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Investigating the Potentials of Restorative Justice Practice

Lode Walgrave*

This Article draws its conclusions from available evaluation research on restorative justice practices. However, to understand thoroughly the scope of this research, two preliminary comments must set the scene—the socio-ethical foundation of restorative justice and its lack of a clear definition.

AWARENESS OF SOCIO-ETHICAL FOUNDATIONS

The option for restorative justice is not an instrumental choice. It is rooted primarily in socio-ethical intuitions. Aimed at restoration instead of acceptance of the punitive premise and giving space for deliberation processes among stakeholders instead of imposing a top-down decision procedure, indeed, it is grounded in different views on human relations and social institutions. It is believed that restorative justice practices are “better,” “more constructive,” or “more just” than the *a priori* option for punishment and formalism in the current criminal justice system.¹ Often, however, these beliefs are not well elaborated; the socio-ethical plus value seems to be considered evidence. Yet, the lack of extension on ethical foundations is problematic. If socio-ethical beliefs are not made explicit and distinguished clearly from observations in practice, evaluation research may be blurred.² Hence, while exploring the socio-ethical roots of restorative justice is not the subject of this Article, it is

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1. See HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 3–5 (2002).

2. LODE WALGRAVE, *RESTORATIVE JUSTICE, SELF-INTEREST AND RESPONSIBLE CITIZENSHIP* 2–3 (2008).

important to be aware of them to understand the status of evaluation research on restorative justice practices.

As will be made clear later in this Article, criteria for measuring restorative justice efficiency are not the same as the criteria used to evaluate traditional criminal justice interventions.³ The instrumental effects of restorative justice must be considered within the particular socio-ethical ground that led to the restorative justice option. In fact, the bottom line is not that the effects of restorative justice practices must be clearly better than the known effects of the traditional criminal justice interventions but only that they may not be worse. Imagine if no benefits were found: the victims were not systematically better off, the offenders did not better understand why their behavior was unacceptable, they continued to reoffend as before, or both, and no advantages were observed for community life or public safety. If the effectiveness of restorative justice were exactly the same as that of punitive justice, the preference for restorative justice would hold out. Unless its outcomes were significantly worse for the victim, the offender, or public safety, restorative justice advocates would stick to their option for restorative justice.

But still, evaluation research on restorative justice practice is needed. Brilliant ideas may indeed turn out badly in practice. That is why systematic checks must be carried out to find out what restorative justice brings about in reality. Currently, restorative justice practices are being implemented for an increasingly broad range of crimes, including the most serious ones, all over the world.⁴ A growing number of countries and states have legislation that favors responses with a view to reparation.⁵ International organizations have recently issued statements and recommendations endorsing a

3. See *infra* notes 39–46 and accompanying text.

4. Mark S. Umbreit, William Bradshaw & Robert B. Coates, *Victims of Severe Violence in Dialogue with the Offender: Key Principles, Practices, Outcomes and Implications*, in *RESTORATIVE JUSTICE IN CONTEXT: INTERNATIONAL PRACTICE AND DIRECTIONS* 123 (Elmar G.M. Weitekamp & Hans-Jürgen Kerner eds., 2003).

5. Paul McCold, *The Recent History of Restorative Justice: Mediation, Circles and Conferencing*, in *HANDBOOK OF RESTORATIVE JUSTICE* 23, 35–41 (Dennis Sullivan & Larry Tifft eds., 2006); Daniel W. Van Ness, *The Shape of Things to Come: A Framework for Thinking About a Restorative Justice System*, in *RESTORATIVE JUSTICE: THEORETICAL FOUNDATIONS* 1, 1–2 (Elmar G.M. Weitekamp & Hans-Jürgen Kerner eds., 2002).

restorative approach to offending.⁶ At first glance, this expansion alone suggests that restorative justice practices are indeed a feasible response to crime, and that they are attractive to an increasing proportion of the general population, justice officials, and policy-makers. On its own, this is an important indication, but it is not sufficient to conclude that restorative justice is a good option. Deeper, more nuanced, and more systematic exploration of restorative justice practice is necessary.

SEARCHING FOR CLARITY ON RESTORATIVE JUSTICE

Surveying the empirical assessments of restorative justice, one is confronted with a lack of clarity in the concept of restorative justice. Yet, clarity is badly needed for evaluation research.⁷ If the object of the investigation is not well delimited, one cannot investigate it accurately. Without transparent differentiation between socio-ethical options and empirical findings, the assessments lose credibility. If the relationship between the mainstream punitive apriorism and restorative justice is not understood unambiguously, the two cannot be compared adequately. If there is no view on the variety and complexity of possible restorative justice practices, conclusions based on one type of practice cannot address restorative justice as a whole. If there is no clarity about the objectives of restorative justice, its success or failure cannot be assessed.

Currently, restorative justice is a complex and lively realm of different—and partially opposing—beliefs and options, renovating inspirations and practices in different contexts, and scientific “crossing swords” over research methodology and outcomes. Restorative justice is, at the same time, a social movement with different degrees of self-criticism and a domain of scientific research with different degrees of methodological adequacy. It is a field of its own, looking for constructive ways of addressing the aftermath of crime but also part of a larger socio-ethical and political agenda.

6. McCold, *supra* note 5, at 35.

7. WALGRAVE, *supra* note 2, at 2; Inge Vanfraechem & Ivo Aertsen, *Empirical Research on Restorative Justice in Europe: A Challenge*, in RESTORATIVE JUSTICE REALITIES: EMPIRICAL RESEARCH IN A EUROPEAN CONTEXT 267 (Inge Vanfraechem, Ivo Aertsen & Jolien Willemsens eds., 2010).

Many interconnected tendencies have influenced the re-emergence of restorative justice, such as feminism, deincarceration movements, indigenous peoples' emancipation movements, and options for reconfirming the responsibility of (young) offenders.⁸ Probably, the most important roots are victims' movements, communitarianism, and critical criminology.⁹

Practices have evolved since the early 1970s in the United States, Canada, and Europe.¹⁰ Originally, a number of isolated initiatives did not refer at all to a restorative justice concept.¹¹ It is only since the late 1980s and early 1990s that they have led to a realm of practices, social movements, theory-formation, ethical reflection and empirical research, which is now referred to as "restorative justice."¹² The application of its principles is spreading far beyond criminal matters, penetrating the regulation of disputes and discipline problems in schools, neighborhood conflicts, child welfare and protection matters, labor and business regulation, and even the resolution of conflicts involving systemic political violence.

Given its diverse roots, broad field of implementation, and current variety of forms, it is not surprising that restorative justice does not appear as a clearly defined set of thoughts and implementations but rather as a confused, seemingly even incoherent, assembly. Adding to the confusion are apparently similar movements, under banners such as transformative justice, relational justice, community justice, peacemaking justice, and the like.¹³ Different and even competing visions on restorative justice are presented in the literature.¹⁴ Johnstone and Van Ness present restorative justice as a "deeply

8. DANIEL VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE 12–19 (3d ed. 2006).

9. JACQUES FAGET, LA MÉDIATION: ESSAI DE POLITIQUE PÉNALE 23 (1997); VAN NESS & STRONG, *supra* note 8, at 43–47.

10. McCold, *supra* note 5; Christa Pelikan & Thomas Trenczek, *Victim Offender Mediation and Restorative Justice: The European Landscape*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 5, at 63, 63.

11. McCold, *supra* note 5, at 24.

12. *See id.*; VAN NESS & STRONG, *supra* note 8, at 34–35.

13. VAN NESS & STRONG, *supra* note 8, at 23.

14. Jim Dignan, *Restorative Justice and the Law: The Case for an Integrated, Systemic Approach*, in RESTORATIVE JUSTICE AND THE LAW 168 (Lode Walgrave ed., 2002); Paul McCold, *Restorative Justice: Variations on a Theme*, in RESTORATIVE JUSTICE FOR JUVENILES: POTENTIALITIES, RISKS AND PROBLEMS 19 (Lode Walgrave ed., 1998).

contested” concept, subject to debate and differences in approaches.¹⁵ As a consequence, seeking consensus on one single definition seems to be an impossible mission.

The discussion of how to understand restorative justice is dominated by the opposition between a process-based versus an outcome-based view. A majority of restorative justice advocates would prefer the process-based approach, as reflected in McCold’s statement: “The essence of restorative justice is not the end, but the means by which resolution is achieved.”¹⁶ The hallmark of restorative justice is indeed the attempt to bring victims and offenders together in an inclusive encounter aiming at a consensual resolution of the prejudices caused by a crime. However, restorative justice cannot be reduced to such process, for two reasons.

First, no process can be defined or evaluated without referring to its purpose. A deliberative process is valued in restorative justice, not because of the deliberation on its own, but because it facilitates mutual understanding and expressions of remorse, compassion, apology, and forgiveness, which may lead to reparative agreements and feelings of respect, peace, and satisfaction.¹⁷ These feelings also are outcomes. Processes that do not seek to contribute to the reparation of the crime-caused harm are not part of restorative justice. Conversely, a sanction imposed in order to partially repair a victim’s harm and feelings of safety in the community may in some circumstances be considered in a restorative justice perspective.

Second, restricting restorative justice to voluntary deliberations would drastically limit its scope and doom it to stay at the margins of the system.¹⁸ The mainstream response to crime would remain coercive and punitive. The criminal justice system would act as the gatekeeper and probably be very selective in its referrals to deliberative restorative processes.

15. Gerry Johnstone & Daniel Van Ness, *The Meaning of Restorative Justice*, in *HANDBOOK OF RESTORATIVE JUSTICE* (Gerry Johnstone & Daniel Van Ness eds., 2007).

16. Paul McCold, *Paradigm Muddle: The Threat to Restorative Justice Posed by Its Merger with Community Justice*, 7 *CONTEMP. JUST. REV.* 13, 15 (2004).

17. See Inge Vanfraechem, *Community, Society and State in Restorative Justice: An Exploration*, in *IMAGES OF RESTORATIVE JUSTICE THEORY* 73, 76 (Robert Mackay et al. eds., 2007).

18. Dignan, *supra* note 14, at 172.

Restoration must be seen as the goal, and voluntary processes as tools, though vital ones. The focus on the outcome allows for a maximalist version of restorative justice.¹⁹ A maximalist version of restorative justice includes all actions to achieve partial repair. Deliberative processes hold the highest potential for achieving restoration, but if voluntary agreements cannot be reached, a maximalist approach on restorative justice must be taken.²⁰ It may include coercive obligations in pursuit of partial reparation, such as formal restitution or compensation, fines or working for the benefit of a victims' fund, and community service.²¹ Generally, they are imposed by a justice system that should also be oriented primarily towards imposing reparative sanctions instead of punishments.²² Of course, such sanctions do not achieve the full potential of the restorative paradigm, but restorative justice is not a simple black-and-white option. It can be achieved to different degrees.²³ And achieving partial reparation is better than achieving no reparation at all.

In this Article, I consider restorative justice as “an option for doing justice after the occurrence of an offence that is primarily oriented towards repairing the individual, relational and social harm caused by that offence.”²⁴ Restorative justice is not a limited set of actions or programs but an option that may inspire to different degrees a variety of initiatives, programs and systems. “Restorative justice is a compass, not a map.”²⁵ The key element is the goal of repairing the crime-caused harm. All options and actions that aim at correcting such harm can be included in the restorative justice concept. All options and actions that do not address these harms are not considered restorative justice, though they may be very respectable and worthwhile.

19. WALGRAVE, *supra* note 2, at 23.

20. *Id.*

21. *Id.* at 107–08.

22. *Id.* at 107.

