Empowerment and Retribution in Criminal and Restorative Justice*

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**Biographical Note

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Abstract

Contrary to the implied suggestion in many restorative justice critiques of the status quo, the chief strength of restorative justice interventions does not lie in their rejection of punitiveness and retribution, but *the empowerment of communities of care who are the most likely to respond effectively to both the causes and the consequences of criminal wrongdoing.* Thus, it is the empowerment of affected stakeholders on both sides that is the crucial feature of restorative justice, and the feature whose absence causes both conventional and restorative justice to fail.

Key words

criminal justice, crime control, recidivism, retribution, punishment, court-based responses to crime, the legal profession, alternative dispute resolution, negotiated settlement, group decision, individual and community empowerment, restorative justice philosophy and practice

Empowerment and Retribution in Criminal and Restorative Justice

Restorative justice critiques of the status quo in criminal justice often miss their mark because of the mistaken belief that current practice in criminal justice is essentially, or predominantly, retributive. What is being overlooked is that restorative justice responses often contain retributive and punitive elements themselves – and sometimes, such as in serious cases, necessarily so. (Barton 1999, Ch. 10) Therefore, blaming retribution, or even punitiveness, for the ills of the criminal justice system is largely beside the point. Punishment and retribution cannot be ruled out by any system of justice. By implication, a more plausible critique of the status quo is needed.

That critique, I argue, is that the status quo in criminal justice silences, marginalises, and disempowers the primary stakeholders in the criminal justice dispute. These are the victim, the offender, and their primary circles/communities of influence and care – typically, their respective families, friends, peers, and colleagues. Their disempowerment is the single most significant reason why the criminal justice system so often fails to achieve justice for those on the receiving end of the criminal justice response, including victims and the general community, who continue to suffer the consequences of the system's inability to prevent re-offending and crime.

It is my contention that the chief weakness of the status quo is the greatest strength of restorative justice interventions. Contrary to the implied suggestion in many restorative justice critiques, the strength of restorative justice responses does not lie in their rejection of punitiveness and retribution, but in the empowerment of communities who are the best placed to address *both* the causes *and* the consequences of the unacceptable behaviour in question.

The arguments of this paper proceed as follows. I start by identifying the basic elements of the received view in the restorative justice movement, as to what is wrong with the status quo in criminal justice. This is followed by a disambiguation and critique of the claim that the problem with the criminal justice system is that it is retributive. I show that this view, as well as the view that restorative and retributive justice are incompatible, are both mistaken. To provide restorative justice critiques of the status quo with more bite, next I propose a shifting of the focus from punitiveness and retribution to critical questions of *empowerment and disempowerment.* Finally, I show how such a shift in focus allows healthy critiques of restorative justice interventions themselves in the development and evolution of best practice in this relatively new area.

I
The received view, and why it is inadequate

Restorative justice critiques of the status quo in criminal justice are characterised by two main beliefs. The first is that the criminal justice system is a failure because traditional, court-based responses to crime are retributive, in that the system is only interested in retaliation and punishment, or at best, in retributive justice. The other main element of the received view is that punishment, retribution, and retributive justice are incompatible with restoration and restorative justice.[1] It is my contention that restorative justice critiques of

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[1] These beliefs are evident, for example, with varying emphases, in Bird 1998; Braithwaite & Pettit 1990; Consedine 1995; Dignan and Cavadino 1996; Galaway and Hudson 1996; Jones 1996; McDonald, Moore, O'Connell & Thorsborne 1995; Moore 1993; Morris & Young 1999; Munn 1993; Sherman, Strang, Barnes, Braithwaite, Inkpen & Teh 1998; Umbreit 1989; Van Ness 1990; 1996; 1997; Walgrave 1995; Wright 1991, 1996; Wundersitz and Hetzel 1996; Zehr 1990; Also, in Bowen, Boyack, Consedine, Hayden & Henderson,

the status quo are unsustainable on both these points. I shall take them in turn.

To be sure, I do not wish to take issue with the claim that the status quo is not particularly interested in restorative justice. What I do question, rather, is the claim that the problem with the criminal justice system is that it is retributive. This, I believe, is an inaccurate diagnosis, but showing it to be so requires a disambiguation of the claim, which can be interpreted, and is often meant, in at least two ways. These interpretations are derived from the two senses in which the term 'retribution' and its derivative 'retributive' are being used in the literature. These terms have a standard, proper sense and a corrupted, queer sense.

In their proper sense, as indicated in dictionary definitions, these terms refer to the idea that punishment is imposed on a wrongdoer as a matter of just deserts, that they are being punished because they deserve to be punished for their wrongful behaviour. This means that the *just deserts* conception of retribution is defined by reference to a specific type of reason or rationale that is behind the imposition of the punishment, namely the offender's ill-desert, and which is satisfied, in a manner of speaking, through some sort of negative repayment, or pay-back, which is punishment.

