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UNDERSTANDING RESTORATIVE JUSTICE THROUGH THE LENS OF CRITICAL CRIMINOLOGY

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Introduction

There is an uneasy relationship between critical criminology and restorative justice. On the one hand, restorative justice is a story of optimism, reform and social change. Yet it also demonstrates a tendency to work within traditional criminal justice systems and whilst doing so, fails to challenge the exclusionary processes of criminalisation. This chapter explores some of the tensions between restorative justice and critical criminology – it is a critique of restorative justice within the context of the unfulfilled possibilities that restorative justice might hold.

Restorative justice can be defined in a number of ways including as a process, or as a set of values or goals, or more broadly as a social movement seeking specific change in the way criminal justice systems operate. A frequently cited definition is that restorative justice 'is 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' (Marshall 1999: 5). This definition emphasises the process requirement that all parties have an opportunity to be heard about the consequences of the crime and what needs to be done to restore victims, offenders and the community. Other definitions emphasise the values and goals of restorative justice rather than the process. The core values are said to be healing relationships between all parties involved, community deliberation rather than state-centred control of decision-making, and non-domination.

The roots of restorative justice can be found in a range of different approaches in criminology and law emerging during the 1960s and 1970s and provide a context for the contemporary development of restorative justice as akin to a 'social movement'. These origins include the development of 'informal' justice, including victim-offender mediation. In addition a number of intellectual traditions supported the development of restorative justice, including European critical traditions of abolitionism, religious traditions stressing reconciliation and healing, and in North America, Australia and New Zealand those who stressed the values of Indigenous cultures

and dispute resolution processes in 'pre-state' societies (Daly & Immarigeon 1998; Pavlich 2005).

In practice, restorative justice has varied significantly both in process and in the extent to which core values and goals are met. Restorative justice covers a range of practices that might occur at various points within the criminal justice process, including pre-court diversion, processes working in conjunction with the court including at the point of sentencing, and post sentencing with prisoners. We can see examples of restorative justice in victim-offender mediation, in family group and youth justice conferencing, and in sentencing circles. We can also see claims to restorative justice as a principle in post conflict and transitional justice settings such as the South African Truth and Reconciliation Commission. In addition there are a range of areas outside the criminal law where restorative justice practices have been used including workplaces, schools and child protection matters. There is a wide literature on the processes of restorative justice (for recent examples, see Johnstone & Van Ness 2007; Sullivan & Tift 2006). In addition, there have been numerous evaluations of restorative justice programs in New Zealand, Australia, the United Kingdom, Europe and North America (for summaries, see Strang 2001; Luke & Lind 2002). It is not the purpose of this chapter to review either the process or evaluation literature.

In its more critical manifestations, restorative justice theory has provided a critique of key conceptualisations and institutions of the criminal justice system. It provided the possibilities for challenging the discourses of criminalisation and punishment. It decentred the notion of 'crime' to the extent that categories of 'harm', 'conflict' and 'dispute' replaced the state's exclusive definition of criminal behaviour. It rethought the relationship between victim, offender and community, and in particular challenged the idea that the rights and interests of the victim and offender were diametrically opposed in a 'zero sum' relationship. In regard to penality, restorative justice presented itself as a 'third way' between just deserts and rehabilitation.

Yet restorative justice can also be seen as a discourse which is consonant with neo-liberalism to the extent that it focuses on the 'active' responsibility of individual subjects: the responsibility of the offender for the particular crime and the responsibility of the victim to participate in a process to restore their losses. Further the process itself rejects a key role for the state and privileges ownership by the community (O'Malley 2006: 221-222). A key argument in this regard is that restorative justice practices have developed within, and helped to create bifurcated criminal justice systems, which increasingly distinguish access to restorative justice programs on the basis of recidivism and risk.

Critical perspectives on restorative justice have emerged from a number of avenues. For the purposes of this discussion, these arguments may be grouped as neo-marxist, postmodernist and poststructuralist, feminist, postcolonial and liberal. These critical perspectives are broad. Not surprisingly, there are intersections and overlap in their application to restorative justice. These critiques cover various points relating to the role of the state and its agencies, concepts of globalisation and community, relations of class, 'race', ethnicity and gender, and questions about the rule of law, legal principles and appropriate process. Fundamental to these critiques are questions of power and resistance and modes of punishment within neo-liberal regimes.