23. Van Ness, *supra* note 5, at 1, 6–13; ZEHR, *supra* note 1, at 54–57.

24. WALGRAVE, *supra* note 2, at 21.

25. ZEHR, *supra* note 1, at 10.

EMPIRICAL RESEARCH ON RESTORATIVE JUSTICE PRACTICE

Regular consultation of several websites on restorative justice and restorative practices reveals an almost daily increase in empirical assessments.²⁶ The scope is very diverse. They range from small local tests to broad national projects or international comparative surveys; some just describe a restorative justice program, others present a quasi-experimental design to find out the impact of restorative justice practices; some address restorative justice as a whole, others focus on certain aspects, such as victim participation, community involvement, or offender rehabilitation.²⁷ It is not easy to draw a straight line through the available package. Today's conclusions are likely to be out of date tomorrow. The following brief survey is based mainly on several high-quality surveys and meta-analyses, with a particular focus on victim-offender mediation and conferencing.²⁸ Most mention serious methodological shortcomings and lack of theoretical depth. McCold concludes that "research on restorative justice practice today is a mile wide, but only an inch deep."²⁹

METHODOLOGICAL PROBLEMS

Research evaluating human interventions is always precarious. This is true not only of research on restorative justice practices but

26. See, e.g., PFI Ctr. for Justice & Reconciliation, *Evaluation Reports*, RESTORATIVE JUST. ONLINE, <http://www.restorativejustice.org/programme-place/07evaluation/reports> (last visited Apr. 16, 2011); *Research Annotated Bibliography*, CENTER FOR RESTORATIVE JUST. & PEACEMAKING, http://www.cehd.umn.edu/ssw/rjp/Resources/Research_Annotated_Bibliography/AB_Author.asp (last visited Apr. 16, 2011); *Documents Index*, CENTER FOR PEACEMAKING & CONFLICT STUD., <http://peace.fresno.edu/docs/> (last modified May 10, 2010).

27. *Id.*

28. JEFF LATIMER, CRAIG DOWDEN & DANIELLE MUISE, DEP'T OF JUSTICE CAN., *THE EFFECTIVENESS OF RESTORATIVE JUSTICE PRACTICES: A META ANALYSIS* (2001); LAWRENCE W. SHERMAN & HEATHER STRANG, *RESTORATIVE JUSTICE: THE EVIDENCE* (2007); James Bonta et al., *Restorative Justice and Recidivism: Promises Made, Promises Kept?*, in *HANDBOOK OF RESTORATIVE JUSTICE*, *supra* note 5, at 108; Anne Lemonne & Ida Hyde, *The Evaluation of Restorative Justice: Lessons to Be Learned from a Data Collection of Evaluative Programmes in Europe*, in *RESTORATIVE JUSTICE REALITIES: EMPIRICAL RESEARCH IN A EUROPEAN CONTEXT*, *supra* note 7, at 11; Paul McCold, *A Survey of Assessment Research on Mediation and Conferencing*, in *REPOSITIONING RESTORATIVE JUSTICE* 67 (Lode Walgrave ed., 2003).

29. McCold, *supra* note 28, at 106.

also for evaluations of traditional punishment, prevention, and treatment programs. The meta-analyses in the “what works” research tradition, for example, list a number of methodological shortcomings in many evaluations,³⁰ including unclear indication of measurable program objectives, invalid instruments, absence of or inadequate control groups, doubtful external validity, problematic measurement of reoffending, overoptimistic interpretations by committed believers, and lack of attention to undesirable side effects. In general, overconfidence in “evidence-based” work may be naïve.³¹ That also applies to evaluation of restorative justice programs. But evaluation of restorative justice is also confronted with a few particular challenges.³²

Feasibility

As most typical restorative justice practices depend on voluntary participation of the stakeholders, the first question is whether such practices can be achieved. The feasibility question is irrelevant in the imposition of traditional criminal justice interventions. The question is seldom asked in treatment programs, where those who refuse treatment are simply not counted in. Moreover, the feasibility question is less complicated in traditional intervention programs, because only the offender is concerned; in restorative justice processes one of the most difficult issues is bringing together two parties—victims and offenders—who are assumed to have opposing views and interests.

30. D.A. ANDREWS & JAMES BONTA, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* 91–98 (2003).

31. See generally Adam Crawford, *The Governance of Urban Safety and the Politics of Insecurity*, in *URBAN SAFETY: PROBLEMS, GOVERNANCE AND STRATEGIES* 65 (Kees van der Vijver & Jan Terpstra eds., 2004); Lode Walgrave, *Criminology as I See It Ideally*, Address Before the European Society of Criminology European Criminology Award, Edinburgh (Sept. 5, 2008), in *CRIMINOLOGY IN EUROPE* (Eur. Soc’y of Criminology, Amsterdam, Neth.), Nov. 2008, at 3.

32. See Gordon Bazemore & Lori Elis, *Evaluation of Restorative Justice*, in *HANDBOOK OF RESTORATIVE JUSTICE*, *supra* note 15, at 395; Hennessey Hayes, *Reoffending and Restorative Justice*, in *HANDBOOK OF RESTORATIVE JUSTICE*, *supra* note 15, at 428–30; McCold, *supra* note 28, at 74–75.

Quality

As with prevention and treatment programs, the quality of restorative justice processes varies greatly.³³ There are brilliant performers and awful bunglers. Several methodological options have different potential for distinct kinds of cases. Various models—direct and shuttle mediation;³⁴ Family Group Conferencing according to the New Zealand model;³⁵ the Wagga-Wagga-model or the Real Justice model of conferencing;³⁶ conferences led by police or by civil facilitators³⁷—are methodologically dissimilar, each with particular potential and risks. Probably a large part of the observed differences in results is due to such variations. So far, these variations have been explored insufficiently. Therefore, evaluations cannot just address “the” restorative justice practice but must indicate precisely which type of process is explored; they must also include accurate process descriptions and evaluations based on clear conceptions of what a good restorative justice process should be.³⁸

Criteria for Evaluation

One challenge is defining evaluation criteria. Traditional criminal justice or treatment interventions aim at the offender. Hence, their standard for success is easy to define, even if not always easy to measure accurately: reoffending must decrease.³⁹ But as restorative

33. See generally sources cited *supra* note 28 for variety of existing studies.

34. See *Shuttle Mediation*, SAFEGUARDING COMMUNITIES—RESOLVING CONFLICT, http://www.scmc.sacro.org.uk/SCMC_12_ShuttleMediation.pdf (last visited Apr. 16, 2011) (describing shuttle mediation).

35. See *infra* note 75.

36. See David B. Moore & Terry A. O’Connell, *Family Conferencing in Wagga Wagga: A Communitarian Model of Justice*, in *FAMILY CONFERENCING AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM?* 44 (Christine Wundersitz & Joy Alder eds., 1994), available at <http://www.aic.gov.au/documents/9/2/F/%7B92F860FB-8CF5-4D3B-81F9-2B4C9046767D%7Dch3.pdf>.

37. *Police as Restorative Justice Facilitators*, RESTORATIVE JUST. ONLINE, <http://www.restorativejustice.org/police/2police-as-restorative-justice-facilitators> (last visited Apr. 16, 2011) (listing studies of conferences led by police facilitators).

38. Nathan Harris, *Evaluating the Practice of Restorative Justice: The Case of Family Group Conferencing*, in *REPOSITIONING RESTORATIVE JUSTICE*, *supra* note 28, at 121, 129–31.

39. See, e.g., *WHAT WORKS: REDUCING REOFFENDING: GUIDELINES FROM RESEARCH AND PRACTICE* (James McGuire ed., 1995) (providing studies and results that show what works

justice does not aim primarily at the offender but instead at the harm to be repaired, the first standard of success cannot target the offender and his reoffending; it must indicate the degree of reparation of harm, suffering, and social unrest. Material compensation is only a part. How do you measure psychological, relational, or social restoration? Some authors have suggested indicators such as decreasing Post Traumatic Stress Syndrome in victims to show the degree to which victims have recovered from their victimization.⁴⁰

Satisfaction of the participants is one of the most researched variables in assessments of restorative justice.⁴¹ While this may seem too superficial and general a concept, it is an important one.⁴² Because restorative processes put the decision of how to repair the harm in the hands of the direct stakeholders, it is logical to look for subjective criteria that express their feelings. Satisfaction means that the participants accept the conference or mediation and its outcome. It does not mean that they are completely happy or enthusiastic. Satisfaction is to be understood in relation to what they expected.⁴³ Sometimes, satisfaction is a kind of relief, because the event went better than they feared. Moreover, satisfaction is a container concept that covers a broad range of feelings and subjective evaluations—whether the victimization is taken seriously, the victims are listened to respectfully, their own opinion is taken into account, “procedural justice”⁴⁴ occurs, and the offender has apologized sincerely.⁴⁵ Many projects investigate such elements separately.

Apart from satisfaction and its components as indications of subjective contentment, external checks are needed. The juridical quality of the process is investigated insufficiently; more research is needed on due process rights and the proportionality of the reparative

for reducing reoffending).

40. SHERMAN & STRANG, *supra* note 28, at 88.

41. *See id.* at 25.

42. Daniel Van Ness & Mara Schiff, *Satisfaction Guaranteed? The Meaning of Satisfaction in Restorative Justice*, in RESTORATIVE COMMUNITY JUSTICE, REPAIRING HARM AND TRANSFORMING COMMUNITIES 47, 49–51 (Gordon Bazemore & Mara Schiff eds., 2001).

43. *Id.*

44. TOM TYLER, WHY PEOPLE OBEY THE LAW 6 (2006).

45. Mara Schiff, *Satisfying the Needs and Interests of Stakeholders*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 15, at 228, 233.

effort in relation to the seriousness of harm.⁴⁶ Also reoffending is an external criterion. Influencing the offender is a derivative effect of the primary objective to repair, but it must be researched. If reoffending increased, the additional harm to peace and safety in the community would be contrary to the pursued restoration. Moreover, increased reoffending after restorative processes would be detrimental to the public and political acceptance of restorative justice.

Phases and Levels

Restorative justice ambitions (or pretensions) are broad and numerous. Bazemore and Schiff distinguish immediate outcomes, intermediate outcomes, and long-term outcomes.⁴⁷ In fact, four evaluation phases can be distinguished: (1) the quality of the process itself (respect for rights, mutual respect of stakeholders, empowerment, participation); (2) the feelings immediately after the process (procedural justice, satisfaction, mutual image of victims and offenders); (3) the execution of the reparative plan (carried out correctly or not, feeling of “being restored” in the victim, self image and prospects of the offender); and (4) on longer term (reoffending, experiences in victims).

Not all criteria are equally important. Distinctions exist between indispensable preconditions (respect for human rights), hard core reparation (assessable reparation or compensation of concrete damage and suffering), wider restorative effects (subjective feelings of peace, reintegration of victim and offender, feelings of safety in local community) and impact on wider community and institutional level (growing confidence in restorative justice dealing with offending, and the extension of restorative model of conflict resolution towards other fields of social life).

46. Lode Walgrave, *Restorative Justice and the Law: Socio-Ethical and Juridical Foundations for a Systematic Approach*, in *RESTORATIVE JUSTICE AND THE LAW*, *supra* note 14, at 191, 216.

47. GORDON BAZEMORE & MARA SCHIFF, *JUVENILE JUSTICE REFORM AND RESTORATIVE JUSTICE: BUILDING THEORY AND POLICY FROM PRACTICE* 45–46 (2005).

Comparison

All success is relative. The value of restorative justice processes can be gauged only in comparison with other models of intervention. Criminological research clearly shows that routine application of punishment does not present good effects. Meta analyses of prevention and treatment programs show that many do not work but that certain projects, under some conditions, may have some positive impact on some potential offenders. The question now is whether restorative justice can offer other and more positive results. The composition of adequate control groups is necessary. That is a problem in all evaluative research, but restorative justice projects face an additional problem.⁴⁸ As typical restorative justice interventions rely on voluntary participation, the group is hard to compare with a control group of victims and offenders involved in a traditional penal procedure, where voluntariness is far away. Moreover, the traditional system is currently the gatekeeper for referral to restorative justice projects, based on uninformed intuitions.⁴⁹ The referrals are mostly a selection of benign cases which are easier to resolve.⁵⁰ Some surveys of evaluation projects based on random assignment deliver more accurate data,⁵¹ but they cannot resolve the problem completely.⁵²

These problems and the lack of theoretical framework make it difficult to set up methodologically sound research that focuses accurately on the crucial elements or dynamics that really are key to being restorative and that may make a difference in attaining the different objectives at different levels. The question whether “restorative justice works or not” must be specified much more, because it cannot be answered satisfactorily in its bluntness. Yet, despite these challenges, some provisional conclusions can be derived from the available research.