By contrast, in their queer and corrupted sense, 'retribution' and 'retributive' are being used to mean nothing more than 'punishment' and 'punitive,' respectively. This is a corrupted sense for several reasons. First, it ignores the etymology of the word 'retribution,' which is the Latin '*retribuo*' = 'I pay you back.' Second, it flies in the face of current dictionary definitions, which are all in terms of the *just deserts* conception already explained. Third, it ignores the vast body of literature on retribution and punishment, which makes a meaningful

Hickey, and Lapsley, in Consedine & Bowen 1999, and generally most writers on restorative justice. Pleasingly, Howard Zehr has recently come to reject the restorative/retributive dichotomy as false.

and important distinction between those two concepts.

The problem with this indiscriminate use of the 'retributive' label is that it creates conceptual muddle and linguistic imprecision in an already difficult area. This alone is reason enough to respect and follow established convention – a brief explanation of which may help those unfamiliar with it appreciate the point. In the area of punishment justification, *punishment* is a much wider notion than *retribution*, as punishment includes not only desert-based punishment, (which is the only one properly called retribution), but also punishment imposed on people with instrumental (utilitarian and consequentialist) reasons in mind, such as, for instance, deterrence, correction, and the rehabilitation of the offender. In the proper sense of the word, such punishment is not retributive, but instrumental, as it is not imposed with the offender's negative moral deserts in mind, but the desirable consequences the punishment is believed, or hoped, to have.

The difference between the two types of reasons for punishment is thought to be significant. That difference, in fact, forms the basis of the longstanding debate over the moral acceptability of retributivist *versus* consequentialist justifications of punishment.[2] Therefore, from the point of view of the many scholars already working in this area, it is misleading to characterise just any kind, or form, of punishment as 'retribution' or 'retributive,' regardless of the reasons that underlie its imposition. 'Punishment' and 'punitive' are not synonymous, respectively, with 'retribution' and 'retributive, and the distinction between retributive and instrumental punishment should not be blurred in critiques of the criminal justice system, faulting the status quo for being retributive.

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[2]Walgrave (1995), for instance, has a meaningful and active engagement with retributivist and instrumental conceptualisations of the criminal justice system – even though, as I am arguing in this paper, retributive interpretations of the system and its objectives are far from compelling.

I turn now to evaluate that diagnosis under the two interpretations made possible by the distinction I have just drawn between retribution and punishment. Under the *just deserts* interpretation, (a) the problem with the criminal justice system is alleged to be that it is only interested in giving wrongdoers their just deserts. Under the punishment interpretation, (b) the problem with the criminal justice system is claimed to be that it is punitive, and punishment, it is alleged, doesn't work. I examine these claims in turn.

(a) The problem with the status quo is that it is only interested in giving wrongdoers their just deserts. There are two major difficulties with this claim. First, even a cursory glance will reveal that the language of criminal legislation is largely instrumental, rather than retributive. Laws are predominantly couched in utilitarian, consequentialist language where deterrence, public safety, the protection of people's rights, and the correction of offenders are the primary reasons and justifications for punishment. The second problem for the above claim is closely related to the first. Sentencing judges rarely justify their sentences with reference to the idea that offenders need to be given their just deserts. Their foremost considerations are the public interest in safety and deterrence, rehabilitation and correction of offenders, the integrity of the criminal justice system in terms of consistency with established precedents, and the general principle that, insofar as it is possible, like cases should be treated alike. Retribution in the 'just deserts' sense rarely rates mention as a consideration by sentencing judges, and even when it does, it is hardly the dominant reason for the imposition of the penalty in question.

Perhaps the most telling example of instrumental reasoning being dominant in our courts is provided by *The Queen v Clotworthy 1998*. This is a fascinating case in which the New Zealand Court of Appeal sent an offender to gaol against the wishes of the primary victim. After discussing the matter with the offender in a restorative justice meeting, the victim

considered imprisonment a wasteful and inappropriate way to resolve the matter. Instead, the offender undertook to pay the victim's medical bills by remaining employed. With some modifications, the District Court approved the agreement and the matter was settled to everyone's satisfaction, except the Crown's, who subsequently succeeded in overturning the agreement in the Court of Appeal.[3] The following excerpt contains the main elements of the Justices' reasoning in their decision.

> We record that Mr Cowan [the victim] was present at the hearing. We gave him the opportunity to address us. He reiterated his previous stance, emphasising his wish to obtain funds for the necessary cosmetic surgery and his view that imprisonment would achieve nothing either for Mr Clotworthy or for himself. We can understand Mr Cowan's stance. He is to be commended for having forgiven Mr Clotworthy and for the sympathetic way he has approached the matter. It must be said, however, that a wider dimension must come into the sentencing exercise than simply the position as between victim and offender. The public interest in consistency, integrity of the criminal justice system and deterrence of others are factors of major importance. (The Queen v Clotworthy 1998, p. 12.)