The state role in restorative justice processes

A major neo-marxist critique of restorative justice emerged at the same time as new restorative justice practices, particularly in juvenile justice, were being formulated in the early 1990s (see for example, White 1994). This critique revolved around the relationship between restorative justice and the state. In particular the developing state-directed control of restorative justice appeared to undermine the more radical potential of restorative justice. Neo-marxists were concerned that the claims of restorative justice embodied both a profound naiveté about the nature of politics and a sanguine view of state power. As White (1994: 187) argued, restorative justice:

> accepts at face value the liberal democratic notion that the state is somehow neutral and above sectional interests, that it operates for the 'common good', and that it is an impartial and independent arbiter of conflicts.

From a neo-marxist perspective, there has been little recognition by restorative justice proponents of the move over the past two decades from a social state to a more repressive state as part of the ascendancy of neo-liberal politics. The withdrawal from responsibility in areas of health, education and welfare, and the shift towards modes of governance through privatisation, and individual and community responsibilisation have all had profound effects on the role of the state in crime control. Similarly, the class-based impact of unemployment and marginalisation, particularly among young people, poses very real problems for restorative justice practice – especially if that practice is built on a presumption of individualised responsibility for crime and restoration. What the neo-marxist critique demands is that restorative justice respond seriously to these broader social and economic issues and that it be able to deal constructively with the various 'hidden injuries' of class including alienation from school and work, homelessness, drug abuse and marginalisation.

A further concern, particularly in Australia and New Zealand, is the failure to understand the complexity of the relationship between colonised peoples and colonial/postcolonial states. There is little recognition that the state and particularly its criminal justice agencies are not seen as legitimate by Indigenous peoples in settler states. A state-sponsored restorative justice program may well be viewed with suspicion and seen as another imposed form of control which undermines existing Indigenous modes of governance. There is the added political and historical irony to this, given that restorative justice proponents, particularly during the 1990s, defined their activities as consonant with, and drawing inspiration from Indigenous cultures (Cunneen 1997; Blagg 1997).

Policing

A major issue stemming from the relationship between restorative justice and the state has been policing and criminalisation. In many jurisdictions the police exercise significant discretionary powers over restorative justice programs. For example, police can determine access to youth justice conferencing programs, and play a key role in the operation of the conferencing process and subsequent agreement. The centrality of the police role is especially problematic given concerns over the inappropriate exercise of police discretion, the dominance of police or other professionals over other conference participants and the lack of accountability of police (White 1994; Cunneen 1997). The expanded police role in restorative justice

programs has led to greater police powers. In most jurisdictions the increased role of police has not been accompanied by any further accountability or control over police decision-making (Blagg 1997). At the same time there have been significant legislative extensions of police powers in Australia, particularly in relation public order offences (see Brown et al 2006; McCulloch this volume). These greater powers have the effect of bringing more people into all areas of the criminal justice system, including those deemed 'restorative'.

Indigenous peoples, and racial and ethnic minorities may have good reason to be sceptical that police are independent arbiters in the process of restorative justice. There is the danger that minority youth will be classified by police as 'unsuitable' for restorative justice schemes particularly if they have prior offending histories or are deemed uncooperative (Cunneen & White 2007).

Restorative justice processes need to effectively critique inappropriate and racist policing and broader processes of criminalisation. Policing and the criminal justice system has a determining role in constituting social groups as threats and in reproducing a society built on racialised boundaries. The process of criminalisation constitutes 'a significant racialising discourse' (Keith 1993: 193), from which restorative justice is not immune. If restorative justice lacks the ability to critique increases in police powers, public order interventions over minor offences or the discriminatory use of stop and searches, then it is nothing more than another regulatory device used in the service of power. It becomes simply a mode of governance that facilitates and further legitimates state intervention.

Punishment

Restorative justice reaches into longstanding debates about the nature and purpose of punishment. Daly and Immarigeon (1998) question whether restorative justice is indeed contrary to retributivist or rehabilitation models of justice or combines elements of these approaches. More significantly, restorative justice programs have been introduced within a framework of greater emphasis on individual responsibility, deterrence and incapacitation. As other writers in this book have argued (for example, Pratt, Hogg) there has been a significant intensification of punishment over the past decades – at the same time as restorative justice practices have been introduced. Thus there may be elements of restorative justice, retribution, just deserts, rehabilitation and incapacitation all operating within a particular jurisdiction at any one time.