48. See JAMES DIGNAN, UNDERSTANDING VICTIMS AND RESTORATIVE JUSTICE 138 (2005).

49. See VAN NESS & STRONG, *supra* note 8, at 153–57; ZEHR, *supra* note 1, at 46–47.

50. Dieter Dölling & Arthur Hartmann, *Reoffending After Victim-Offender Mediation in Juvenile Court Proceedings*, in RESTORATIVE JUSTICE IN CONTEXT: INTERNATIONAL PRACTICE AND DIRECTIONS, *supra* note 4, at 208, 212–13.

51. See, e.g., LATIMER, DOWDEN & MUISE, *supra* note 28; SHERMAN & STRANG, *supra* note 28.

52. WALGRAVE, *supra* note 2.

FEASIBILITY OF RESTORATIVE JUSTICE PROCESSES

The first empirical question is whether restorative justice processes are feasible. Skeptics do not believe that it would be feasible to set up voluntary meetings between victim and offender as the mainstream. They expect that it will be possible only for a minority of cases, addressing mostly benign offenses, often involving acquaintances. That can be checked.

Several levels of selection exist. Not all offences registered by the criminal justice system are referred to restorative processes.⁵³ A system selection is caused by the referring agencies such as police, public prosecutors' offices, and courts.⁵⁴ They screen out cases that they consider—rightly or not—inappropriate for restorative justice. In the majority of programs, for example, serious cases are not referred, because it is believed that those who commit severe crime are not approachable with such programs and that “no risk” can be taken.⁵⁵

An agency selection may occur if the program uses certain criteria for acceptance, as most agencies do. Their offer to set up meetings is limited to, for example, minors or less serious offenses. Moreover, the agency may interrupt the preparatory phase, because the facilitator concludes that his offer or capacities do not match the case.

Participation in restorative justice processes is—at least in principle—voluntary. Of course, voluntariness is not a clear cut criterion. Willingness to join in the mediation or conference is influenced positively or negatively by social pressure, threat of being referred to court, and the quality of the invitation among other elements.⁵⁶ Yet, several reasons may bring invited stakeholders to decline participation. Stakeholder selection happens when the offender refuses participation because he does not see any benefits in it, or when the victim rejects being involved for practical, emotional, or punitive reasons.

53. See Dignan, *supra* note 14, at 173.

54. See VAN NESS & STRONG, *supra* note 8, at 153–57; ZEHR, *supra* note 1, at 46–47.

55. See ZEHR, *supra* note 1.

56. Carolyn Boyes-Watson, *Reflections on the Purist and the Maximalist Models of Restorative Justice*, 3 CONTEMP. JUST. REV. 441, 443–45 (2000).

Moreover, not all encounters lead to successful conclusions and not all agreements are carried out well. McCold found that “[a]pproximately half of the cases referred to programmes never reach a hearing.”⁵⁷ The rate varies from 10 percent and more than 90 percent, and depends on many variables, such as type of program, type of crime, target group, the previous relation between the victim and the offender, and the social context of the program.⁵⁸ If the meeting takes place, the agreement rate varies from 72 and 100 percent, and the rate of compliance with the agreement varies from 38 and 96 percent.⁵⁹

For both victims and offenders participation depends on the perceived costs and benefits of participating.⁶⁰ Sometimes the impact of the offense was too minor and the expected benefits too few.⁶¹ Kirkwood found significant differences in participation and agreement rates between the several agencies that organized mediation processes—in mostly minor offences.⁶² The findings suggest that the intrinsic quality of the restorative justice process is crucial. This factor should be included more in all evaluations.

All of these selection biases and differences do matter in evaluation research. To check the feasibility of restorative processes and to estimate the external validity of the empirical investigation, various steps in the selection must be charted. The differences between the groups at each selection stage reduce the scope of the research results. They also deeply affect possible comparisons of restorative justice results with those of traditional criminal justice interventions, where such selections do not happen.

57. McCold, *supra* note 28, at 89.

58. *Id.* at 84.

59. *Id.* at 90.

60. Steve Kirkwood, *Restorative Justice Cases in Scotland: Factors Related to Participation, the Restorative Process, Agreement Rates and Forms of Reparation*, 7 *EUR. J. CRIMINOLOGY* 107, 109, 116 (2010).

61. *Id.*

62. *Id.* at 118–19.

VICTIMS

Consistent with the paradigm shift, the first concern is the possible impact of restorative practices on victims. At first sight, it seems evident that restorative justice responses meet victims' needs better than traditional criminal justice does. Yet, the position of the victims in restorative justice practice is less clear than it may seem.⁶³

While victims' movements comprise some of the most important precursors of restorative justice, some victim advocates warn of possible negative side effects.⁶⁴ So far, the large majority of restorative justice processes are implemented within or mandated by the justice system, which is basically offender oriented.⁶⁵ Hence, there is a continuous, often inarticulate, pressure to focus on the offender. Genuine respect for the victim's interests and needs may become subordinate.⁶⁶ The victim's story is then used as a "pedagogical means" to motivate the offender for treatment, rather than as a decisive indication to determine appropriate reparative actions.⁶⁷ Or the victims may be dragged into a process that impedes them from fully expressing their anger about what happened.

The opportunity offered to victims to be heard and to play a crucial role in the aftermath of the offense may turn into a moral obligation or even a duty. It may become too heavy a burden. The traditional judicial procedures position the victim as the one to whom something is due. The victim is shielded from direct responsibilities. Restorative processes seem to take away this relatively "comfortable" position. Not all victims can cope with that. Risks exist for secondary victimization because the process may cause additional trauma and

63. Lode Walgrave, *Victims in Restorative Justice*, in VICTIMOLOGY, VICTIM ASSISTANCE AND CRIMINAL JUSTICE: PERSPECTIVES SHARED BY INTERNATIONAL EXPERTS AT THE INTER-UNIVERSITY CENTRE OF DUBROVNIK 79 (Otmar Hagemann, Peter Schäfer & Stephanie Schmidt eds., 2009).

64. Antony Pemberton, Frans Winkel & Marc Groenhuysen, *Taking Victims Seriously in Restorative Justice*, 3 INT'L PERSP. IN VICTIMOLOGY 1, 4-14 (2007).

65. Marnie E. Rice, *Violent Offender Research and Implications for the Criminal Justice System*, 52 AM. PSYCHOLOGIST 414 (1997).

66. ANNALISE ACORN, COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE 150 (2004).

67. See DIGNAN, *supra* note 48, at 62-63; Anthony Bottoms, *Some Sociological Reflections on Restorative Justice*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE 79, 103 (Andrew Von Hirsch et al. eds., 2003).

reiterate the power inequalities that existed already between the victim and the offender before the crime occurred.⁶⁸

Surveys indicate that between 20 and 80 percent of victims are willing to participate in mediation or conferencing.⁶⁹ Most programs report over 50 percent willingness. Participation depends partly on the nature and the seriousness of the offence, but surviving family members may also participate after murders.⁷⁰ Victims' participation rates also depend on offender characteristics.⁷¹ They are higher with juvenile offenders than with adults, lower if offenders belong to an ethnic minority, and higher in case of first offenders.

Of crucial importance is the process by which the victims are invited. Kirkwood, for example found that victims were more inclined to join in if they were contacted after the offender, suggesting that their decision is more positive if they know already that the offender is willing to take responsibility and to make amends.⁷²

Benefits victims see in a restorative justice process are grounded mainly in the opportunity for communication: they want to express their feelings to the offender, hope to receive an explanation, and hope to have an impact on what should be done. Many victims also are motivated by a sense of public responsibility and think that the process may contribute to more understanding in the offender and less reoffending. Only a minority is especially interested in material reparation or compensation.⁷³ Reasons mentioned for non-participation are fear of being confronted with the offender (and his family), apprehension about losing control over one's own anger, and unwillingness to spend more time on the case.⁷⁴ Principled rejection

68. Carol LaPrairie, *Altering Course: New Directions in Criminal Justice and Corrections: Sentencing Circles and Family Group Conferences*, 26 AUSTRAL. & N.Z. J. CRIMINOLOGY 78 (1995).

69. See, e.g., DIGNAN, *supra* note 48, at 144, 149 (citing participation rates of 15 and 80 percent).

70. MARK S. UMBREIT ET AL., *FACING THE VIOLENCE: THE PATH OF RESTORATIVE JUSTICE AND DIALOGUE* 94–95 (2003).

71. See McCold, *supra* note 28, at 87–88.

72. Kirkwood, *supra* note 60, at 117.

73. HEATHER STRANG, *REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE* 92 (2002).

74. SHERMAN & STRANG, *supra* note 28, at 62; see also BAZEMORE & SCHIFF, *supra* note 47, at 197.

of the restorative approach is rather seldom found. Maxwell and Morris found that only four percent of victims explicitly wanted a punitive judicial procedure.⁷⁵ In 45 victims of serious youth crime, a Belgian pilot project found only one advanced reasons of principle for refusing to attend the conference.⁷⁶

Satisfaction is one of the most general and stable findings. In general, victims' satisfaction rates vary between 75 and 98 percent.⁷⁷ Victims who participate in mediation or conferencing are significantly more satisfied than those who go through a traditional judicial procedure.⁷⁸ They perceive a high degree of procedural justice, appreciate the communicative value of the encounters, and find the outcomes more just than traditional judicial sanctions.⁷⁹ Victims also suffer less post-traumatic stress after a conference, feel less fear and anger, and more sympathy for the offender.⁸⁰ The majority of victims of juvenile crime believe that all victims should be offered an opportunity to attend a conference.⁸¹

Currently, however, these findings remain very general and hide more nuanced and more complicated outcomes. Not all victims are equally satisfied. For example, victims involved in processes after serious crimes seem to report less satisfaction than other victims.⁸² A small percentage is even more distressed after the process than before.⁸³ Still, this proportion is lower than among those who go to

75. Gabrielle Maxwell & Allison Morris, *Research on Family Group Conferences with Young Offenders in New Zealand*, in *FAMILY GROUP CONFERENCES: PERSPECTIVES ON POLICY AND PRACTICE* 88 (Jim Hudson et al. eds., 1996).

76. Inge Vanfraechem, Hergo in Vlaanderen (FGC in Flanders) (2003) (unpublished research report) (on file with Leuven, Onderzoeksgroep Jeugdcriminologie K.U.Leuven).

77. IVO AERTSEN ET AL., *REBUILDING COMMUNITY CONNECTIONS—MEDIATION AND RESTORATIVE JUSTICE IN EUROPE* (2004).

78. DIGNAN, *supra* note 48, at 137–39, 145; SHERMAN & STRANG, *supra* note 28, at 62; STRANG, *supra* note 73, at 133.

79. SHERMAN & STRANG, *supra* note 28, at 62–64.

80. DIGNAN, *supra* note 48, at 141–42; Heather Strang et al., *Victim Evaluations of Face-To-Face Restorative Justice Conferences: A Quasi-Experimental Analysis*, 62 *J. SOC. ISSUES* 281, 292–301 (2006).

81. See Inge Vanfraechem & Lode Walgrave, *Restorative Conferencing in Belgium: Can It Decrease the Confinement of Young Offenders?*, 66 *CORRECTIONS TODAY* 72 (2004).

82. Kathleen Daly, *A Tale of Two Studies: Restorative Justice from a Victim's Perspective*, in *NEW DIRECTIONS IN RESTORATIVE JUSTICE: ISSUES, PRACTICE, EVALUATION* 153, 159 (Elizabeth Elliott & Robert Gordon eds., 2005).

83. GABRIELLE MAXWELL ET AL., *ACHIEVING EFFECTIVE OUTCOMES IN YOUTH JUSTICE*

court.⁸⁴ Most of the dissatisfied victims had been involved in poorly monitored conferences.⁸⁵ Hence, deeper research must explore the complicated balance of possible benefits and risks for victims in restorative justice processes. It should also be influenced by social, psychological, and clinical insights into victimization and coping processes.⁸⁶ Such research would not only reveal the positive side of restorative justice for victims but also point to a number of risks of involving certain victims of certain offences too enthusiastically in restorative justice processes.