The instrumental nature of the reasoning behind this judgement is clear. There is no mention of the offender having to "pay" for their wrongful action through a harsher punishment, or of the offender's "just deserts" anywhere in the summary of arguments, or in the justification of the decision to impose a three year custodial sentence. On the contrary, there is much weight given to the need to maintain sentencing consistency in the interests of the public and of the criminal justice system, and the importance of deterring others from committing similar crimes. Interestingly, arguments that Mr Clotworthy was not in danger of re-offending and that he presented no risk to the public by staying out of gaol were accepted by the prosecution and by the Court. Notwithstanding, the Court concurred with the prosecution that "This was more than moderately serious offending, and the need to deter others for public safety reasons is too important." (The Queen v Clotworthy 1998, p. 14.)

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[3]For a more detailed description of the case, see Boyack 1999.

In view of such consequentialist reasoning by sentencing judges, it is simply not credible to blame retribution for the ills of the court system. To be sure, there are many things wrong with the wisdom of the Justices in the above decision and I shall return to them later. Retribution, however, is not one of them.

In light of these considerations, the criticism that the criminal justice system is only interested in giving offenders their just desserts is dubious and can be easily rejected by defenders of the status quo by pointing out that they are doing what they are doing, not for retribution, but for the greater good of society.

(b) The problem with the criminal justice system is that it is punitive and punishment doesn't work. This claim also has two main difficulties with it. One is that many people remain convinced that punishment is, or can be, an appropriate response to criminal wrongdoing, especially where serious wrongdoing is concerned. This comes through unambiguously in Umbreit's surveys of crime victims.

> Without question, nearly all citizens at large and crime victims specifically want criminals to be held accountable through some form of punishment." ... Oftentimes, the need for punishment was expressed in terms of "accountability." "Justice to me requires some punishment." "It doesn't have to be severe but has to be something that causes them to know they did something wrong and they have to pay for that." (Umbreit 1989, pp. 52, 54.)

The second difficulty with the implicit rejection of punishment in the above claim is that it is far more probable than not that, overall, punishment and its threat play a major role in order maintenance. To be sure, this was the main reason why the prosecution took the Clotworthy case to the Court of Appeal, and seemed to be one of the main reasons why the appeal was upheld. One need not agree with the particular judgement reached in that case – I certainly do not – to appreciate the sense in the reasoning behind it. Even if Mr Clotworthy himself

was not in danger of re-offending if given a non-custodial sentence, the need for deterring others from committing similar offences was considered a weighty enough reason to justify a custodial sentence.

More generally, even if the threat of punishment is no longer a deterrent to a relatively small number of repeat offenders, that does not mean that the prospect of punishment, such as imprisonment, for instance, is not a deterrent to the majority of people who otherwise might be more tempted to break the law and violate the rights of others in pursuit of their own goals and interests. At best, the evidence on this point is inconclusive, but the phenomenon of sharp increases in mindless vandalism, looting, and violence by otherwise law abiding citizens when they feel that they can get away with it, should cause us to re-think the wisdom of rejecting punishment altogether.

Also, at a conceptual level, it is far from clear that a criminal justice system is even conceivable (without logical contradiction, as in the idea of a married bachelor), if punishment is ruled out as a possible response to criminal offending. A system that manages, controls and responds to crime without resorting to any form of punitiveness may well prove preferable to current practice, but it would be a misnomer to refer to it as a criminal *justice* system. It would be more appropriate to call it a crime *management* system, or a crime *control* system. Where criminal justice is concerned, the concept of justice seems to presuppose the idea of a punitive response, if not that of retribution in its proper, *just deserts* sense.

Such conceptual points, of course, concern the meaning of key terms and of proper language use. While they do indicate the essential nature of the relevant subject or practice, they will not settle substantive, pragmatic and moral questions, such as whether punishment is a wise or appropriate response to criminal wrongdoing.

To settle such questions conclusively, we would need empirical data of the kind we do not possess. What we do have, however, are established practices, social conventions, and traditions that determine, guide, or regulate our responses to criminal wrongdoing on both pragmatic and moral grounds. The acceptability of punitive responses, and indeed the insistence on such responses where the crime is especially abhorrent and great, is a reflection of a deeply entrenched tradition that regards punishment as a fitting, and often necessary, response to serious forms of anti-social behaviour. What makes such responses appropriate is the *retrospective* responsibility mature (and intellectually unimpaired) members of society bear for their behaviour.[4] (Barton 1999, Ch. 8)

This tradition, and the ongoing popular belief that punishment is an appropriate, and sometimes necessary, response to serious wrongdoing, are reflected in our laws; and indeed in the laws of virtually all known societies and cultures, from the despotic to the democratic – so far so that it is hard for us to even imagine a social order where punitiveness was ruled out as an appropriate response to serious wrongdoing. Therefore, it should come as no surprise that restorative justice practices do not reject punitive measures, but include and use them in constructive ways, and mostly to maximum effect, for the benefit of everyone involved. This brings me to the second main point against restorative justice critiques of the status quo, namely that it is a mistake to think of restorative justice as being the opposite of punishment or even of retribution. These are compatible and, therefore, the former does not require a rejection of the latter.

II

[4] They bear this responsibility quite independently of the likely consequences of those responses, even though the likely consequences should, by all means, be taken into account.