Discussions of postmodern penality are useful in contextualising the place of restorative justice in contemporary fields of punishment. Pratt (2000), for example, has discussed the return of public shaming, and the resurfacing of a premodern penal quality. He also notes the development of other phenomena that would seem out of place within a modern penal framework including boot camps, curfews and the abandonment of proportionality (2000: 131-133). O'Malley (1999) has discussed the 'bewildering array' of developments in penal policy including policies based on discipline, punishment, enterprise, incapacitation, restitution and reintegration – policies which are mutually incoherent and contradictory. However, much of the discussion around a postmodern penality has centred on the movement of penal regimes towards the prediction of risk: the development of 'techniques for identifying, classifying and managing groups assorted by dangerousness' (Feeley & Simon 1994: 173).

The emphasis on actuarialism, the prediction of risk and policies of incapacitation are not contradictory with the way restorative justice practices have developed, rather they can be seen as complementary strategies put in place within single systems of justice. Indeed risk assessment becomes a fundamental tactic in dividing populations between those who benefit from restorative justice practices and those who are channelled into more punitive processes of incapacitation through being refused bail, or facing mandatory supervision or imprisonment. The modes of assessing risk are increasingly accomplished through a variety of 'weak' and 'strong' risk predictive mechanisms from a simple recognition of prior criminal record through to the application of specifically designed risk assessment tools.

We can see these processes operating more clearly in the context of a greater *bifurcation* of existing justice systems. For example, in Australia conferencing models have been introduced in a context where juvenile justice systems are increasingly responding to two categories of offenders: those defined as 'minor' and those who are seen as serious and/or repeat offenders. Minor offenders benefit from various diversionary programs such as conferencing schemes. Serious and repeat offenders, on the other hand, are classified ineligible for diversionary programs and are dealt with more punitively through sentencing regimes that are more akin to adult models.

Further, these processes of bifurcation have been intensifying over the past decade particularly with changes in bail legislation, which have dramatically increased remand numbers among adults and juveniles, and greater restrictions on eligibility to diversionary programs such as youth conferencing.

Globalisation

Globalisation has the effect of imparting preferred models of capitalist development, modernisation and urbanisation (Findlay 1999). In this context, globalisation increasingly demands particular forms of capital accumulation, as well as associated social and legal relations both within and between nation states. At first glance this may seem irrelevant to the localised claims of restorative justice. Yet discussions around globalisation should alert us to the need to situate the growing interest in restorative justice within the shifting boundaries of relations within and between the first world and the third world. This is particularly the case when much restorative justice talk presents itself as an alternative narrative on justice, as something outside the justice paradigms of retribution, deterrence and rehabilitation, and as a form of resolving disputes which is 'non-Western'.

Little attention has been paid to whether restorative justice can be seen as much as a globalising force as traditional western legal forms. The potential to overrun local custom and law is as real with restorative justice as it is with other models built on retributivism or rehabilitation (Cunneen 2002). The risk is that restricted and particularised notions of restorative justice will become part of a globalising tendency which restricts local justice mechanisms in areas where there is a demand to 'modernise' (Findlay 1999; Zellerer & Cunneen 2001: 251). Thus actual localised customary and non-state practices for resolving disputes and harms will be replaced by what the West understands to be restorative justice – and we can see examples of this in Australia where Aboriginal customary processes are seen as less legitimate than state-sanctioned forms of restorative justice such as conferencing. Alternatively

traditional forms of localised justice may be forced to respond to crimes they were never designed to deal with (for example, the gacaca local dispute processes in Rwanda dealing with genocide) in the interests of broader appeals to restorative justice (Iffil 2007).

Reparations and transitional justice

Another tendency of globalisation is the expanding role of restorative justice in dealing with matters of transitional justice, state crime and the gross violation of human rights. There is a growing literature that considers the importance of reparations for historical injustices and the potential links between reparations and restorative justice (Cunneen 2006; Findlay & Henham 2005). Internationally there has been growing acceptance that governments acknowledge and make reparations to the victims of human rights abuses, as well as widespread acceptance of the principle of reparations. Reparations have significant potential overlap with the goals of restorative justice, and have been articulated as such for example in the South African Truth and Reconciliation Commission (Cunneen 2006).