Our conclusion must remain provisional and cautious. The high satisfaction scores may hide risks for some victims. Moreover, we must remember selection biases. The scores are gathered from a selected group, i.e. those who were prepared to participate. One can expect that satisfaction would be lower among those not participating. In addition, victims in restorative justice processes meet with an offender who has already confessed.⁸⁷ That is certainly not always the case in court sessions. The confession of the offender is crucially important for the victim's feelings.⁸⁸ Therefore it appears that only those victims who are willing to participate have truly good chances of not being disappointed. There are also indications to suggest that many of those who did not participate would have been more satisfied if they had.⁸⁹

OFFENDERS

Among offenders, the willingness to participate in a restorative process is also high. For example, Strang et al. list participation rates between 58 and 100 percent in their survey of several conferencing

158 (2004), available at <http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/research/youth-justice>.

84. DIGNAN, *supra* note 48, at 145.

85. STRANG, *supra* note 73, at 151.

86. Pemberton, Winkel & Groenhuisen, *supra* note 64.

87. Daly, *supra* note 82, at 167.

88. *Id.*

89. In the Belgian project, the outcomes of the conference were presented to eleven of the non-participating victims. Nine of them called the outcome "just" or "very just," and seven of them found that "maybe they should have participated." Vanfraechem, *supra* note 76.

applications.⁹⁰ Here as well, the quality of the preparatory process is important, and the offender will also weigh the risks included against the possible benefits for him/her in participating.⁹¹ Probably many of them simply hope to come out better that way than if they went to court. That is not necessarily a problem. As long as it does not lead to secondary victimisation for the victims, one can realistically expect and accept that the offender begins a meeting with some calculation. We would all do the same. We shall see that the process during the meeting itself makes most offenders understand the harm they caused and become increasingly emotionally involved and less rationally calculating.⁹²

Satisfaction rates among offenders are very high. Bonta et al. mention an average expression of satisfaction of 87.7 percent.⁹³ McCold found more feelings of fairness and satisfaction in the programs characterized by the highest degree of stakeholder participation.⁹⁴ He also found that the correlation between victim satisfaction and offender satisfaction was high, which seemed to achieve the pursued win-win situation.⁹⁵

REOFFENDING

As reoffending is a peculiar subject of great public interest, it is a matter for a separate sub section. “Evaluating a new paradigm by the criteria of the old paradigms is inappropriate.”⁹⁶ Restorative interventions are not a new treatment program. They express another paradigm, in which repairing the harm is the primary objective. While reoffending is not the first concern of restorative justice, the bottom line is, as argued before, that restorative justice interventions should not provoke more recidivism than traditional interventions.

Despite the methodological shortcomings mentioned, some general conclusions can be drawn. Clearly, the available results do

90. Strang et al., *supra* note 80, at 291.

91. Kirkwood, *supra* note 60, at 116.

92. *See infra* notes 114–23 and accompanying text.

93. Bonta et al., *supra* note 28, at 114.

94. McCold, *supra* note 28, at 85.

95. *Id.* at 94–95.

96. *Id.* at 95.

not lead to triumphant conclusions regarding reoffending. Sherman and Strang, for example, conclude their survey of randomized controlled trials that the (mostly police-led) conferences significantly reduced repeat offending among violent offenders under thirty years of age in Canberra but produced little or no difference among violent males under eighteen years in Northumbria.⁹⁷ A significant reduction was found among male property offenders under eighteen in Northumbria, but little or no difference among property offenders under eighteen in Canberra.⁹⁸

A few restorative justice schemes seem to increase reoffending compared to traditional criminal justice sentencing.⁹⁹ It is not always clear why, but some hypotheses can be advanced. Sherman and Strang, for example, noted more re-arrests among young Aboriginals for property offenses in Canberra and refer to comparable (but statistically non-significant) observations among young Hispanics in Bethlehem, Pennsylvania.¹⁰⁰ My hypothesis is that the increases were a direct consequence of the police facilitation of the conference. If ethnic minorities have poor relations with police, which is often the case, police-led conferences may provoke more defiance than compliance.

Bonta et al. used methodological requirements to select 39 studies of restorative justice programs, broader than just conferencing, for meta-analysis.¹⁰¹ The overall effect was about a seven percent lower rate of repeat offending, compared with traditional criminal justice handling of cases.¹⁰² There was little variation in the mean effect across samples (adults/juveniles) and types of intervention.¹⁰³ Studies published after 1996 reported greater effects than those published earlier, and Bonta et al. attributed this to the higher intrinsic quality of the projects.¹⁰⁴ The schemes yielded little effect if they were

97. SHERMAN & STRANG, *supra* note 28, at 22.

98. *Id.*

99. See LATIMER, DOWDEN & MUISE, *supra* note 28, at 14–16.

100. SHERMAN & STRANG, *supra* note 28, at 22.

101. Bonta et al., *supra* note 28, at 112–13.

102. *Id.* at 114.

103. *Id.* at 115.

104. *Id.*

contextualized within criminal justice sanctions.¹⁰⁵ Those outside the criminal sanction system produced up to 10 percent reduction.¹⁰⁶ Better results were achieved in programs targeting mostly violent offenders,¹⁰⁷ which is in line with other outcomes reported for violent crimes¹⁰⁸ and serious crimes.¹⁰⁹ This is paradoxical when one observes that conferences are applied mostly to divert rather benign youth offences from court. Better effects are also observed with low-risk offenders (violent offenders do not necessarily have a higher risk of reoffending).

Retrospective studies confirm that the best predictor of reoffending is not whether there is a conference but rather prior offending and life experiences and the social prospects of the young offender.¹¹⁰ One can indeed imagine that a single intervention may have more influence on a young person who still has intensive bonds to social life than one who has drifted far away from social norms and values. It is probably in the same sense that we must understand why more young offenders desist after conferencing than older ones.¹¹¹

Many of the above-mentioned studies and surveys compare restorative justice practices as a whole with current criminal justice. They do not differentiate sufficiently among the various modalities and versions, while there is clear evidence that the quality of the conference matters.¹¹² “Good outcomes depend on good practice,”

105. *Id.*

106. *Id.*

107. *Id.* at 116.

108. JOANNA SHAPLAND ET AL., DOES RESTORATIVE JUSTICE AFFECT RECONVICTION? THE FOURTH REPORT FROM THE EVALUATION OF THREE SCHEMES 41 (2008); LAWRENCE W. SHERMAN, HEATHER STRANG & DANIEL J. WOODS, CTR. FOR RESTORATIVE JUSTICE, AUSTL. NAT'L UNIV., RECIDIVISM PATTERN IN THE CANBERRA REINTEGRATIVE SHAMING EXPERIMENTS (RISE) 3 (2000); Hennessey Hayes, *Assessing Reoffending in Restorative Justice Conferences*, 38 AUSTL. & N.Z. J. CRIMINOLOGY 77, 92 (2004).

109. Lawrence Sherman, *Reason for Emotion: Reinventing Justice with Theories, Innovations, and Research*, 41 CRIMINOLOGY 1, 19–20 (2003).

110. MAXWELL ET AL., *supra* note 83, at 199–215; Hennessey Hayes & Kathleen Daly, *Conferencing and Re-offending in Queensland*, 37 AUSTL. & N.Z. J. CRIMINOLOGY 167, 177–78 (2004).

111. *Id.* at 179.

112. Hennessey Hayes & Kathleen Daly, *Youth Justice Conferencing and Reoffending*, 20 JUST. Q. 725, 747 (2003); MAXWELL ET AL., *supra* note 83, at 214, 215.

Maxwell summarizes.¹¹³ Shapland et al. found a significant relation between less reconviction and the adult offenders' appreciation of the conference (the offender realized the harm done, the offender was actively involved in the conference, and the offender felt the conference was useful).¹¹⁴ Less reoffending occurred after family group conferences that were experienced as "fair, forgiving, allowing them to make up for what they have done and not stigmatizing or excluding them."¹¹⁵ When the offender expressed remorse and a consensus was reached, conferences were more effective.¹¹⁶ It is not clear, however, whether remorse is provoked by the quality of the conference or is part of a compliant attitude of the offender which existed prior to the conference. "[W]here offenders have decided to try to stop offending, a conference can increase motivation to desist (because of what victims and offender supporters said) and provide the support offenders may need to help tackle problems relating to their offending."¹¹⁷

An important element is the follow-up after the conference. If the conference is followed by systematic support or treatment for the offender, the risk of recidivism is much lower.¹¹⁸ A well-conducted conference is an excellent opportunity to start such support. Daly found, for example, that sexual offenders were more likely to accept treatment after a conference than when they had been given a punitive sentence.¹¹⁹ Programs that also include social support and assistance with job placement seem to be much more successful than others.¹²⁰ "It may not be the role of restorative justice facilitators to deliver treatment programming; yet it would be useful if they would

113. Gabrielle Maxwell, *The Youth Justice System in New Zealand: Restorative Justice Delivered Through the Family Group Conference*, in RESTORATIVE JUSTICE AND PRACTICES IN NEW ZEALAND: TOWARDS A RESTORATIVE SOCIETY 45, 65 (Gabrielle Maxwell & James H. Liu eds., 2007).

114. SHAPLAND ET AL., *supra* note 108, at 40–41.

115. MAXWELL ET AL., *supra* note 83, at 214.

116. GABRIELLE MAXWELL & ALLISON MORRIS, UNDERSTANDING REOFFENDING (1999); Hayes & Daly, *supra* note 112, at 756.

117. SHAPLAND ET AL., *supra* note 108, at iv.

118. MAXWELL ET AL., *supra* note 83, at 214–15.

119. Kathleen Daly, *Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases*, 46 BRIT. J. CRIMINOLOGY 334, 351 (2005).

120. MORRIS JENKINS & GORDON BAZEMORE, OHIO DEPT OF REHAB. & CORR., STATE OF OHIO CITIZENS CIRCLE FORMATIVE EVALUATION (2006).

recognize the need for treatment and the type of programming that would assist in reducing offender recidivism, and make the appropriate referrals for treatment.”¹²¹ This is not contradictory to restorative justice objectives but may be seen as complementary to them.

All in all, the results regarding reoffending are complicated and sometimes contradictory. Restorative justice interventions are not a magic potion to eliminate recidivism. There is a tendency to reduce reoffending, but a few studies report an increase. One of the main reasons for the confusion may be the lack of differentiation in the independent variables. Restorative practices differ in the technical quality of the facilitating process, in the type and version of practices, in the (absence of) judicial context, in target groups, etc.¹²² All these variants may influence outcomes, including reoffending. For example, one cannot deliver recommendations on restorative justice for ethnic minorities in general on the basis of data from police-led conferences only. Equally, there are reasons to believe that the characteristics of family group conferencing in its original New Zealand context are more appropriate for serious offenses than the police-led diversionary conferencing schemes.

FROM “WHAT WORKS” TO “WHAT HELPS”

Parker concludes that there is no proof that restorative justice reduces recidivism.¹²³ He points to the so-called “what works” research to indicate what should be done. “What works” refers mainly to a series of meta-analyses of earlier evaluations of treatment and prevention programs, aimed at identifying the characteristics that might be effective in reducing recidivism.¹²⁴ Bonta et al., for example, list three principles for effective rehabilitation: (1) the intensity of the intervention must be in proportion to the offender’s risk of reoffending; (2) the programs must target the direct criminogenic needs, rather than indirect non-criminogenic needs; (3)

121. Bonta et al., *supra* note 28, at 117.

122. *See generally* McCold, *supra* note 28.

123. Richard Parker, Restorative Justice: Why Doesn’t It Work in Reducing Recidivism?, Paper presented at the 7th International Conference on Restorative Justice (Feb. 2005).

124. *Id.*

the program must be tailored to the learning style of the individual.¹²⁵ Behavioral-cognitive programs that appeal to the active responsibility of the offender are more effective than other treatment or punitive approaches.¹²⁶ No program is infallible. The reductions in reoffending are always limited and depend on the kind of the intervention, characteristics of the target groups, and many factors beyond the scope of the programs.¹²⁷ In fact, the “what works” tradition should be renamed as “what may work.”