Restorative and retributive justice are compatible

In practice, restorative justice responses incorporate punitive and retributive measures and elements in what appear to be optimum doses and degrees. Typically, they are mixed in with other measures such as increased social and community support to eliminate the underlying causes of the offending, and where indicated, further education and treatment. Indeed, it is difficult to see how restorative justice processes could become a widely accepted, let alone the preferred, response to crime, unless they were either complemented by punitive responses through other fora, such as the courts, or allowed direct incorporation of punitive elements in restorative justice outcomes and resolutions, as in fact they do. This has been recognised by Judge McElrea, a prominent supporter of restorative justice interventions in response to crime. In connection with conferencing rape cases, he makes the telling point that conference outcomes "might still include imprisonment as part of a sentencing package. Punishment can still play a part in restorative justice without it being the dominating influence it is today." (McElrea 1996, p. 7.)

This point should be well taken, especially by advocates of restorative justice. It is vitally important because, unless punitive outcomes are allowed to be part of agreements, the use of alternative dispute resolution processes will never be an accepted practice in criminal justice. This is especially true of those areas where restorative justice responses are needed most: the more serious offence categories where the harm, and the potential for further and ongoing harm, are the greatest. (Barton 1999, Ch. 9) This point also comes through with startling clarity in the documented restorative justice conference between the parents and friends of a murdered young man and his killers. (Dee Cameron: "Facing the Demons," *An Inside Story*. Sydney: Australian Broadcasting Corporation. Tuesday, 1 June, 1999.)

Once again, it is a mistake to think that punitive elements of an agreement automatically undermine or weaken its restorative potential. Quite the contrary. Some appropriate level and form of punitiveness will enhance the effectiveness of the restorative justice response, and will often have to form part of agreements to be acceptable to the relevant parties. That wrongdoing deserves punishment is a fundamental aspect of our reality, even if that reality is, in part, socially constructed. Our liability to punishment is an ineliminable part of what defines us as mature and responsible members of the moral community. As a result, in many cases of serious victimisation, no amount of therapy, or indeed conference discussion, may replace a victim's and the community's need to know that wrongdoing is punished, that justice, including justice in the retributive, *just deserts* sense, is done.

The incorporation of punitive and retributive elements in restorative justice processes, resolutions and outcomes should not cause alarm. The notion that punitiveness and retribution are incompatible with restoration is a myth, and is shown to be so by both history and current practice. Current restorative justice practices have been inspired by, and in many respects modelled on, traditional community-based systems of conflict resolution, which have been well known for their retributive character. A traditional *Maori* meeting that dealt with a rapist murderer, for example, could easily see the man being executed by his own family as *utu* (repayment), for what he had done, and the retributive character of the Australian Aboriginal practice of spearing the offender as *pay-back* is equally obvious. Claims to the contrary, that such indigenous practices are not really retributive, are but pious misinterpretations of indigenous practices and traditions in matters of wrongdoing and punishment – a point I have argued in more detail elsewhere (Barton 1996, 1999), and shall take up again further below.

Far from having to reject punishment and retribution from the available range of responses, what needs to happen in restorative justice interventions is that any punitive response to

wrongdoing is complemented with genuine caring, acceptance and reintegration of the person, as opposed to stigmatising, rejecting or crushing them – provided, that is, that they appreciate the moral gravity of their behaviour and are intent on making amends. This way, far from defeating restorative justice, a well pitched punitive measure will form part of, and will enhance restoration for everybody involved. Unfortunately, offenders who are otherwise whole-minded but refuse to respect the rights of others, and choose not to abide by the reasonable norms and laws of civil society, or who, in the context of a restorative justice meeting treat the victim and other participants with defiance and contempt, leave little or no alternatives to punishment and incapacitation.[5]

By failing to recognise and appreciate this point, advocates of restorative justice are hindering their own cause. But they are also creating confusion. Especially because of the mistaken belief that punishment and retribution are incompatible with restoration, some advocates of restorative justice contradict themselves. For example, Morris and Young assert that retributive justice is "fundamentally at odds with the defining values of restorative justice and cannot, therefore, be part of it," while also believing that "restorative justice ... [does not] remove prisons from available sanctions when parties to the restorative justice process agree to them." (Morris and Young 1999, in the sections Vigilantism and Conclusion, respectively.)

Worse, other advocates of restorative justice tend to give severely distorted interpretations of traditional revenge practices of indigenous people – which, as I have argued elsewhere,

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[5]But see Braithwaite & Mugford (1994), who have put forward compelling arguments, not necessarily incompatible with the view I have just expressed, that we should never give up making attempts to reintegrate an offender into the community of law abiding citizens, no matter how hopeless it may seem at the time.

are essentially retributive in character in the proper sense of that word. (Barton 1996, 1999) In the face of overwhelming evidence to the contrary, the retributive character of these practices tends to be disguised, played down, or outright denied in the restorative justice literature. For instance, Wundersitz and Hetzel describe and identify as "appropriate reparation by the 'offender'" the Australian Aboriginal practice of "'pay-back'" which, as they admit, "could include some physical 'reprisal' such as ritual spearing." (Wundersitz and Hetzel 1996, p. 136.) Consedine goes even further when he explicitly denies the retributive nature of *pay-back* in Aboriginal Australia.

