bonds in addition to the provision of adequate resources and referral to appropriate agencies. This model allows the successful reintegration of juvenile offenders into their community and has been largely adopted²⁶ at the expense of the Wagga model, at least in the Australian jurisdiction.²⁷

²¹ Daly & Immarigeon, above n 10, 26.

²² Daly & Immarigeon, above n 10, 26.

²³ G Bazemore, 'The Community in Justice: Issues, Themes and Questions for the New Neighbourhood Sanctioning Models' (1997) 19(2) *The Justice System Journal* 207.

²⁴ Blagg, above n 6.

²⁵ Blagg, above n 6.

²⁶ Daly & Hayes, above n 18, 2.

²⁷ Daly & Hayes, above n 18, 2.

RESTORATIVE JUSTICE: AN AUSTRALIAN PERSPECTIVE

Diversion from traditional retributive criminal processes in juvenile offending is evident throughout the Australian jurisdictions. In Western Australia, juvenile justice teams comprised of coordinators and police officers (with the added advantage of an Aboriginal member to assist in matters involving indigenous youth offenders) are predominantly concerned with diversion of cases that are considered too serious for official police cautioning²⁸ yet not serious enough for traditional court intervention. The main issue is to consider whether a family group conference is warranted, although in Western Australia at least, conferencing is restricted to less serious offences.²⁹ The South Australian experience is perhaps the most applied of all restorative justice programs in the Australian jurisdiction as this state has the longest running statutory-based restorative justice scheme with a high volume of conferencing, as does New South Wales which is equally pro-active in providing a free telephone hotline service offering legal advice for juvenile offenders. Tasmania has recently established a statutory framework and allows both police and facilitator conferencing while the Northern Territory and Queensland operate under statutory regimes with varied approaches such as 'post-court' conferences in lieu of month-long detentions in the Northern Territory and pre-conference interviews with victims and offenders in Queensland. Other states like Victoria and the Australian Capital Territory operate without a statutory basis and at a far lower level of conferencing although the Australian Capital Territory has been prescient in adult restorative justice initiatives through the so-called Re-Integrative Shaming Experiments of the mid 1990s, which conferenced adult offenders aged up to their late 20s in specific offence categories such as drink driving.³⁰ Indeed, the Australian Capital Territory has extended its restorative justice regime to include a restorative justice facility at every stage of the criminal justice process in addition to the creation of the Ngambra circle sentencing court for indigenous offenders.³¹ Also encouraging is the Adult Restorative Justice Conferencing Pilot program that was initiated in the South Australian jurisdiction during 2004, which offered consenting adult victims and offenders the opportunity to meet and discuss both harm caused by offences and restorative solutions for all offences under the control of the Magistrates Court, with the exception of domestic violence offences and those under the auspices of the Mental Impairment Court.³²

A NEW PARADIGM? A DISCUSSION OF RESTORATIVE JUSTICE

²⁸ M Hakaiha 'Youth Justice Teams and the Family Meeting in Western Australia: A Trans-Tasman analysis' in C Adler & J Wundersitz (eds), *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (1994) 1.

²⁹ Daly & Hayes, above n 18, 4.

³⁰ Daly & Hayes, above n 18, 3.

³¹ J Hinchy, 'The Canberra Restorative Justice Model: From Pre-Court Diversion to Parole' (Paper presented at New Frontiers in Restorative Justice: Advancing Theory and Practice, Centre for Justice and Peace Development, Massey University at Albany, New Zealand, December 2-5 2004) 1.

³² R Sarre, 'An Adult Restorative Justice Pilot Project in South Australia' (Paper presented at Third Conference of the European Forum for Victim-Offender Mediation and Restorative Justice, Budapest, Hungary, October 14-16 2004) 1.

While the restorative justice faction is gaining momentum around the globe, especially in view of the widespread overpopulation of prisons and high rates of recidivism, it is useful to examine possible problem areas associated with its widespread application. Predictably, seeking a seamless incorporation of restorative justice into the inflexible, traditional criminal justice system would seem ambitious. Moreover, many judges, magistrates, police and prosecutors are cynical of restorative justice and see it as a soft option that does not deter criminals or potential criminals. Indeed, restorative justice is seen on occasion as a second-class form of justice that fails to send the requisite serious message regarding criminal activity. An emphasis on personal issues rather than punishments, allowing offenders a voice and an emphasis on prevention³³ as compared with traditional sanctioning has added to perceptions like this, as has the emphasis on diversion from prosecution which has generated an impression of leniency. Messages such as these are unlikely to always find favour with victims of crime, for example, yet restorative methods can on occasion be interpreted more severely than traditional retributive methods. As an example, restorative justice interventions often require that offenders face victims and make reparation.³⁴