Actually, restorative justice practices do offer an excellent basis for implementation of the principles just listed.¹²⁸ Well-conducted restorative mediations and conferences focus on direct relational needs, go straight to the crime and its consequences, appeal to the offender’s active responsibility, and offer a cognitive reparation experience in a no-nonsense, well-structured way that is perfectly understandable for all participants.¹²⁹

One principle deserves special attention. According to Bonta et al. the intensity of the intervention must be in proportion to the offender’s risk of reoffending.¹³⁰ Most evaluations have measured the reoffending after the restorative meeting, in isolation from the after-care.¹³¹ It may be naïve to expect that a conference of a few hours could on its own change a life course that is sometimes going wrong from birth. But the meeting is an excellent opportunity to begin treatment and other social support afterwards.¹³² A well-conducted restorative encounter offers, more than the traditional judicial procedure, an opportunity for the offender and his family to recognize that things are going wrong and should change.¹³³ They

125. Bonta et al., *supra* note 28, at 111–12.

126. James McGuire & Philip Priestly, *Reviewing ‘What Works:’ Past, Present and Future*, in *WHAT WORKS: REDUCING REOFFENDING* 3, 16 (J. McGuire ed., 1995).

127. Friedrich Lösel, *It’s Never Too Early and Never Too Late: Towards an Integrated Science of Developmental Intervention in Criminology*, *THE CRIMINOLOGIST* (Am. Soc’y of Criminology, Cleveland, OH), Sept./Oct. 2007, at 1, 3–6.

128. Gordon Bazemore & Dee Bell, *What Is the Appropriate Relationship Between Restorative Justice and Treatment?*, in *CRITICAL ISSUES IN RESTORATIVE JUSTICE* 119 (Howard Zehr & Barbara Toews eds., 2004).

129. *Id.* at 123–28.

130. Bonta et al., *supra* note 28, at 111.

131. *See supra* notes 96–122 and accompanying text.

132. *See supra* notes 129–55 and accompanying text.

133. *See* BAZEMORE & SCHIFF, *supra* note 47, at 216.

may be more ready to accept treatment afterwards. For the reoffending issue, the quality of the follow-up is at least as important as the conference itself¹³⁴ and should be included in the evaluation studies.

Despite the partial congruence of restorative justice practices with treatment in the “what works style,” a profound contradiction subsists. Whereas restorative justice views the offender as a moral agent, capable of taking responsible and constructive options if the adequate conditions are fulfilled, the “what works” approach takes such view much less evidently. “What works” sees the offender mainly as a bearer of risks and examines what kind of treatment is to be applied to him. The offender is viewed as the passive object of the intervention, like the machine to be repaired is viewed by the engineer.

In that respect, the Good Lives Model in offender rehabilitation, as presented by Ward and Maruna, is more in line with the restorative justice philosophy.¹³⁵ The Good Lives Model “begins from the assumption that offenders are essentially human beings with similar needs and aspirations to nonoffending members of the community.”¹³⁶ The best possible tool for offender rehabilitation is the offender’s motivation.¹³⁷ “Yet, without their support, no one will ever save rehabilitation.”¹³⁸ The great majority of offenders aspire to leave their socially marginalized lifestyle and to become respected law abiding citizens, but many of them are unable to make that turn on their own.¹³⁹ Without a realistic hope that the aspiration can come true, they will not commit themselves into an enduring effort to surpass the crime-prone situation.¹⁴⁰ Appropriate help can foster such hope. That is why Ward and Maruna recall their approach “what helps” instead of “what works.”¹⁴¹ Restorative justice fits well in this

134. See Bazemore & Bell, *supra* note 128, at 125.

135. TONY WARD & SHADD MARUNA, REHABILITATION: BEYOND THE RISK PARADIGM 107 (2007).

136. *Id.* at 24.

137. *Id.* at 176.

138. *Id.*

139. *Id.* at 15.

140. *Id.* at 126–27.

141. *Id.* at 12.

view.¹⁴² A restorative process is an opportunity for the offender to discover positive ways of being somebody. Being offered the possibility to make up for the harm caused and to feel respect for that is a crucial element for changing self-image and public image in a positive way.¹⁴³ It may open the window on a more socially integrated future, and thus be a major motivation in the offender's quest for rehabilitation.

Still, having an impact on the offender is not the primary aim of restorative justice programs, though it can be a part of the "balanced" reparative goal.¹⁴⁴ Even if research on restorative justice does not unambiguously demonstrate that it always reduces reoffending considerably,¹⁴⁵ the overall results are encouraging. The participation rate is higher than skeptics would expect; victims and offenders report that they are better off after such a process; and there is evidence that recidivism is not worse.¹⁴⁶ And that is what matters in the coherent restorative justice approach. How can these results be explained? The next section examines the possible theoretical understandings of a restorative justice process.

THEORETICAL APPROACHES TO RESTORATIVE PROCESSES

At first sight, a constructive meeting between a victim and an offender is not evident. Victims and offenders seem by definition to be opponents. The current hardening of social life probably does not make things easier in that respect.

Yet, restorative justice philosophy rests on a belief that, despite their contrasting roles and initially contradictory views of the incident, victims and offenders have reasons to be motivated to try to find a constructive solution. And it happens, indeed. If the

142. John Blad, *Criminal Justice Without Threats*, in SECURITY, NODAL GOVERNANCE AND JUSTICE UNDER THE RULE OF LAW (2010).

143. Gordon Bazemore & Shadd Maruna, *Restorative Justice in the Reentry Context: Building New Theory and Expanding the Evidence Base*, 4 VICTIMS & OFFENDERS 375, 379 (2009).

144. Bazemore & Bell, *supra* note 128, at 119, 120–21; Gordon Bazemore & Sandra O'Brien, *The Quest for a Restorative Model of Rehabilitation: Theory-for-Practice and Practice-for-Theory*, in RESTORATIVE JUSTICE AND THE LAW, *supra* note 14, at 31, 31–32.

145. *See supra* notes 96–122 and accompanying text.

146. *See supra* notes 77–89, 96–122 and accompanying text.

appropriate conditions are shaped, both victims and offenders are brought to understand that they share interest in an authentic dialogue, in view of a constructive settlement and the social peace it facilitates. How can that be explained? It brought me to advance the paradoxical concept of “common self-interest.”¹⁴⁷

THEORETICAL MODELS

So far, most research on restorative justice has tried to find out *whether* such processes work, rather than *why* or *how* they may work. Evaluation research on restorative justice practice oriented by theoretical presuppositions is relatively scarce. From the rich fund of theories of human and criminal behavior and its treatment, some hypotheses can be advanced to speculate about why and how restorative justice might work as it does. This section presents a selection of the most prominent visions.

First of all, restorative justice processes avoid some deficiencies inherent in penal justice. Communication in traditional criminal justice is poor. The formalized settings and the threat of punishment make authentic communication of what happened almost impossible. This reduces the potential for a positive impact on the stakeholders dramatically. Restorative justice processes, on the contrary, offer ample potential for authentic communication. Sherman contrasted his defiance theory against the traditional deterrence expectations in classical penal theories.¹⁴⁸ In his view, the extent to which offenders experience sanctions as arbitrary or illegitimate will affect their resistance against the authorities that imposed the sanctions.¹⁴⁹ The day-to-day functioning of the criminal justice machine provokes defiance rather than compliance.¹⁵⁰

Among the more positive theoretical explanations as to why and how restorative justice processes function as they do, reintegrative shaming is probably the most popular one.¹⁵¹ The core of it is, in

147. WALGRAVE, *supra* note 2, at 104–14.

148. Lawrence Sherman, *Defiance, Deterrence and Irrelevance: A Theory of the Criminal Sanction*, 30 J. RES. CRIME & DELINQUENCY 445 (1993).

149. *Id.* at 461–65.

150. *Id.* at 465–66.

151. See JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989).

Braithwaite's words, "(1) that tolerance of crime makes things worse; (2) that stigmatization, or disrespectful, outcasting shaming of crime, makes crime worse still; and (3) that reintegrative shaming, or disapproval of the act within a continuum of respect for the offender and terminated by rituals of forgiveness, prevents crime."¹⁵² If shaming is stigmatising, as in most court interventions, the risk is psychosocial identification with non-conformism and further offending.¹⁵³ If, on the contrary, shaming is focused on the behaviour and not on the person and is followed by gestures of reacceptance, it is a powerful emotion that can lead to desistance.¹⁵⁴ This theory was boosted in criminology in the 1990s, and has been predominant in the restorative justice literature.¹⁵⁵ Restorative conferences were seen as an ideal scene of "successful reintegration ceremonies."¹⁵⁶

Since then, several criticisms have challenged the original version of the theory.¹⁵⁷ The centrality of the shame emotion in restorative encounters has been nuanced and completed. Other (moral) emotions and dynamics, such as guilt, remorse, and empathy, seem to play an equally important role.¹⁵⁸

It has been recognized that shame, as such, does not necessarily lead to compliance.¹⁵⁹ Being subjected to a shaming experience can lead to reintegrative gestures but also to disintegrative reactions.¹⁶⁰ It

152. See JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 74 (2002).

153. BRAITHWAITE, *supra* note 151, at 55, 102–03.

154. *Id.* at 55.

155. See BRAITHWAITE, *supra* note 152, at 74.

156. John Braithwaite & Stephen Mugford, *Conditions of Successful Reintegration Ceremonies*, 34 BRIT. J. CRIMINOLOGY 139, 139–40 (1994).

157. BRAITHWAITE, *supra* note 152, at 79.

158. Jacques Faget, *Reintegrative Shaming: À Propos de la Théorie de John Braithwaite*, LES CAHIERS DE LA JUSTICE 59 (2006); Susanne Karstedt, *Emotions and Criminal Justice*, 6 THEORETICAL CRIMINOLOGY 299, 311–12 (2002); Allison Morris, *Shame, Guilt and Remorse: Experiences from Family Group Conferences in New Zealand*, in PUNISHING JUVENILES: PRINCIPLE AND CRITIQUE 157, 169–74 (Anthony Duff & Ido Weijers eds., 2002); Bas Van Stokkom, *Moral Emotions in Restorative Justice Conferences: Managing Shame, Designing Empathy*, 6 THEORETICAL CRIMINOLOGY 339, 341, 347–50 (2002); Lode Walgrave & Ivo Aertsen, *Reintegrative Shaming and Restorative Justice: Interchangeable, Complementary or Different?*, 4 EUR. J. CRIMINAL POL'Y & RES. 67, 70–71 (1996).

159. THOMAS SCHEFF & SUZANNE RETZINGER, EMOTIONS AND VIOLENCE: SHAME AND RAGE IN DESTRUCTIVE CONFLICTS 30 (1991).

160. *Id.*

can provoke defiance, expressed through denial of responsibility or anger at the shamer.¹⁶¹ That is why later versions have elaborated on the concept: it is not shame as such, but “acknowledged shame,” that is the constructive emotion which may lead to accepting responsibility and being prepared to comply. “Shame Acknowledgement involves the discharging of shame through accepting responsibility and trying to put things right. The opposite is a resistance to accepting responsibility and making amends. Shame displacement means displacement of shame into blame and/or anger towards others.”¹⁶²

Furthermore, reintegrative shaming theory originally was developed to orient the prevention of crime and reoffending. It focuses mainly on what happens to the offender. Because restorative processes are focused at least as much on emotional and other benefits to the victim, reintegrative shaming is too limited in scope. Some fear that programs relying too much on reintegrative shaming theory risk being less restoration-oriented and using the victims as “shamers” or “props,” instead of focusing genuinely on the victims’ needs.¹⁶³

It is, however, difficult to avoid an offender feeling shame if he is personally confronted with the rejection of what he did, as in conferencing or mediation. To reduce the risk that shame remains unacknowledged, the social emotional climate of the experience is crucial. Here is where the theory of procedural justice comes in.¹⁶⁴ This theory opposes the punitive model of enforcing compliance with the law.¹⁶⁵ The theory states that in their contacts with the police and justice system, people are more concerned with the way they have been treated than with the outcome of the procedure.¹⁶⁶ Procedural

161. *Id.* at 127–30.

162. John Braithwaite & Valerie Braithwaite, *Shame and Shame Management*, in SHAME MANAGEMENT THROUGH REINTEGRATION 3, 12 (Elisabeth Ahmed et al. eds., 2001).

163. DIGNAN, *supra* note 48, at 117; Mark Umbreit & Howard Zehr, *Restorative Family Group Conferences: Differing Models and Guidelines for Practice*, 60 FED. PROBATION 24, 27 (1996).