Part of the globalising tendency is the introduction of specific processes for responding to state violations of human rights, and can be seen in the work of organisations like the International Centre for Transitional Justice (ICTJ) in New York. The ICTJ provides advice and models for the establishment of truth and reconciliation commissions. The concern is that these processes for restorative justice are ones that become imposed, partly in the interests of the West to resolve conflict in a particular way, and without local and organic links to the particular society.

Community

Pavlich (2005) notes that within restorative justice discourses the absolute existence of 'community' is assumed. Community appears as the 'spontaneous and voluntary collective domains that constitute the foundations of civil society' (2005: 97). Community is not a natural set of relations between individuals, nor a natural social process lying at the foundation of civil society. Communities are always constructed on the broad terrain of history and politics. Radical critiques provide a multilayered understanding of the problematic relationship between community and state. Basic to this understanding is a concern that the notion of community presents a harmonious view of social and political relations, which masks conflict, power, difference, inequality and potentially exploitative social and economic relations.

The postmodernist understanding of restorative justice has questioned the implicit consensual notions of civil society and community. Pavlich (2001) argues that 'community' is also fundamentally about *exclusion*. 'The promise of community's free and uncoerced collective association is offset by a tendency to shore up limits, fortify a given identity, and rely on exclusion to secure self-preservation' (2001: 3). Such a vision of community is only a short step away from the 'gated' community of the wealthy excluding the poor; the community of interest generated by power and prestige. 'Community' can easily spill over into class, cultural and racial purity, xenophobia and racism (Bauman 1998). Indeed the problem is that restorative justice can become what it opposes: a practice which closes, limits and excludes individuals, rather than reintegrates.

Another point of departure in radical critique is to question the claim that restorative justice provides an avenue for 'the community' to take back from the state the ownership of the problem of crime. From feminist perspectives the problem has been that the state has never adequately criminalised crimes of violence against women. To the extent that we can discuss 'community' in this context, we may well find that 'community' reflects the patriarchal relations which provide for the acceptance of violence against women. Rather than providing a barrier and safeguard against offending, it may provide social and cultural legitimation for violence.

From a postcolonial perspective, colonial policies were directly responsible for the destruction and reconstruction of 'community' in the interests of the coloniser. Many contemporary Indigenous communities were created directly as a result of colonial government policies of forced relocations. Further, contemporary racial and ethnic minority communities within first world metropoles are specifically created under conditions determined by neo- and post-colonial relations which influence the nature of immigration and post-immigration experiences (Cunneen & Stubbs 2002). History and contemporary politics have shaped both Indigenous and post-war immigrant communities. What then does 'community' mean for minority people in these situations and how does it impact on relations with the police, the criminal justice system and the state more generally?

Neo-marxist and governmentality critiques of neo-liberalism also identify the current tendencies towards the responsibilisation of individuals, families and communities and the preference towards 'governing at a distance'. Pavlich (2005: 97) notes that the 'community' of restorative justice is essentially constituted by the state which designs, creates, funds and staffs the restorative justice project. It provides authority and legitimacy to the 'community' that then participates in the restorative justice project. Such a community is not independent of state agency.

Gender

Perhaps the most sustained critique of restorative justice has come from feminists who have emphasised the lack of understanding of power relations embedded in crimes against women. Feminist arguments have been particularly important in relation to the problems of applying restorative justice practices to domestic violence. The starting point in this critique is that domestic violence is a particular type of crime and that the fundamental priority of any type of intervention must be to ensure the physical protection for victims, usually women and children (Stubbs 1997, 2002).

Thus restorative justice needs to be able to deconstruct generalised notions of crime: the nature of domestic violence is specific. The violence is not a discrete act between two individuals who are unknown to each other. Rather the violence may be part of a number of gendered strategies of control including various forms of behaviour and coercive tactics. The violence itself may be part of a patterned cycle of behaviour which includes contrition. Furthermore, there are social and cultural dimensions that give meaning and authorisation to the violence and constrain women's options in response (Stubbs 2002: 45). We cannot assume that actors marshalled together for a restorative justice conference will be capable of reflecting the necessary support for victims who are in a structurally disadvantaged position.

Indeed, the basic premise of restorative justice, that the harm between victim and offender is to be repaired, must be questioned as an outcome sought by women seeking intervention, support and protection against violence (2002: 51).