A fundamental problem associated with the restorative justice process is that participants for the most part are voluntary, which can be problematic within a criminal justice system. As argued by Marshall,³⁵ should one of the parties refuse to cooperate, the range of available restorative justice options is severely limited. Indeed, a lack of cooperation from all parties inevitably leads to the use of traditional criminal justice methods although, by and large, participants offered restorative justice opportunities tend to contribute. Moreover, higher rates of adherence to agreements and outcomes by participants in restorative justice determinations have been experienced to date, which compares more than favourably with the payment of fines or compensation orders under traditional court methods. Conversely, little benefit for a victim would likely be achieved by direct mediation, should an antagonistic offender take particular exception to mediation, and would be both a wasted exercise and traumatic. Restorative justice outcomes and determinations, however, offer some flexibility to participants and have the added benefit of greater comprehension by participants than traditional legal procedures. Naturally, the problem remains of obtaining permission for restorative justice interventions. Commentators such as Bowen & Consedine³⁶ correctly draw attention to difficulties in obtaining an offender's consent within what is a coercive criminal justice environment.

Another problem generated by restorative justice practices is the question of neutrality amongst facilitators in the various models of conferencing and panels, etc. Commentators such as Daly & Immarigeon³⁷ and Bowen & Consedine³⁸ argue that an essential safeguard that needs to be incorporated within a restorative justice structure is that interventions must, as a rule, occur only after the offender has admitted guilt, because admissions made during conference proceedings may be protected by

³³ Marshall, above n 12, 6.

³⁴ Daly & Immarigeon, above n 10, 37-38.

³⁵ Marshall, above n 12, 8 & 24.

³⁶ Bowen & Consedine, above n 1, 23.

³⁷ Daly & Immarigeon, above n 10, 38-39.

³⁸ Bowen & Consedine, above n 1, 22-23.

confidentiality agreements. Bowen & Consedine³⁹ emphasise that any crime could potentially come under the umbrella of restorative justice once an offender has admitted guilt (assuming they have eschewed the traditional criminal justice process), especially as the restorative process is particularly suitable in serious crimes given the extended pain inflicted to family supporters of the victim, etc. Marshall⁴⁰ argues that not only are there significant benefits to be gained by victims of serious crime, but progress can also be made in the area of prevention. He maintains, however, that restorative justice interventions should accompany and not replace traditional criminal justice practices. A necessary caveat in the use of restorative justice techniques is, of course, the notion that victims should not be doubly victimised. Essentially, offenders have often been in positions of power over victims in many circumstances (such as in sexual assault and child molestation), such that an encounter with the offender during a conference would be less than prudent. Naturally, supporters and secondary victims could deputise in these situations. Umbreit & Vos⁴¹ describe an early groundbreaking mediation encounter with death row inmates (facing execution shortly thereafter) and their victims' family members as being both healing and beneficial to all concerned. As a corollary, they recommend that cautious expansion of restorative justice encounters to victims or family support parties and offenders of severe violent crime could be explored.

Face to face encounters, argue Bowen & Consedine,⁴² are an advantage of restorative justice methods as offenders are often confronted with the consequences of their offence (frequently to acute embarrassment) in the presence of the victim's family and support network. Young offenders typically find the family group conference both sobering and shameful as the environment itself engenders seriousness while the consequences of the offence cannot be avoided. Conversely, a culture of denial is encouraged under traditional criminal justice methods in addition to the depersonalisation of the offence itself. The confrontational setting utilised under restorative justice methods has the added advantage of empowering the victim who can suffer from anonymity within the traditional criminal justice system. Often victims use the conference forum to question why the offender singled them out for attention, which can be therapeutic as more often than not offences are committed on a random basis rather than as a result of pre-determined targeting of the victim (although it must be said that offenders can on occasion 'orient' themselves to a conference, for example, in an attempt to repair their own reputations rather than the harm itself).⁴³

Despite this drawback, the feeling of recovering some measure of respect by victims is often a by-product of conferences as the offence itself often renders them violated and disrespected. Indeed, the relationship between offender and victim is particularly important, as an opportunity for reparation that extends further than financial compensation can serve the victim's interests better. On many occasions, for example, an apology in addition to undertakings by the offender to work for the victim or attend counselling can result. Moreover, additional social benefits include victim and

³⁹ Bowen & Consedine, above n 1, 12.

⁴⁰ Marshall, above n 12, 9.

⁴¹ M Umbreit & B Vos 'Homicide Survivors Meet the Offender Prior to Execution: Restorative Justice Through Dialogue' (2000) 4(1) *Homicide Studies* 1.

⁴² Bowen & Consedine, above n 1, 20.