> In all cases we have outlined, while there is so much verbal emphasis on revenge, it is plausible to infer that underlying this is a general aim of achieving order and balance. An injury is done, the status quo is upset, retaliation provides a means by which this may be restored. ... [This] is essentially a restorative process, not a retributive one. (Consedine 1995, p. 113.)

These are confused and misleading interpretations of what, clearly, are retributive practices, and the "conceptual gerrymandering" involved in such reinterpretations of traditional revenge practices has been rejected elsewhere. (Barton 1999, Ch. 10) The process of *pay-back,* is indeed highly ritualised and is closely monitored and controlled by the community. It is important, however, that the word 'ritual' does not mislead the reader. Such "ritual spearing" signifies real spearing, and sometimes multiple spearing of the wrongdoer – often resulting in very serious injuries, and sometimes death. More to the point, while such *pay-back* is restorative in the sense that it restores social peace between the conflicting parties and between the wrongdoer and the rest of their community, and while to aboriginal people it might be less punitive than imprisonment, it is neither credible, nor helpful to describe it as "reparation by the 'offender,'" or worse, to assert that the practice is "not a retributive one." The Aboriginal Australians themselves call it "pay-back" and their justification for it is deontological, rather than instrumental in the way Consedine's reinterpretation suggests. Their customary laws, which they refer to as *"The Law,"* require that wrongs *must be*

punished through *pay-back*. This is a sacred duty and it is accepted and insisted on by all members of the community, wrongdoers and victims included, as being right on account of *The Law*. And, while it is true that the restoration of social order and social peace are unthinkable without fulfilling the requirements of *The Law* in terms of *pay-back*, the inevitable restorative function of *pay-back* is no ground for a redescription of its basic character as if it were a non-retributive, consequentialist practice.

It is a justified conclusion in light of the above, that restorative justice is quite compatible with retributive justice. The particular degree, form, and mix of retributive and punitive elements in a restorative justice response will, of course, depend on a number of different factors, such as culture, tradition, and circumstance. Positive results from restorative justice programs[6] indicate that concerned communities of care are the best placed to get this mix right. They are not obtained through a supposed rejection of punishment and retribution by restorative justice programs and interventions.

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[6]To be fair, empirical data on conferencing success is ambivalent. In terms of participant satisfaction, for example, the results from some programs are nothing short of outstanding, showing near-perfect results. (Moore 1995; Palk et al. 1998; Tuhiwai Smith & Cram 1998) In other programs, the results are not as good but, arguably, they are still better, all things considered, than court. (Sherman, et al. 1998; Maxwell & Morris 1993; 1996; Maxwell 1998; Morris & Maxwell 1997). There are two likely explanations for the discrepancies between programs. One is that, by comparison, programs with lower satisfaction figures are the ones that tend to take on high risk cases. The other one is that these programs haven't yet addressed some important practice issues, such as adequate and ongoing training for practitioners and quality feedback systems on practice. While currently, there is no credible data that would establish the degree to which these factors impact on participant satisfaction in the various programs, it is a clear implication of my analysis here that disempowerment of key stakeholders through poor practice is heavily implicated in sub-optimal results and low satisfaction figures.

A summary of the arguments so far

Anti-retributivist critiques of the status quo are like toothless tigers. They make much noise, and may even impress the naive, but ultimately they have no bite. They miss the mark on two counts. On the first count, the diagnosis that the problem with the criminal justice system is that it is retributive cannot be sustained in either the proper, 'just deserts,' or the corrupted, 'punishment,' sense of the word. In the former sense, it is simply not true that the system is only interested in giving offenders their just deserts. The language of legislation and the obvious instrumental reasoning in judicial sentencing both contra-indicate such a diagnosis. As to the latter sense, the claim that the problem with the system is that it is punitive is equally dubious. Established practice and the authority of tradition lend strong support to the view that punishment and its threat play an important role in order maintenance. This is further supported by the popular view, according to which punishment is an appropriate, and often necessary, response to serious wrongdoing, as without some appropriate level and form of punishment, justice, including restorative justice, is simply impossible. Finally, the evidently false assumption that punishment and retributive justice are incompatible with restorative justice, in that the former cannot figure in restorative responses to crime, make this particular line of attack on the status quo doubly beside the point.

The diagnosed failure implicit in that last point, namely the failure to recognise evidently punitive and retributive elements in restorative justice interventions and outcomes, indicates, not only a failure to identify the chief problem with the criminal justice system, but an even more disconcerting lack of understanding of the nature of restorative processes and restorative justice itself. If this is right, two further conclusions follow. First, an alternative diagnosis to the ills of the justice system must be found. Second, for such a diagnosis to be adequate, it must give a plausible account, not only of what is wrong with the status quo in

criminal justice, but also of what makes restorative justice responses preferable – because, as we have seen, simple rejections of punitiveness and retribution fail this test. This is the task of the next section.