There is also no particular reason to suspect that restorative justice practices will privilege or indeed give a voice to minority women or respond adequately to different groups of women who experience differing levels of violence. In Australia, for example, the homicide rate for Indigenous women is 10 times that of other women. Other minority women also have variable rates, for example, Filipino women's homicide rate is five times the general rate for other women in Australia (Cunneen & Stubbs 2002). These differences directly reflect the gendered outcomes of colonial and postcolonial conditions. Having said that, it is also worth noting that colonised women's appalling experience with western criminal justice interventions may lead them to see restorative justice as a potential avenue for better outcomes (Nancarrow 2006).

Liberal critique and legal process

Many criminal justice activists have expressed disquiet over aspects of restorative justice programs. Often these criticisms are aimed at specific restorative justice practices and might be broadly characterised as critiques based on liberal arguments centred around the rule of law and equality before the law. The concerns can be distinguished from those of critical criminologies to the extent that they assume with a certain level of 'tweaking' the process can be rectified.

Yet these concerns also represent the protection of basic rights and values that critical criminologists would also seek to uphold. They include concerns over abuse of due process; absence of procedural rights and protections; excessive, disproportionate or inconsistent outcomes and so forth (see for example, Warner 1994: 142-146). These concerns include the potential undermining of defendant's rights at the investigatory, adjudicatory and sentencing stages of the criminal justice system.

At the investigatory stage, the lack of independent legal advice, pressures to admit an offence to obtain the presumed benefit of diversion and the avoidance of a criminal record, and the lack of testing of the legality of police searches, questioning and evidence gathering may compromise outcomes. Furthermore, the pressure to admit an offence means that issues relating to *mens rea* (the defendant's mental fault) and legal defences are not considered by the court.

A related concern is that the outcome from a restorative justice program may be more punitive than might be expected if the normal sentencing principles of consistency, proportionality and frugality were applied. There is also potential to ignore the basic human rights principles relating to children and young people: upholding the primacy of the best interests of the child and rehabilitation when sentencing and making other decisions affecting children and young people.

The establishment of conferencing and other restorative justice procedures can introduce the potential for net widening. In particular, young people may become subject to conferencing procedures for behaviour which would have previously been regarded as too trivial to warrant official intervention (Polk 1994: 133-135). Whether this emerges as a problem in particular jurisdictions will to some extent depend on the specific legislative and policy framework within which the restorative justice

procedures operate. For example, legislative criteria determining use, and checks and balances over referral and other official decision-making may act to minimise the potential problem. In an effort to provide a framework for improving conferencing for young people, the Australian Law Reform Commission (1997: 482) has recommended that national standards for juvenile justice should provide best practice guidelines for family group conferencing.

'Non state' punishment and postmodern hybridity

Restorative justice often lays claim to a pre-modern Indigenous authenticity as part of its search for a 'myth of origin' (Daly 2002). Often the claims, which link restorative justice practices to Indigenous peoples, are trivialising. They disavow the complex effects of colonial policies which have, at various times, sought to exterminate, assimilate, 'civilise', and Christianise Aboriginal peoples. They also disavow the complexity and variations in Indigenous dispute resolution mechanisms (Zellerer & Cunneen 2001: 246-247).

The search for origins of restorative justice in Indigenous traditions has provided an important rhetorical tool to distinguish restorative justice traditions from modern state-centred systems of punishment. It has been partly a story about what the West has lost. The broad argument is that over the longer period of human history the state assumed the function of punishment only relatively recently and that, previously, societies functioned well with restorative forms of sanctioning. Restorative methods of dispute resolution were dominant in non-state, pre-state and early state societies: individuals were bound closely to the social group and mediation and restitution were primary ways of dealing with conflict. Further, these pre-modern, pre-state restorative forms of sanctioning can still be found practised in Indigenous communities today.

There are simple dichotomies underpinning this story of restorative justice: non-state sanctioning is restorative (and, conversely, state imposed punishment is not) and Indigenous societies and pre-modern societies do not use utilise retributive forms of punishment as their primary mode of dispute resolution. Yet this simple story distorts the diversity of Indigenous cultures and the variety of sanctions used by Indigenous peoples within their specific cultural frameworks. Not surprisingly, some sanctions are 'restorative', in the sense that a modern proponent of restorative justice would accept, and some, clearly, are not. Indigenous sanctions might include temporary or permanent exile, withdrawal and separation within the community, public shaming of the individual, and restitution by the offender and/or their kin. Some sanctions may involve physical punishment such as beating or spearing.