⁴³ K Daly 'Restorative Justice, The Real Story' (2002) 4(1) *Punishment & Society* 70.

offender viewing each other as people rather than stereotypes and greater positiveness for offenders (compared to formal punishment and prosecution under traditional retributive justice regimes), which can actively encourage the feeling that society will re-accept the offender.⁴⁴

Moreover, Daly & Immarigeon⁴⁵ anticipate that while diversity may be a beneficial component of the restorative justice movement there will surely be some conjecture over principles and goals of restorative justice such that the diversity itself may create a less than coherent image to the mainstream. Along with diversity of participants, there will undoubtedly continue to be key ideological differences amongst converts and critics. Despite differences in philosophy between Neo-Liberals and their focus on entrepreneurial pursuits and economic rationality with democratic socialism, restorative justice, it would seem, can safely traverse such differences by accommodating both progressive responses to crime and law and order type issues. Indeed, a country like Singapore, which is not normally known for fiscal lavishness, was an early convert to restorative justice methods.

Commentators such as Umbreit⁴⁶ also warn of the potential danger of 'window dressing' in criminal justice systems where restorative justice procedures and practices are incorporated only on the periphery, such as the use of token pilot programs while traditional retributive practices continue with little, if any, victim or community involvement. Moreover, trendy and more humane language is on occasion used to describe what are traditional criminal justice responses. Examples include punitive, traditional retributive justice responses to crime being conveniently repackaged as restorative justice solutions in line with increases in popular support for restorative justice. In essence, therefore, such tactics reflect little more than a 'flavour of the month' approach.⁴⁷ White⁴⁸ for example warns of potential misrepresentation of traditional retributive justice outcomes as those of restorative justice based on nothing more than the forum in which they are dispensed. That is, should traditional retributive justice outcomes be dispensed in a family group conference, they are often considered restorative because they occur outside a traditional court setting. For this reason, close examination of so-called restorative justice processes is imperative.

Critics of restorative justice quite understandably point to fears that an overemphasis on victims' rights and community attitudes will result in ever more disciplinary criminal justice outcomes while defenders of victims' rights share concerns that an overemphasis on benefits to offenders will lead to increased victim participation in the criminal justice process. There are also fears that well-entrenched criminal law standards such as a defendant's right for protection against disproportionate punishment and wrongful conviction may be diminished under restorative justice methods such as conferencing. This may occur, for example, when an offender may be encouraged to accept excessive punishment. Also crucial are victims' rights to justice and rights against secondary victimisation by the criminal process such as

⁴⁴ Marshall, above n 12, 11.

⁴⁵ Daly & Immarigeon, above n 10, 30.

⁴⁶ Umbreit, above n 8, 23.

⁴⁷ H Zehr & H Mika, 'Fundamental Concepts of Restorative Justice' (1998) 1 *Contemporary Justice Review* 49.

⁴⁸ R White, 'Communities, Conferences and Restorative Social Justice' (2003) 3(2) *Criminal Justice* 146.

inequitable choices being forced upon them like family group conferencing or nothing at all.⁴⁹

There may also be a risk that an over focus on restorative justice within the criminal justice system may lead to the diversion of attention from the excessive use of incarceration which remains a first order issue. That is, financial resources will be scarce within the criminal justice system until this major issue is addressed, which will further delay the widespread and continual implementation of restorative justice procedures and practices. Suffice it to say, more research needs to be completed with respect to differences in outcome between offenders who undertake restorative justice practices and those who choose to remain within the traditional criminal justice framework.⁵⁰ Notwithstanding the excessive costs involved in traditional retributive justice practices such as incarceration and intense supervision, it would be naïve to assume that restorative justice methods would necessarily lead to a reduction in the cost of administering and dispensing justice. While the inefficient postponement and rescheduling of cases under retributive practices is commonplace, the very same tribulations arise under the restorative justice model as, for example, time and labour requirements for conferencing can be even more taxing than traditional court appearances. Indeed, a conference coordinator may be expected to both identify and liaise with all participants involved in a conference, which can naturally be problematical from an administrative perspective. Conferencing in a high volume jurisdiction may experience the very same cost cutting and expeditious administrative and professional practices that often result in justice interests being marginalised in traditional retributive justice regimes.⁵¹

Similarly problematic is the very nature of modern societies and communities. Specifically, any practice or procedure that requires community involvement must contend with the skill level and resources of the community. That is, modern societies and communities can exhibit cultural and age-related social divides. Whilst this phenomenon is hardly new, wider gaps are developing by virtue of an aging population in most Western societies and racial/social/religious/secular differences, which generate inequalities and social injustices. An assumption of community involvement in restorative justice programs generates further implications upon basic societal requirements such as education/training programs in addition to social policies like welfare, health, housing and employment, as a 'community' is essential if there is to be effective community involvement. Issues such as community based requirements and social injustice/inequality are, of course, equally problematic in traditional retributive criminal justice regimes but do not, it would seem, create reasons for not exploring restorative justice options if a higher quality of justice or victim's benefits are obtainable.⁵²

Such community based power according to Consedine⁵³ involves an undeniable shift away from state-based power which, he argues, parallels earlier periods of history

⁴⁹ Marshall, above n 12, 24.