III
Disempowerment in criminal justice

The problem with the status quo is that it disempowers the primary stakeholders in the criminal justice dispute, namely, the victim, the offender, and their respective social circles of support and care, which, typically, consist of their respective families, close friends, peers and colleagues.[7] These people are the primary stakeholders in the sense that they have the most to gain or lose by a criminal justice intervention and its outcome. Their empowerment in terms of meeting, discussing and resolving criminal justice matters should be sought, not only because they have the most to gain or lose from the success or failure of the intervention, but also because, typically, they happen to have the best chance of achieving the following three important objectives that should be pursued in any criminal justice response:

a) Prevent re-offending by eliminating the underlying causes of the unacceptable behaviour in question.
b) Reduce and, as far as possible, repair the harmful consequences of the criminal wrongdoing in question, especially the harm caused to the victim.
c) Achieve a maximally satisfying resolution or agreement that will meet both the material

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[7]In another context Daly points out quite rightly that "The problem in criminal-court practices is not that the female voice is absent, but that certain [gender] relations are presupposed, maintained, and reproduced." (Daly 1989, p. 2)

> and the emotional needs of the principal parties concerned. (Retzinger & Scheff 1996.) The ultimate aim should be to help the parties achieve closure in terms of emotional conciliation and a feeling that the matter has been dealt with fairly, that justice has been done.

A feeling of satisfaction that justice has been done is difficult to achieve for the primary stakeholders, unless they are empowered to have their say in terms of what they consider to be right or wrong, fair or unfair, and express keenly felt but legitimate emotions of hurt, disappointment, and anger in socially acceptable ways. As shown by victim accounts of their experiences of the traditional court system, unless these things can happen, the parties will not feel that they have been heard, or that they and their feelings and views matter in the decision making process. (Giuliano 1998) Also, unless important stakeholders are actively involved in formulating an agreement or resolution, they will be less likely to feel ownership over it, will be less likely to be committed to honouring it, and will be less likely to feel satisfied with it. (Barton 1999) Finally, by comparison to third parties, such as legal and other professionals, primary stakeholders are more likely to know the finer details of the circumstances and the needs of the offender and the victim, and therefore are better able to foresee whether some proposed resolution is going to achieve the above mentioned objectives, and indeed whether the proposed agreement is viable or is more likely than not to set the participants up for further disappointment and failure.

In light of these considerations, and assuming that the primary function of criminal justice interventions is indeed to promote peace and social harmony by means of ensuring justice for the parties concerned, the suggested diagnosis of the ills of the status quo should be uncontroversial. The criminal justice system, which is epitomised by the traditional court process, is anything but empowering to the primary stakeholders. In their purported mission to protect the innocent and punish the guilty, contemporary criminal justice systems

marginalise and disempower the very people who have most at stake in particular criminal justice interventions. Most significantly, victims and accused alike are discouraged and denied real opportunities to take an active role in the legal processing and resolution of their cases. In effect, they are reduced to the status of idle bystanders in their own cases in what, after all, is *their* conflict.

A paradigm illustration of what is wrong with the status quo is Sir Anthony Mason's suggestion that the courts could implement restorative justice principles by there being a coming together of the judge, the prosecutor and the defence lawyer to make a decision as to whether some offender should be given a conference or not. (*Restorative Justice and Civil Society*. Canberra: The Australian National University, February 1999. Included as Chapter 1 of this volume.) Now, you might ask, what is wrong with that? The simple answer is that it perpetuates the disempowerment of the key stakeholders in a very important decision – a decision that is likely to make a huge difference in terms of how the case is going to be resolved, which, in turn, has serious implications for the primary stakeholders involved. This kind of monopoly by legal professionals over important decisions in the criminal justice process is the hallmark of the status quo. The most serious problem with it is that it unnecessarily silences and disempowers the very people who are the best placed to make the decisions in question. Such a system is likely to result in many inappropriate decisions being made, with the result that those who have the most at stake will unnecessarily miss out on the potential benefits of a face to face meeting. This is because, apart from being quite often poorly informed, disinterested third parties tend to have their own set of priorities in making such decisions – priorities that are priorities only to them, and which are typical of a bureaucratic state apparatus, and which are often contrary to the more basic and immediate needs and interests of the key parties.

In terms of the empowerment paradigm, the alternative to Sir Anthony Mason's suggestion

is obvious. It is the victim and the offender, along with their respective families or communities of support, that should be asked whether they would like to meet face to face to discuss and try resolving the matter between them. If they would, let them and give them the required expertise and support to maximise the chances of a successful outcome. If they do not wish to have such a meeting, their wishes must be respected just the same and the case can proceed to court.

In other words, this is where empowerment of the primary stakeholders in criminal justice must start: by giving them the power to choose between alternative ways of resolving the matter. Whether resolution should be attempted by way of court, victim – offender mediation, sentencing circle, or a conference, or indeed by some other method, or some kind of combination of these, should be left to the primary stakeholders to decide. If they cannot reach consensus between them, then the matter can be decided by appropriately qualified professionals, but not before that. Indeed, such general principles of empowerment should be present in all of the major criminal justice agencies: policing, court, and corrections.