Rather than a simple dichotomy between a pre-modern, pre-state restorative justice, and the modern state's model of retributive (and rehabilitative) punishment, perhaps a more useful conceptualisation is to see the current developments in restorative justice within a framework of hybridity that is neither pre-modern nor modern. By 'hybridity', I am referring to transformations in punishment, similar to a form of 'fragmented' justice or 'spliced' justice, where traditional legal bureaucratic forms of justice are combined with elements of informal justice and Indigenous justice (Blagg 1997; Daly 2002).

Thinking about restorative justice within the context of hybridity provides us with the opportunity to think through the complexity of the relationship between restorative justice and state-centred punishment. It provides the opportunity to avoid critical criminology's approach to restorative justice falling into a 'criminology of catastrophe' (O'Malley 2000) that is over-determined and leaves little room for contestation, transformation and resistance. In that spirit I offer both a pessimistic and an optimistic view of restorative justice hybridity.

A pessimistic view of restorative justice hybridity

A pessimistic reading of current developments is that in many cases restorative justice programs have been introduced within frameworks emphasising individual responsibility, deterrence and incapacitation. It is an argument that has informed much of this chapter. It is an argument that sees punishment in neo-liberal societies as incorporating a variety of goals and processes from restorative justice to incapacitation.

It is a view of penal policy that emphasises inconsistencies in punishment, but which in their overall effect has seen a substantial increase in more punitive outcomes (see Pratt et al 2005). In this context restorative justice is reduced to yet another penal strategy reserved for those who are deserving, while the 'undeserving' (the homeless, the marginalised, the poor and non-white populations) get what they have always got in ever increasing numbers – gaol.

Statistically robust risk assessment tools used in countries like Canada and Australia (such as the Youth Service Level Case Management Inventory) provide a veneer of science to the sorting of people on the basis of race and class. The focus on individual factors such as age of first court order, prior offending history, failure to comply with court orders, and current offences are all used to predict risk of future offending. A range of socio-economic factors is also connected to risk, including education (such as 'problematic' schooling and truancy) and unemployment. The individual 'risk' factors are de-contextualised from broader social and economic constraints. And so through the miracle of statistics, the most marginalised groups within society reappear as those who offer the greatest risk to 'our' security. Our 'evidence-based' research tells us these are the 'problem cases' unlikely to respond to the opportunities offered by restorative justice, and are fit subjects for more punitive law and order policies.

An optimistic view of restorative justice hybridity

However, there is also an alternative story to hybridity. For example, an optimistic account of the development of restorative justice hybridity might be found in recent developments in Indigenous justice. There is potential to create new positive forms of hybrid justice which are consistent with the principles of restorative justice. New spaces can be created wherein Indigenous communities have opportunities to formulate and activate processes derivative of their own particular traditions, and where scepticism about state-imposed forms of restorative justice can be replaced with organically connected restorative justice processes that resonate with Indigenous cultures (Cunneen 2007).

This vision of restorative justice where hybridity and cultural difference can be accepted is emancipatory in a broader political sense, whereby restorative justice is not only a tool of criminal justice; it is a tool of social justice. In this example, hybridity can involve a re-imagining of new pathways and meeting places between Indigenous people and the institutions of the coloniser – a place where the institutions of the coloniser are no longer taken for granted as normal and unproblematic, where the cultural artefacts of the colonisers (the criminal justice system) lose their claim to universality. In this context, restorative justice provides an opportunity for decolonisation of our institutions and our imaginations and a rethinking of possibilities (Cunneen 2002).

One brief example of these hybrid developments is the expansion of Indigenous courts [1] which allow the local Indigenous community to become more actively involved in the sentencing process and, as a result, introduce new ideas about what might constitute an appropriate sentence for an offender. In this sense, community involvement opens the sentencing process up to influences beyond the ideas of criminal justice professionals. This is particularly important for Aboriginal communities who have generally been excluded from legal and judicial decision-making. The courts typically involve Aboriginal elders or community group members sitting on the bench with a magistrate. They speak directly to the offender, expressing their views and concerns about offending behaviour and provide advice to the magistrate on the offender and about cultural and community issues. Offenders might receive customary punishments or community service orders as an alternative to prison. Importantly, appeals to restorative justice in this context provide an avenue for opening up the justice system to greater Indigenous control. It is an opportunity to reconfigure the justice system with different values, different processes and different sets of accountability.