⁵⁰ J R Gehm, 'Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks' (1998) *Western Criminological Review* 17.

⁵¹ K Daly 'Mind the Gap: Restorative Justice in Theory and Practice.' (Paper presented to Cambridge Seminar on Restorative Justice, Cambridge and Toronto, 2000-01) 15.

⁵² Marshall, above n 12, 8.

⁵³ Consedine, above n 4, 160.

when community, not state, played a pivotal role in the lives of citizens. State-based power is a relatively modern development occurring only in recent centuries. After all, victims and offenders are not the only personalities involved in criminal offending, as the entire community is implicated and many would consider it appropriate that communities are empowered to intervene via restorative justice methods.⁵⁴ The input of community within the restorative justice movement cannot be overstated. Indeed, as argued by Bazemore,⁵⁵ members of communities must combine and utilise their strengths as fully engaged participants by contributing toward the development of community justice solutions like restoration, community healing, rehabilitative and public safety objectives and reintegrative shaming to achieve accountability of sanctioning, in addition to challenging other key elements of the retributive criminal justice system that could ultimately lead to its transformation.

RESTORATIVE JUSTICE: WHERE ARE WE HEADING?

While the widespread application of restorative justice remains problematic, the potential for an offence to be personalised by the victim and offender can be beneficial for all parties concerned as it allows the articulation of both the pain and anguish received in addition to (as described earlier) an explanation of why the victim was singled out amongst others in the first place.⁵⁶ These elements are conspicuous by their absence under traditional criminal justice systems and can be seen as remedial for those parties involved in a criminal offence. One suspects that a major stumbling block in the way of widespread acceptance of restorative justice as a legitimate form of achieving justice is that of perceived punishment. Perhaps, as argued by Daly,⁵⁷ the focus should be on the coexistence of the concept of punishment under the auspices of both restorative justice and traditional methods, as although they may differ markedly from one another in both philosophical and practical terms, coexistence should not be seen as wildly optimistic. That is, while it remains appropriate that the state's main response to crime should be punishment, it should not be seen as contradictory that punishment under restorative justice programs could coexist alongside traditional retributive methods.

Indeed, restorative justice could then be seen as providing alternative punishments rather than alternatives to punishment. A combination of both traditional retributive methods and the rehabilitative nature of restorative justice would, it would seem, go a long way toward improving the nature of the criminal justice system. Mainstream societal acceptance of restorative justice principles, however, remains problematic. With this in mind, Daly⁵⁸ suggests that the removal of burdensome retributive or restorative labels from justice practices and their replacement with the notions of 'old' and 'new' justice may be a worthwhile exercise. In this way, the content of the principle or justice practice is removed, which may pave the way for a developmental or transitional approach that would facilitate a new justice paradigm that includes

⁵⁴ Bowen & Consedine, above n 1, 20.

⁵⁵ Bazemore, above n 23, 221.

⁵⁶ Bowen & Consedine, above n 1, 24.

⁵⁷ K Daly, 'Revisiting the Relationship between Retributive and Restorative Justice' (Paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February 1999) 3.

⁵⁸ Daly, above n 43, 61.

many elements of the older or traditional approach. However, as argued by Wachtel,⁵⁹ until mainstream research justifies restorative justice in terms of reducing recidivism or general crime prevention, then it may, unfortunately, be consigned to a tangential role within the criminal justice system rather than a legitimate alternative to traditional retributive methods. This is despite much evidence confirming that victims, offenders, family members and others find restorative justice both beneficial and equitable.

As predicted by Daly,⁶⁰ we may be some way from the phrase 'I'll see you in conference' being entrenched in the popular lexicon. It will surely take some time for the public to become familiar with alternative justice scripts and social relations. Perhaps most importantly, then, the challenge facing restorative justice is in awakening new cultural definitions and sensibilities concerning justice. Indeed, it would be ambitious to expect victims, offenders and supporters to garner the necessary understanding of restorative thinking from lay experiences of the justice process or popular culture.⁶¹ Notwithstanding this acclimatisation dilemma, the widespread application of restorative justice must continue to be pursued with enthusiasm.

⁵⁹ Wachtel, above n 2, 2.

⁶⁰ Daly, above n 51, 18.

⁶¹ Daly & Hayes, above n 18, 6.

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