Empowerment, of course, must continue to be present throughout a restorative justice process, be it a conference, victim – offender mediation, sentencing circle, or whatever. Essentially, the emphasis must be on primary stakeholders being actively involved at all stages and making all the important decisions. And, as long as their proposals, including their proposals for resolution, are within reason and the limits of law, their decisions must be respected and accepted as final. This is the point on which the justices in the Clotworthy case fell short. Rather than showing respect to the wishes of the primary stakeholders, and especially those of the victim, they presumed to know better how the case should be resolved. Because of this presumption, they set aside a sensible agreement between the offender and the victim and imposed their own sense of right and wrong -- a judgement that left the victim, as well as the offender, deeply unhappy, as it caters for a set of priorities that

are at odds with their needs and interests. Additionally, the result is that the victim received significantly less compensation than contained in the initial agreement, as Mr Clotworthy lost his job and became unproductive because of the three year custodial sentence. Also, tax payers are forking out $150,000 to keep Mr Clotworthy in gaol, allowing him to learn how to be a more efficient criminal. The predictable result is that he is likely to come out more of a danger to the community than he ever was before. Even with, or rather, especially since, the protection of the community from crime was a consideration in the judges' reasoning for their decision, defenders of the status quo must excuse the ordinary citizen for asking the obvious question: Where is the sense in it? Judgements such as this only succeed in supporting calls for a substantial and urgent transfer of power from the professionals of the legal system to the primary stakeholders. (McElrea 1996, 1999.)

To summarise, by comparison to the anti-retributivist line of attack discussed earlier, a more effective critique of the status quo is possible by pointing to the institutionalised and systematic disempowerment of the primary stakeholders by the legal profession – a profession that has placed itself at the centre of the criminal justice process and, by doing so, systematically silences and marginalises the primary stakeholders in the course of criminal justice responses to crime. Most of the ills of the criminal justice system can be traced back to this feature of the system. Therefore, it is not retribution, but the disempowerment of the primary stakeholders that restorative justice critiques of the status quo must focus on. The same holds true when evaluating restorative justice interventions – a point taken up in the remaining section.

IV

Disempowerment in restorative justice

It would be naive to think that all restorative justice interventions are positive and wonderfully successful. All too often they are not. Especially when a program is poorly implemented, without proper training in conflict resolution and facilitation techniques, or with an ill-defined vision and poor understanding of how to implement restorative justice principles in practice, many conferences fail and a significant number of them victimise and re-victimise the key participants. My suggestion is that such unhappy experiences for offenders, victims, and their supporters are the result of silencing and disempowerment, or rather the result of conference coordinators failing to empower them in appropriate ways to speak their minds, and stand up for what they, in good faith, believe to be right and fair. For example, victims can experience marginalisation and severe disempowerment when they are not invited to attend their conferences, are given inadequate notice or consideration in setting the time and venue of the meeting, attend ill-prepared in terms of holding realistic expectations, knowledge of the process, awareness of their rights and responsibilities, or attend without a strong group of supporters on whom they can lean if the meeting gets difficult. In the absence of such safeguards, victims are vulnerable and can feel intimidated and re-victimised, especially if the offender or their family prove hard to deal with. The same holds true for offenders and their families who can find the experience overwhelming and humiliating, unless they are similarly prepared and adequately supported during what is for them a very difficult time.

The thesis that disempowerment (including the mere lack of empowerment) leads to unsatisfactory results for the key participants in restorative justice interventions can be demonstrated by reference to family group conferences (FGCs). While there tends to be a lot of focus on the successes of FGCs, the reality is that they can fail to achieve restorative justice for the parties concerned in an alarmingly high number of cases. Not only can FGCs fail in terms of reaching agreement between the parties, but they can make things worse for those who have already been victimised through the initial crime. For example, in the

samples studied by Maxwell and Morris:

a) Only in 41% of cases did victims attend the FGC – mostly because they were not invited or were given insufficient notice.
b) Of those victims that attended, only in 49% of cases did they express *any* degree of satisfaction with the outcome. (My emphasis.)
c) Only about a third of victims went away from the FGC feeling better.
d) 25% of the interviewed victims said they felt worse as a result of attending the FGC, and
e) 38% of FGCs attended by victims who were interviewed resulted in the victim saying they felt worse. (Maxwell and Morris 1993, p.119; 1996.)

Similarly, with respect to offenders, Maxwell and Morris found that:

a) Only a third of young offenders felt involved and often said little in their FGCs.
b) 26% of a sample of 14 – 16 year olds referred to FGCs in 1990 – 91 had been (re)convicted within 12 months.
c) 64% of them had been (re)convicted after just over four years, and
d) 24% of them had been persistently reconvicted over the same period. (Morris and Maxwell 1997.)