164. TYLER, *supra* note 44.

165. Tom R. Tyler, *Restorative Justice and Procedural Justice: Dealing with Rule Breaking*, 62 J. SOC. ISSUES 307, 308 (2006).

166. Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 669–73 (2007).

justice focuses on the subjective sense of being treated fairly with respect and equity, being taken seriously, and being listened to by the authorities.¹⁶⁷ The basic assumption is that when people are treated with procedural justice, “they view law and legal authorities as more legitimate and entitled to be obeyed.”¹⁶⁸ Procedural justice is crucial for belief in the system’s legitimacy, for both victims and offenders.¹⁶⁹ It brings about a shift from the motivation to avoid punishment by an external power towards an internal motivation to comply with a legitimate authority.¹⁷⁰ The characteristics of a restorative justice meeting offer better conditions for the stakeholders to feel such procedural justice than traditional court proceedings.¹⁷¹ The empirical assessment so far confirms that both victims and offenders feel fairly and respectfully treated in a conference. It is probably the main reason why they acquiesce with the process and with what is agreed. It is a crucial (but not sufficient) basis for both to begin to (re)construct their lives as (re)integrated citizens.

In addition to being treated fairly, the experienced support and confidence of loved ones provides a strong platform for a new start. Bazemore and Schiff refer to Cullen’s idea of social support as a crucial concept.¹⁷² Victims and offenders who can rely on ongoing relationships of informal control and support will benefit in a conference.¹⁷³ These “natural helpers” are empowered in a conference to provide ongoing guidance and assistance and to support healing and adjustment in the aftermath of the crime and the conference.¹⁷⁴ The idea recalls Hirschi’s theory of social bonds, especially the attachment bond.¹⁷⁵ There are indeed reasons to believe that a successful conference may help tighten social bonds, so that they are an informal social platform for reparation and for social reintegration afterwards. This is probably what Shapland et al. mean

167. *Id.*

168. Tyler, *supra* note 165, at 308.

169. *Id.* at 312.

170. *Id.* at 311–13.

171. *See id.* at 316.

172. BAZEMORE & SCHIFF, *supra* note 47, at 54, 62.

173. *Id.* at 54.

174. *Id.*

175. *See* TRAVIS HIRSHI, CAUSES OF DELINQUENCY (1969).

when they write: “where offenders have decided to try to stop offending, a conference can increase motivation to desist (because of what victims and offender supporters said) and provide the support offenders may need to help tackle problems relating to their offending.”¹⁷⁶

If participants experience procedural justice, and feel supported by their informal network, shame can be acknowledged and can become reintegrative.¹⁷⁷ For offenders, it may be the starting point for reconstructing their identity in a more socially conformable version. Maruna found that desistance from further criminality depends most on the opportunity to “make good,” meaning to reform the conception of the self as a social-norm-compliant person.¹⁷⁸ Sherman suggests that restorative encounters may facilitate such “epiphanies” as he calls them.¹⁷⁹ Maruna also presents restorative conferences as redemption rituals and sees the opportunity to repair what has been done wrong as a major chance to build a new identity.¹⁸⁰ In terms of the Good Lives Model, a restorative justice encounter can be very helpful for the offender to turn the page and commence the way towards social rehabilitation.¹⁸¹

Finally, as argued above, well monitored restorative justice processes offer an excellent context in which to implement the principles of effective correctional treatment, as advanced in the “what works” research tradition.¹⁸²

Except for the procedural justice theory, the theories mentioned so far focus mainly on the offender. Strang et al. advance a theoretical approach concerning the victim.¹⁸³ Cognitive behavioural therapy indicates that “victims may extinguish their fear by repeatedly reliving their trauma or confronting people involved in trauma in safety and far from the fearful place where the event occurred.”¹⁸⁴

176. SHAPLAND ET AL., *supra* note 108, at iv.

177. Braithwaite & Braithwaite, *supra* note 162, at 39–57.

178. SHAD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES 9–10 (2001).

179. Sherman, *supra* note 109, at 13–14.

180. MARUNA, *supra* note 178, at 155–68.

181. WARD & MARUNA, *supra* note 135; Blad, *supra* note 142.

182. Bazemore & Bell, *supra* note 128.

183. Strang et al., *supra* note 80, at 285.

184. *Id.*

Moreover, cognitive behavioural therapy offers the victims an opportunity to be shown that they were not responsible for what happened to them.¹⁸⁵ Restorative justice encounters obviously present a context wherein the victim can relive and confront the victimisation in a safe and respectful climate, which may help to reduce the post traumatic stress.¹⁸⁶

Not all interventions named as restorative are so evidently. Pemberton et al., for example, indicate some risks that may occur if victims are involved too thoughtlessly in restorative justice processes.¹⁸⁷ Based on social psychology and trauma-based studies, they point to the importance of the extent to which victims perceive the event as being under control and whether they attribute the blame for what happened to themselves or to the offender and the risk of anger rumination and receiving insincere apologies.¹⁸⁸ Practice and research on restorative justice programmes should draw more attention to these and other specific factors.

To understand the socio-emotional dynamics of the restorative conference, Collins' theory on Interaction Rituals may offer an interesting orientation.¹⁸⁹ In this theory, interaction rituals are meetings characterized by four features: (1) participants are physically present and influenced by proximity; (2) participation is clearly defined as distinguished from non-participation; (3) all participants focus on a common target; and (4) all participants are moved by a common emotional mood.¹⁹⁰ Restorative encounters clearly respond to these characteristics. Interaction rituals may provoke "collective effervescence," a high emotional intensity which drags the emotions to be focussed on the common goal.¹⁹¹ It can be applied to the intensive emotional dynamics in a restorative process and help to explain why they so often lead to constructive satisfying outcomes, including apologies and forgiveness.

185. *Id.*

186. *Id.* at 286.

187. Pemberton, Winkel & Groenhuisen, *supra* note 64.

188. *Id.*

189. RANDALL COLLINS, INTERACTIONAL RITUAL CHANGE 3–46 (2004).

190. *Id.* at 48.

191. *Id.* at 49.

Not all processes do equally well. But there are “few studies that help to identify best practices within categories of restorative justice programs.”¹⁹² To orient such studies, a theoretical frame is developed for gauging the “restorativeness” of the interventions. It is a normative construct based on restorative justice principles to establish program integrity.¹⁹³ Victim-sensitivity is crucial in the construct.

A SEQUENCE OF MORAL EMOTIONS

Some sequential order can be suggested in the moral emotions that occur in a restorative justice conference.¹⁹⁴ Typically, most offenders will begin the session with embarrassment, as they are exposed to possible blame.¹⁹⁵ Many offenders also feel at the beginning some vague shame and guilt: they understand that they have misbehaved, disappointed their beloved persons, and caused trouble or harm.¹⁹⁶ Most will hope to get through the process in the least uncomfortable way possible.¹⁹⁷ Victims’ emotions at the beginning are linked directly to their victimization: the offense has caused harm and was humiliating.¹⁹⁸ They feel shame and possibly embarrassment over the humiliation they have undergone but also want this suffering made right, because they know the intrusion was unjust.¹⁹⁹ Victims probably hover between punitive retribution, a desire to inflict an equal humiliation and suffering on the offender, and restoration, a demand for reparation or compensation for the prejudices suffered.²⁰⁰

192. Gordon Bazemore & Diane Green, *Yardsticks for Victim Sensitive Process: Principle Based Standards for Gauging the Strength and Integrity of Restorative Justice Intervention*, 2 VICTIMS & OFFENDERS 289 (2007).

193. BAZEMORE & SCHIFF, *supra* note 47, at 33.

194. Nathan Harris, Lode Walgrave & John Braithwaite, *Emotional Dynamics in Restorative Conferences*, 8 THEORETICAL CRIMINOLOGY 191, 199 (2004); WALGRAVE, *supra* note 2.

195. Harris, Walgrave & Braithwaite, *supra* note 194, at 199.

196. *Id.* at 200.

197. *Id.*

198. *Id.*

199. STRANG, *supra* note 73, at 108–18.

200. Harris, Walgrave & Braithwaite, *supra* note 194, at 200.

These emotional starting points can orient the rest of the conference.²⁰¹ The original unpleasant and disempowering feelings can provoke defiance in the offender, initiating a process towards unacknowledged shame. That can cause greater dismay and additional indignation in the victim and others, provoking escalation of the conflict, stigmatization, and secondary victimization.²⁰² It is therefore crucial to create a secure climate of respect and fairness, to make sure that procedural justice is experienced from the beginning and support from the “natural helpers” clearly felt.²⁰³ Many offenders will then be able to take a vulnerable position and accept responsibility. In such a climate, victims will also understand more easily that the conference cannot respond to their expectations from the very beginning.

Then the victim tells his story of harm and suffering, fear and anger. The victim explains the suffering to which he has been subjected. Most offenders, confronted with that, will be touched by compassion and begin to sense the invitation to apologize. It is an important transformation. The initial shame, focused on one’s own discomfort under the regard of the other, will be completed by compassion, which is focused on the discomfort of the other. In our expectation, most offenders will not remain indifferent to the suffering of their victims, even if they were indifferent initially. Victims will appear to them as being more than “an object with a handbag” or some anonymous owner of a car but a concrete human being with needs and emotions. If the conference goes well, the offenders will understand the suffering.

But it is not only compassion they will feel. They will recognize that their behavior has caused suffering. The wrongfulness of their behavior now appears more clearly. Guilt may emerge, and its grounds become more concrete than at the beginning: the reason for the norm is clear and even emotionally felt. Moreover, offenders feel shame, especially because their wrong-doing is exposed to those who care about them and who are important to them.

201. *Id.*

202. BRAITHWAITE, *supra* note 151, at 79–81.

203. BAZEMORE & SCHIFF, *supra* note 47, at 54.

This is crucial to the conferencing process. The ideal sequence relies very much on empathy to induce remorse or guilt and shame. The offender must recognize the suffering of the victim and accept responsibility for it. Both aspects can go wrong. Empathy in the offender for the victim's suffering is possible only if the offender himself experiences empathy. If he is disrespected, he is likely to become fixed in a defensive, defiant attitude and to close his mind to the suffering of the victim.²⁰⁴ If he feels respect, despite rejection of what he did, and experiences that participants try to understand who he is and how he came to do what he did, he is more likely to open his mind to the suffering of the other.

Still, shame and guilt are unpleasant feelings, which one wants to be relieved of. Acknowledging responsibility only adds to the pain. And that can also make things go poorly. The direct confrontation may provoke in the offender a defensive reaction, denying the suffering or rejecting the responsibility for it.²⁰⁵ But shame and guilt may also be accepted and resolved through acknowledgement and reparation. If the offender experiences support and gestures of reacceptance, he is more likely to risk a weak position and accept responsibility for what happened.²⁰⁶ To be relieved of the unpleasant feelings, the offender will then be inclined to make positive gestures in a restorative sense, including an apology.

Apology is crucial in a restorative process.²⁰⁷ The offending act, the victimization, cannot be undone, but the very fact that the act has been committed and that it is unjust must be explicitly noticed.²⁰⁸ An apology, "no matter how sincere or effective, does not and cannot undo it what has been done. And yet, in a mysterious way and according to its own logic, this is precisely what it manages to do."²⁰⁹

204. See Sherman, *supra* note 148, at 459.

205. See generally BRAITHWAITE, *supra* note 151.

206. *Id.*

207. Bottoms, *supra* note 67, at 94; Lawrence W. Sherman et al., *Effects of Face-to-Face Justice on Victims of Crime in Four Randomized, Controlled Trials*, 1 J. EXPERIMENTAL CRIMINOLOGY 367, 388 (2005).

208. Bottoms, *supra* note 67, at 95–96.

209. *Id.* at 95 (quoting NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RESTORATION* 5 (1991)).