Conclusion

This chapter has outlined some of the key issues that have emerged in critiques of restorative justice. Finding answers to these criticisms is an important part of developing restorative justice practice and theory in a way that is sensitive to issues of social justice and political transformation. It is important to recognise that many progressive political activists see restorative justice as a preferable policy alternative to more punitive criminal justice approaches. The question is whether restorative justice can actually live up to their expectations.

As critical criminologists we need to ask whether the vision for reform for restorative justice proponents coalesces with other social and political movements. For example, do feminist interests in the protection of women, or Indigenous interests in promoting self-determination, or anti-racist organisations in reforming the criminal justice system, or neo-marxist interests in social justice match the aims of restorative justice? Does restorative justice assist in meeting the aims of these social and political movements? Will the racism, sexism and class-based interests and biases of the criminal justice system be removed, modified or left untouched by restora-

1 The courts are titled after local Indigenous names such as Koori Courts (Victoria), Murri Courts (Queensland) and Nunga Courts (South Australia). New South Wales has adopted the Canadian circle sentencing model for Indigenous people in that state.

tive justice? Indeed, will greater bifurcation of justice systems serve to compound existing oppressions?

Blagg (1998, and this volume) has discussed the need to open up and imagine new pathways and meeting places in justice systems. He refers to this as the 'liminal spaces' where dialogue can be generated, where hybridity and cultural difference can be accepted. A context of hybridity may be a useful way of considering contemporary developments, where new forms of doing justice are being developed which merge the restorative with new democratising practices. To this extent restorative justice might pose an unrealised promise that still has considerable opportunity for development. That development, however, depends on the establishment of a critical reflexivity about the relationship of restorative justice to other forms of power. While some offenders and victims may be restored, there is also a dark side to a developing hybridity. Restorative justice has also found itself a partner to a greater emphasis on individual responsibility, deterrence and incapacitation.

References

Australian Law Reform Commission 1997, *Seen and Heard: priority for young people in the legal process*, AGPS, Canberra.

Bauman, Z 1998, *Globalization: the human consequences*, Columbia University Press, New York.

Blagg, H 1997, 'A Just Measure of Shame', 37(4) *British Journal of Criminology*.

Blagg, H 1998, 'Restorative Visions and Restorative Justice Practices: conferencing, ceremony and reconciliation in Australia', 10 (1) *Current Issues in Criminal Justice*, July 1998.

Brown, D, Farrier, D, Egger, S, McNamara, L & Steel, A 2006, *Criminal Laws*, Federation Press, Sydney.

Cunneen, C 1997, 'Community Conferencing and the Fiction of Indigenous Control', 30(3) *Australia and New Zealand Journal of Criminology* 292.

Cunneen, C 2001, *The Impact of Crime Prevention on Aboriginal Communities*, New South Wales Crime Prevention Division and Aboriginal Justice Advisory Council, Sydney.

Cunneen, C 2002, 'Restorative Justice and the Politics of Decolonisation', in Weitekamp, E & Kerner, H-J (eds), *Restorative Justice: theoretical foundations*, Willan Publishing, Cullompton.

Cunneeen, C 2006, 'Exploring the Relationship between Reparations, the Gross Violations of Human Rights, and Restorative Justice', in Sullivan, D & Tift, L (eds), *The Handbook of Restorative Justice: global perspectives*, Routledge, New York.

Cunneen, C 2007, 'Reviving Restorative Justice Traditions', in Johnstone, J & Van Ness, D (eds), *The Handbook of Restorative Justice*, Willan Publishing, Cullompton.

Cunneen, C & Stubbs, J 2002, 'Migration, Political Economy and Violence Against Women: the post immigration experiences of Filipino women in Australia', in Freilich, JD, Newman, G, Shoham, SG & Addad, M (eds), *Migration, Culture Conflict and Crime*, Aldershot. Ashgate.

Cunneen, C & White, R 2007, *Juvenile Justice: youth and crime in Australia*, Oxford University Press, Melbourne.

Daly, K 2002, 'Restorative Justice: the real story', 4(1) *Punishment and Society* 55.