These results are disappointing. In light of the much emphasised potential of community empowerment in dealing with crime, these reoffending rates, for example, clearly fall short of legitimate expectations. (Alder and Wundersitz 1994; 1998; Barton 1996, 1999, 2000a,b; Braithwaite 1989, 1996; Braithwaite and Mugford 1994; Maxwell and Morris 1993, 1996, 1997; and generally the works referred to in fn. 1.) Also, from a victim justice perspective, some of the above figures ought to be of the gravest concern. Victims of crime have a lot at stake in the way the criminal justice system deals with their cases, and the above rates of revictimisation raise important moral and legal questions about the appropriateness and legitimacy of exposing victims to high risks of further victimisation in criminal justice

interventions.

The above statistics also underlie the urgency of acting on Braithwaite's observation, that "We need quality research on when and why restorative justice fails." (Braithwaite 1996, p. 24.) Here then is a clear hypothesis that would be well worth testing through research: *Restorative justice fails in cases where one or more of the primary stakeholders is silenced, marginalised and disempowered in processes that are intended to be restorative. Conversely, restorative justice succeeds in cases where the primary stakeholders can speak their minds without intimidation or fear, and are empowered to take an active role in negotiating a resolution that is acceptable and is right for them.* Without such all-round empowerment of the primary stakeholders concerned, restorative justice processes will be restorative only in name. They will not succeed in realising the restorative potential of individual and community empowerment, which, in the final analysis, is the fundamental starting point of restorative justice.

This analysis, of course, is at a relatively high level of generality, whereas the devil tends to be in the detail. Therefore, research must focus on the many ways in which empowerment and disempowerment are engendered and experienced in restorative justice processes. As mentioned above, my personal observations of FGCs in a range of programs on both sides of the Tasman clearly indicate that disempowerment and unsatisfactory outcomes tend to happen when individual stakeholders are not properly prepared, encouraged and supported to speak their minds, participate actively in negotiations and the making of key decisions. All parties must be enabled to negotiate from a position of knowledge, and with confidence that they can deal with this matter and make a positive difference in the outcome.

This, however, requires addressing imbalances of power created by differences in age, gender, culture, social status, institutional affiliation, etc. To give just one more example,

unless the conference Coordinator is highly skilled in the conduct of multi-party negotiations and conflict resolution, and has a clear understanding of the dynamics of interpersonal conflict escalation and resolution as they relate to the concept of restorative justice in terms of empowerment, they are unlikely to succeed in enabling an already timid or crushed young offender find their voice. Yet, unless this happens, the young person's experience will most likely be one of continued disengagement throughout the process, and of humiliation, victimisation and bullying by adults, who, in their own turn, and understandably, will feel equally frustrated and dissatisfied with the young person and the whole conferencing experience. It is my firm belief, however, that a properly trained and skilled facilitator can prevent such failures in the vast majority of cases. This can be done, for instance, by

a) proper preparation of the parties concerned,
b) inviting the right mix of supporters in sufficiently large numbers on both sides,
c) helping the young person to find their voice by encouraging them to have first say in the conference (unless this is culturally inappropriate) to explain and own up to all aspects of what they did, and to accept responsibility for their behaviour voluntarily. Unless this happens from very early on in the conference, an angry victim or a stern police officer can easily, even if inadvertently, knock the last shred of confidence, and/or moral concern for the victim and the rest of society, out of already frightened, timid, disengaged, angry, or defiant young offenders.[8]

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[8]The good sense in giving young offenders first say in conferences has been emphasised by Braithwaite and Mugford as early as 1994 (p. 150), and by others, such as Patrick Power and myself in conversations with conference administrators and practitioners. The point has also been raised at international conferences, but with no discernible impact on practice. The human dimension seems to dictate that, not unlike the legal professionals they so readily criticise, restorative justice administrators and practitioners are as susceptible as anybody else to seek the comfort of the familiar, and to close their minds too quickly to suggestions and opportunities for improving practice. Therefore, it is very important that good systems and practices are

This kind of awareness and practitioner competence in terms of effective techniques of mediation and facilitation are crucial for consistently good, all-round satisfying processes and outcomes in restorative justice terms. Without them, restorative justice interventions can only hope to be the kind of dubious, hit and miss affairs indicated by the above statistics, which brings me to the concluding point of my paper. This is that an effective restorative justice critique of the status quo requires more than a different and more relevant framing of the problem of what is wrong with it. The extra thing needed is results, consistently good results, from the restorative justice programs that have already been established. Without them, no restorative justice critique of the status quo can hope to maintain credibility in the long run, let alone make a difference in the face of bureaucratic priorities, inertia, and the understandable resistance to change by professionals who find it difficult to re-conceptualise and re-define their roles in terms of a different paradigm of justice.[9]

implemented from the very start of a restorative justice program. Unless this is done, changes for the better become increasingly difficult and painful. Even relatively small changes will be met with resistance from within the program by well meaning people who almost invariably equate the concept of best practice with whatever they happen to have become familiar and comfortable with.

[9] For a detailed analysis and discussion of the concept of empowerment and its applications in restorative justice processes, see Barton 2000a.

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