In an apology, the offender recognizes guilt.²¹⁰ He expresses an understanding of the wrongfulness of the norm transgression and confirms his recognition of the victim as a bearer of rights. While recognizing guilt, the apologizing offender asks the victim to “ex-cuse,” literally to “de-accuse” him, to undo him from guilt. The offender takes the vulnerable position by submitting to the victim, placing his fate in the hands of the victim. The victim may refuse or accept the apology, possibly under certain conditions. The roles are reversed now. Whereas the offender exercised power over the victim in the offense, it is now the victim who has the decisive power. The willingness of the offender to undertake material actions to secure restoration underlines the truthfulness of the apology and makes concrete the recognition of the harm he has caused.²¹¹ But still, the offense and the injustice done to the victim are not undone. It is as the novelist Ivo Andric writes: “Injustice, once committed, can neither be corrected, nor annihilated. Attempts to rectify or remove it only create new injustices And if there were no forgiveness and forgetting, injustice would cover the world and turn it into Hell.”²¹² We must hope that the next step in the sequence is taken. It is facilitated by the offender’s apology.

The vulnerable point at this turn is that the apology must be felt as being sincere. If the apology is experienced as a strategy by a calculating offender to get lesser sanctions, rather than as an expression of genuine regret and acceptance of guilt, the victim may feel betrayed again in his confidence and undergo some secondary victimization.

In a successful sequence, when the apology seems to be honest, most victims now feel restored in dignity and in citizenship by the apology. The victim’s desire for revenge fades. Whereas revenge emotions are a drive to respond to humiliation by counter-humiliation, there is no desire for this any more: the offender has in fact removed the humiliation through his apology. To a certain degree, he has “humiliated himself” in the eyes of the victim.

210. *Id.* at 96.

211. *Id.* at 96–97.

212. ALEKSANDAR FATIC, PUNISHMENT AND RESTORATIVE CRIME-HANDLING, at ix (1995) (quoting IVO ANDRIĆ, ZNAKOVI PORED PUTA (1981)).

Moreover, the offender's apology is amplified by the other participants' support, which adds to the vindication of the victim. At this stage, the basic empathy between all humans is activated also in the opposite sense, so that the victim can feel some sympathy for the offender. This opens the way to forgiveness and genuine dialogue.

Forgiveness is more than accepting that the compensation is in balance with the harm suffered. It is a highly moral act to decide to put an end to the conflict, while the act and its consequences are not undone.²¹³ Forgiving is a gift given by the victim to the offender, because it conveys to him the victim's trust that he will restrain from causing further harm and opens hope for constructive relations in the future. It is also a gift from the victim to the community as a whole, because the community will benefit from the elimination of enduring conflict and unsettled accounts in its midst. Genuine forgiveness transcends self-interest and hope of reciprocity, because it is a one-sided step, though it may lead to a better reciprocal dialogue.

Yet, genuine apologies and true forgiveness cannot be primary objectives of restorative encounters. While they are favored by the context and the process, they may be beneficial effects, not explicit goals. If they were delivered under pressure or even ordered, they would lose their meaning. It is the fact of being offered freely as a gift that gives them emotional and relational strength.

The offender's public expressions of remorse and apology and his offer to make reparation also bring him respect, because he had the courage to face his responsibility and was willing to make reparation. The acceptance of the offer by the victim and the approval by the loved ones are expected to have an impact on his ethical identity. There is a chance that he will be able to leave the offense and its consequences behind him (after meeting the conditions) and that he is not fixed in the role of "irredeemable criminal."

The whole process in a non-adversarial, respectful, and supportive climate may facilitate the offender's and his family's awareness that things have been going deeply wrong, and that something must be

213. DESMOND MOILO TUTU, NO FUTURE WITHOUT FORGIVENESS 270-73 (1999); H       Dumont, *Le Pardon, une Valeur de Justice et d'Espoir, un Plaidoyer Pour la Tol  rance et Contre l'Oubli*, 42 REVUE CANADIENNE DE CRIMINOLOGIE 299 (2000).

done to stop the negative development. It may be the occasion to search actively for treatment or help or to accept such an offer.

Of course, this outline represents an ideal situation. Reality is much more complicated and does not often lead to such happy ending. Each conference is different, depending on the nature of the crime, the people involved, the way the process is prepared and facilitated, and many other specific circumstances. Moreover, the outline has focused on the two main stakeholders only, victim and offender, whereas the impact by and on other participants is also of crucial importance. Despite strong recommendations to include parents and other members of the community of care in the encounters, research on their participation is scarce. But the outline may make it easier to understand the potential of restorative encounters to generate satisfaction and feelings of procedural justice among the participants and why they are more likely to comply with the agreements than after a judicial procedure. It also argues for recognition that parents may experience more respect and support, and feel empowered to take up their parenting tasks again; they may also be more open to seeking or accepting external assistance and treatment afterwards.

The outlined sequence also points to the central importance of empathy as the gate-opener in the process. Empathy and compassion are indispensable “intermediate emotions” to make guilt felt, triggering the rest of the process. Therefore, the contextual climate is crucial to make empathy possible. Empathy and respect are possible only if the person himself experiences empathy and respect. They are the key to understanding the communicative and interactive added value of restorative processes. The absence of such a supportive climate in the traditional criminal procedures makes it almost impossible for the offender to be open to compassion. The offender then gets locked into feelings of embarrassment and disempowerment, which favor unacknowledged shame and defiance, rather than open dialogue.

A PARADOX

Whereas we have noted a number of theories and arguments for why restorative justice should be more effective, the empirical

assessment so far does not confirm convincingly the expectations.²¹⁴ In particular, the theoretically based expectations with regard to reoffending are not clearly sustained by the available evidence we mentioned above. Why is that? Several explanations are possible. Theories may be too naive or too one-dimensional, practices may reflect poorly the theoretical promises, and the research projects may not be differentiated enough to focus on crucial factors and mechanisms. A combination of these elements is probable. Additionally, the most plausible explanation might be found in the Good Lives Model. This model states that there is not a magic treatment to rehabilitate the offender; rather, the motivation of the offender himself is crucial.²¹⁵ To succeed in his rehabilitation efforts, the offender must be helped (by his “natural helpers” and by professionals), and he needs a minimum of favorable social conditions and prospects.²¹⁶ The lack of such help after the restorative encounter may be the main reason why restorative justice processes reduce reoffending less than might theoretically be expected. Although restorative processes may help the offender to find the appropriate motivation, most are afterwards left alone again to cope with the social conditions in their daily life. As stated already earlier in this Article: the follow up after the meeting is as crucially important as is the meeting itself.²¹⁷

INVESTIGATING THE PUBLIC DIMENSION OF RESTORATIVE JUSTICE

Crime is also a public event. Hence, another important question is whether the existence and (mainstream) implementation of restorative responses to crime would respond to public needs.

Restorative justice proponents hold that it would contribute to building stronger communities, better than existing criminal justice practices do.²¹⁸ They find arguments in the satisfaction rates among

214. See *supra* note 28.

215. WARD & MARUNA, *supra* note 135, at 117.

216. BAZEMORE & SCHIFF, *supra* note 47, at 54.

217. See *supra* notes 118–41 and accompanying text.

218. BRAITHWAITE, *supra* note 152, at 66–69; see also Paul McCold, *What Is the Role of Community in Restorative Justice Theory and Practice?*, in *CRITICAL ISSUES IN RESTORATIVE JUSTICE*, *supra* note 128, at 155.

community members participating in conferences, the (trend towards) decreased reoffending rates among offenders, the benefits for school communities and workplaces that have implemented restorative responses to norm transgressions, and to the few historical occasions on which restorative-like processes have influenced peacemaking in larger communities.²¹⁹ The impact of restorative justice on a community is anticipated by the increasing community involvement in restorative practices.²²⁰ This is beneficial for cohesion within the community, which in turn improves informal social control and decreases feelings of insecurity.

Counterarguments advanced are that, especially for serious crimes, there is a need to express the public indignation and anger about what happened, which must be canalized through a correct procedure and proportionate public sentence.²²¹ Moreover, it is feared that restorative practices are too soft on crime, so that they do not have a sufficiently deterrent effect on offenders. It may provoke an increase in crime.

PUBLIC NEED FOR PUNISHMENT?

The public need for punishment is documented with empirical data, showing that the majority of respondents wish offenses to be punished.²²² This is of course not surprising in a society in which punishing offences is presented as the clear and unique response to crime. It is not at all certain that the punitive tendency would persist if the public were better informed about other possibilities.

There is data to indicate that public acceptance of restorative responses to crime is high. When reparative alternatives are included in the questionnaires and presented realistically, they attract a large percentage of public choice.²²³ As expected, the type of crime

219. BRAITHWAITE, *supra* note 152, at 66–69.

220. See Mara Schiff, *Satisfying the Needs and Interests of Stakeholders*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 5, at 228, 235–38.

221. Bas van Stokkom, *The Expressive Function of Restorative Punishment: A 'Public Interest' Perspective*, in IMAGES OF RESTORATIVE JUSTICE THEORY, *supra* note 17, at 151, 154.

222. Van Stokkom, *supra* note 221, at 154.

223. ANTHONY DOOB ET AL., AN EXPLORATION OF ONTARIO RESIDENTS' VIEW OF CRIME AND THE CRIMINAL JUSTICE SYSTEM (1998); Klaus Sessar, *Punitive Attitudes of the Public: Myth and Reality*, in RESTORATIVE JUSTICE FOR JUVENILES: REPAIRING THE HARM OF YOUTH

influenced the degree of preference. Sessar, for example, found that in all cases, a majority of his lay respondents opted for the reparative options, mostly outside the criminal justice system (42.4 percent) but sometimes also inside the system (17.4 percent).²²⁴ Of those who opted for punishment on principle, only 21.4 percent chose the last, purely punitive, response.²²⁵ The modalities outside the judicial system were seldom chosen for burglary or rape, but even then, a large majority preferred reparative possibilities under judicial supervision.²²⁶ Notably, the possibility of reoffending did not change these preferences.²²⁷ Sessar concluded that “the conception of the public’s strong punitive sentiments is a myth.”²²⁸

Based on a survey, Roberts and Hough concluded that “[t]he public is unlikely soon to abandon the notion of punishment,” but they also found dissatisfaction about the traditional punitive system and support for “more creative, non-carceral alternatives.”²²⁹ They also write that “[r]estorative (non-punitive) responses carry considerable appeal for the public, particularly for the young and non-violent offenders.”²³⁰

Actually, these results are surprising given that the public is constantly bombarded by the media and the authorities with the message that punishment is a “natural” consequence of offending and given that the public is generally unfamiliar with the potentials of restorative justice. It may feed the suspicion that reparation after an offence is actually a more evident idea than the intentional infliction of pain after the offence but that this idea is suppressed by centuries of punitive apriorism.

CRIME (Gordon Bazemore & Lode Walgrave eds., 1999); Martin Wright, *What the Public Wants*, in *MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY* 264, 266–67 (Martin Wright & Burt Galaway eds., 1989).

224. Sessar, *supra* note 223, at 298.

225. *Id.*

226. *Id.*

227. *Id.* at 300–01.

228. *Id.* at 301.

229. Julian V. Roberts & Mike Hough, *Public Attitudes to Punishment: The Context*, in *CHANGING ATTITUDES TO PUNISHMENT: PUBLIC OPINION, CRIME AND JUSTICE* 1, 6 (Julian V. Roberts & Mike Hough eds., 2002).

230. *Id.*

PUBLIC SAFETY AT RISK?

How systematic implementation of restorative justice would affect public safety cannot be answered by decisive empirical data. The main reason for that may be the absence of enduring and systematic implementation of restorative practices in particular communities, so that its impact on social life in general is hard to observe.

The only tradition of systematic implementation of restorative justice schemes is found in New Zealand. In 1989, the Children, Young Persons and their Families' Act introduced family group conferencing as the mainstream response for all serious youth offenses.²³¹ While New Zealand, like most other developed countries, may have been suffering a wave of increasing intolerance and feelings of insecurity, the statistics on youth offending do not show an increase.²³² On the contrary, Maxwell et al. calculated that the number of arrests fell from more than 8,000 in 1987 to less than 2,000 in 1990 and then rose gradually to just under 3,000 in 2001.²³³ The number of young offenders in court fell from 400 per 10,000 young people in 1987 to fewer than 200 in 1990 and then rose to 240 in 2001.²³⁴ The number of convictions fell from 1,318 in 1987 to 269 in 1990 and 234 in 2001.²³⁵ The number of custodial sentences imposed by adults' courts on waived youths fell from 295 in 1987 to 104 in 1990.²³⁶ In 2001, there were only 73.²³⁷ I am inclined to call such developments beneficial for public safety.