Daly, K & Immarigeon, R 1998, 'The Past, Present and Future of Restorative Justice: some critical reflections', 1(1) *Contemporary Justice Review* 21.

Feeley, M & Simon, J 1994, 'Actuarial Justice: the emerging new criminal law', Nelken, D (ed), *The Futures of Criminology*, Sage, London.

Findlay, M 1999, *The Globalisation of Crime: understanding transitional relationships in context*, Cambridge University Press, Cambridge.

Findlay, M & Henham, R 2005, *Transforming International Criminal Justice*, Willan Publishing, Cullompton.

Iffil, S 2007, *On the Courthouse Lawn*, Beacon Press, Boston.

Johnstone, J & Van Ness, D (eds) 2007, *The Handbook of Restorative Justice*, Willan Publishing, Cullompton.

Keith, M 1993, 'From Punishment to Discipline', Cross, M & Keith, M (eds), *Racism: the city and the state*, Routledge, London.

Luke, G & Lind, B 2002, 'Reducing Juvenile Crime: conferencing versus court', *Crime and Justice Bulletin*, No 69, New South Wales Bureau of Crime Statistics and Research, Sydney.

Marshall, T 1999, *Restorative Justice: an overview*, Home Office, London.

Nancarrow, H 2006, 'In Search of Justice for Domestic and Family Violence: Indigenous and Non-Indigenous Australian Women's Perspectives', 10(1) *Theoretical Criminology*.

O'Malley, P 1999, 'Volatile and Contradictory Punishments', 3(2) *Theoretical Criminology* 175.

O'Malley, P 2000, 'Criminologies of Catastrophe? Understanding criminology on the edge of the new millennium', 33(2) *Australian and New Zealand Journal of Criminology* 153.

O'Malley, P 2006, 'Risk and Restorative Justice: governing through the democratic minimisation of harms' in Aertsen, I, Daems, T & Robert, L (eds*), Institutionalizing Restorative Justice*, Willan Publishing, Cullompton.

Pavlich, G 2001, 'The Force of Community', in Strang, H & Braithwaite, J (eds), *Restorative Justice and Civil Society*, Cambridge University Press, Cambridge.

Pavlich, G 2005, *Governing Paradoxes of Restorative Justice*, Glasshouse Press, London.

Polk, K 1994, 'Family Conferencing: theoretical and evaluative concerns', in Alder, C & Wundersitz, J (eds), *Family Conferencing and Juvenile Justice: the way forward or misplaced optimism?*, Australian Institute of Criminology, Canberra.

Pratt, J 2000, 'The Return of the Wheelbarrow Men', 40 *British Journal of Criminology* 127.

Pratt, J, Brown, D, Brown, M, Hallsworth, S & Morrison, W 2005, *The New Punitiveness: trends, theories, perspectives*, Willan Publishing, Cullompton.

Strang, H 2001, *Restorative Justice Programs in Australia*, A Report to the Criminology Research Council, Australian Institute of Criminology, Canberra.

Stubbs, J 1997, 'Shame, Defiance and Violence against Women: a critical analysis of "communitarian" conferencing', in Bessant, J & Cook, S (eds), *Violence Against Women: an Australian perspective*, Sage, Thousand Oaks.

Stubbs, J 2002, 'Domestic Violence and Women's Safety: feminist challenges to restorative justice', in Strang, H & Braithwaite, J (eds), *Restorative Justice and Family Violence*, Cambridge University Press, Cambridge.

Sullivan, D & Tift, L (eds) 2006, *The Handbook of Restorative Justice: global perspectives*, Routledge, New York

Warner, K 1994, 'Family Group Conferences and the Rights of Offenders', in Alder, C & Wundersitz, J (eds), *Family Conferencing and Juvenile Justice: the way forward or misplaced optimism?* Australian Institute of Criminology, Canberra.

White, R 1994, 'Shaming and Reintegrative Strategies: individuals, state power and social interests', in Alder, C & Wundersitz, J (eds), *Family Conferencing and Juvenile Justice: the way forward or misplaced optimism?* Australian Institute of Criminology, Canberra.

Zellerer, E & Cunneen, C 2001, 'Restorative Justice, Indigenous Justice and Human Rights', in Bazemore, G & Schiff, M (eds) *Restorative Community Justice: repairing harm and transforming communities*, Anderson Press, Cincinnati.