All in all, there is no empirical indication that the restorative justice option would be blocked by a general public punitiveness. While simplistic repressive outcries may sound the loudest in the media, it is far from evident that they are the mainstream. Such an attitude seems rather to be a myth, boosted by simplistic media and extreme-right politics. Moreover, the reduced experience with a

231. Children, Young Persons, and their Families Act 1989, 1989 S.N.Z. No. 24.

232. Allison Morris, *Youth Justice in New Zealand*, in *YOUTH CRIME AND YOUTH JUSTICE: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES* 243 (Michael Tonry & Anthony Doob eds., 2004).

233. MAXWELL ET AL., *supra* note 83, at 264.

234. *Id.* at 267–68.

235. *Id.* at 281.

236. *Id.*

237. *Id.*

tradition of restorative justice response to crime so far does not indicate that this would be detrimental for safety and safety feelings. On the contrary, Kurki writes: “Restorative justice processes carry great potential to turn incidents of crime into positive opportunities of creating new relationships, building communities, and strengthening grass roots democracy. The potential is as yet unrecognised by most criminal justice agencies and researchers, and as a result, largely unrealised and unstudied.”²³⁸

TOWARDS A SECOND GENERATION RESEARCH ON RESTORATIVE JUSTICE

Restorative justice increasingly is seen as another paradigm which will, on the longer term, deeply influence the mainstream response to crime. The option for restorative justice is first of all based on socio-ethical options. The question asked here is whether the available empirical data support this restorative justice preference. The answer so far is yes. This Article has offered empirical reasons to believe in the potential of the restorative justice approach to crime. Not only is it desirable, it also appears also to be feasible. Reoffending rates are not worse after restorative justice processes, probably better.²³⁹ Crucial benefits are that victims are significantly more satisfied and that offenders understand better what they have done.²⁴⁰ There are no indications that public safety and the sense of justice would decrease if restorative justice were implemented more systematically. Additionally, the restorative potential seems to be recognized by the public.²⁴¹

Hence, it is not surprising that restorative justice practices are spreading quickly, and in increasingly differentiated versions, all over the world.²⁴² Restorative justice is developing, from an interesting track to be explored, towards a clear possibility or even an indispensable part of the mainstream response to crime.

238. Lena Kurki, *Evaluating Restorative Practices*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE, *supra* note 67, at 293, 310.

239. *See supra* notes 96–122 and accompanying text.

240. *See supra* notes 77–81 and accompanying text.

241. *See supra* notes 222–30 and accompanying text.

242. *See supra* notes 4–6 and accompanying text.

But the empirical data must be read with care. Methodological inadequacies make most of the data illustrative, rather than conclusive. Most of the practices evaluated were restricted in size and scope, addressing mainly non-serious offences.²⁴³ Often, they are implemented in privileged circumstances. One must, however, not be too critical. Also the research into the effects of punishment, prevention, treatment, and social support programs suffers from methodological difficulties. Most evaluation projects must make do with research designs and measurements that are less rigorous and reliable than the ideal. Evaluating human interventions in human situations indeed does not occur in a laboratory. It is done in real life, and deals with an uncontrollable variety of real problems in real people and groups with particular interests, needs, and rights.

Good restorative justice processes are based on coherent principles and rely on specific skills, but several restorative justice schemes exist with different reaches.²⁴⁴ They do not always work along strict scripts, and the intrinsic quality of the implementation is not guaranteed. They operate at different levels of the intervention and in a great variety of institutional, juridical and legal contexts, which may affect seriously the scope, the modes of operation, and the results. All this makes restorative justice processes seen as the independent variable subject to a huge variety of factors, dynamics and mechanisms. The dependent variable is equally diverse. The reparative objectives range from effects on the direct stakeholders to wide community reform, aim at immediate and long-term outcomes, and may be interpreted differently by the different stakeholders.²⁴⁵ Some are core objectives, others are considered as secondary but meaningful benefits. Actually, not all possible dimensions and variants of independent, dependent and intermediate variables can be controlled in real life. That is why results of evaluation research always need to be read with realistic common sense. Empirical modesty must prevent the claim that the added value of restorative justice practices can be proved scientifically and beyond any doubt.

243. *See supra* note 28.

244. *See* VAN NESS & STRONG, *supra* note 8, at 12–19.

245. *See supra* notes 47–48 and accompanying text.

Such misplaced claims are seen all too often with regard to treatment programs. I have called them “a kind of charlatanism.”²⁴⁶

Yet, further development of restorative justice must go hand-in-hand with more and better research, moving beyond the blunt general question of whether restorative justice works or not. Critical empirical assessment of restorative justice practices remains the best possible safeguard to avoid restorative justice becoming part of “evangelical criminology: the fervour with which [restorative justice] is pursued . . . can blind its followers to its implications.”²⁴⁷ Restorative justice would degrade into a system based on belief, and the restorative justice movement into a sect of believers driven by a “crusading zeal.”²⁴⁸

After a first wave of projects that gave a rather unclear, but positive impression of restorative justice practice, it is time for a second generation of research that would “increase the pixels” and refine the image of what restorative justice can achieve or not. It is as if one would examine whether treatment of offenders works or not. The initial rough “nothing works” statement has been replaced by a more nuanced “what works” question, providing more precise indications of elements of possible treatment success or failure.²⁴⁹ Likewise, restorative justice research must become more nuanced and more focused.

An increasing number of scholars are aware that future research should be more oriented by theoretical considerations.²⁵⁰ In fact, sloppy theorizing makes restorative justice often virtually unfit for accurate research. Much of the available research suffers from lack of clarity about what makes a series of practices being restorative, what their objectives are and what makes them to work as they (might) do. Theorizing must not only develop decent normative standards but also focus on possible explanatory models. It must orient empirical research on more focused hypotheses as to why restorative justice

246. Walgrave, *supra* note 31, at 16.

247. John Pratt, *Beyond Evangelical Criminology: In Meaning and Significance of Restorative Justice*, in *INSTITUTIONALIZING RESTORATIVE JUSTICE* 44, 45 (Ivo Aertsen, Tom Daems & Luc Robert eds., 2006).

248. *Id.*

249. See Bazemore & Bell, *supra* note 128, at 123–24.

250. Bazemore & Maruna, *supra* note 143, at 376.

works, under which conditions, and for what cases. It would lead to stronger research design and may yield sharper results.

Refinement of restorative justice practice as the independent variable is absolutely necessary. Some programs enjoy the full support of justice professionals, but others must cope with indifference, skepticism, or even subversive boycott. A considerable variety exists in the type and seriousness of cases targeted or reached. Indirect mediation is not the same as face-to-face encounters. Mediation is different from conferencing. The New Zealand model of family group conferences differs considerably from other models, among which police led conferences are still very particular. A variety of procedures exist to select and train mediators or conference facilitators. Like in any profession, there are also among facilitators brilliant performers and bunglers. These and many other elements have systematic and deep consequences on the reach and the outcomes of the restorative justice practices. Moreover, the quality of the follow up after the encounter appears to be very important and should be included in the assessment of the independent variable. A few projects have included some differentiation between the examined restorative justice practices, but most do not.²⁵¹ Even important research programs do not describe these variations and pretend to evaluate “restorative justice,” as if all these nuances did not matter. They lose crucial information and offer results that are less significant than they would be if the independent variable were specified more accurately.

The major strength in restorative practices clearly is its potential to favor a sequence of (moral) emotions leading to a kind of satisfaction in the participants. To understand these emotions, several theoretical models have been presented. But systematic empirical exploration is scarce. Mostly process outcomes have been measured, seeking answers to questions as “has there been shame, remorse, guilt, empathy?” But if the sequence of emotions is so important, the process itself will have to be studied. They cannot be measured before or after the conference but must be observed during the

251. See, e.g., Hayes & Daly, *supra* note 112, at 728–33; Maxwell, *supra* note 113.

conference. Participant observation, including qualitative observation is needed to complete the quantitative data.²⁵²

More nuanced research is needed on victims' perception of restorative justice processes and their outcomes. Statistics indicating the benefits for victims hide a number of pressures and social, psychological, and clinical problems that may be caused by too pushy restorative justice approaches. Concerned victims' advocates draw the attention to the fact that we do not know enough of the size and the kind of these problems.²⁵³ It must be taken seriously. If the paradigm shift of restorative justice is taken seriously, it is surprising in fact that evaluation research so far has focused more on the impact on the offender than on the victim. Logically, it should be the inverse.

As restorative justice is mostly being implemented in the context of or mandated by the criminal justice system, more evaluation should address the relation between the restorative justice agencies and the criminal justice institution.²⁵⁴ For example, Bonta et al. found data to suspect that restorative justice schemes outside the system yield better results regarding reoffending than those inside the system.²⁵⁵ That finding deserves closer examination and explanation. It may have to do with the kind of cases dealt with, with the pressure the agencies undergo or other possible elements.

The more restorative justice gains credibility and is accepted as being a part of the mainstream response to crime, the more urgent it is to reflect on how to fit it into an adequate legal frame. The basic issues are how to juxtapose informal processes with formal procedures, how to rely on communities while living in organized states, how to combine creativity and richness of the bottom-up approach with the clarity and strictness of the top-down approach, and how to prioritize voluntariness and compliance with possible coercion. The bottom line is respect for human rights and the children's rights for juveniles.²⁵⁶ But if the paradigm-status of restorative justice is taken seriously, the traditional legal safeguards

252. Harris, Walgrave & Braithwaite, *supra* note 194, at 205.

253. Pemberton, Winkel & Groenhuysen, *supra* note 64.

254. Lemonne & Hydle, *supra* note 28.

255. Bonta et al., *supra* note 28, at 112.

256. See Nessa Lynch, *Restorative Justice Through a Children's Rights Lens*, 18 INT'L J. CHILD. RTS. 161 (2010).

provided in the punitive systems cannot be reproduced. The values behind them, such as equivalence of all citizens and protection of citizens against abuses of power by fellow citizens or by the state, must be respected but made concrete differently. The construction of other legal principles must be considered, which would be more appropriate for the restorative perspective. Restorative justice literature on these questions is not abundant but increasing.²⁵⁷ It is one of the most important themes in deciding how far restorative justice will succeed in penetrating the mainstream response to crime.

Finally, one must be aware that one single project cannot cover all versions, institutional and cultural contexts, dimensions, mechanisms, factors, and direct and indirect causal relations in restorative justice practice. It is far too diverse and uncontrollable. However, a comprehensive theoretical construction could locate all factors, dynamics, mechanisms, and elements—many of them interdependent—that may affect the empirical observations of restorative justice practice. It would allow recognition of the separate research projects and estimation of the degree and kind of the unavoidable methodological compromises. An outline of such construction has been proposed with four levels: (1) A description of the diverse legal and institutional preconditions in which restorative processes are carried out; (2) An observation of the practices themselves (which are broad and wide), including the particular potentials, limitations and risks of each; (3) A differentiated registration of the possible outcomes (These may have a broad range of aims related to different actors, different levels, and different time perspectives); (4) The conception of a research design with adequate control groups, in order to be able to attribute the possible outcomes to the intrinsic characteristics of the restorative practices rather than to other variables.²⁵⁸

But even excellent and clearly positive restorative justice research would not lead directly to the expansion of restorative justice response to crime. Developments in criminal justice are a matter a criminal policy, which depends only partially on practical and

257. See, e.g., BRAITHWAITE, *supra* note 152; RESTORATIVE JUSTICE AND THE LAW, *supra* note 14; RESTORATIVE JUSTICE AND CRIMINAL JUSTICE, *supra* note 67.

258. WALGRAVE, *supra* note 2.

scientific qualities and options. The cultural and political climate is more decisive. While simplistic punitive outcries may sound the loudest in the media, it is far from evident that they really are the mainstream. There is no reason to be pessimistic about the future of restorative justice. Research can help to make a strong case for restorative justice, by holding the mirror for practice through constructive critical evaluation; by intensifying the link between theory, practice, and empirical research; and by juridical and philosophical reflection on the normative status of restorative justice in constitutional democratic states.