

Legal Journals from Thomson Reuters

- Australasian Dispute Resolution Journal**
Ruth Charlton
- Australian Business Law Review**
Professor Robert Baxt AO
- Australian Intellectual Property Journal**
Dr David Lindsay
- Australian GST Journal**
Christine Peacock
- Australian Journal of Administrative Law**
Dr Damien J Cremean
- Australian Journal of Competition and Consumer Law (formerly Trade Practices Law Journal)**
Dr R J Desiatnik
- The Australian Law Journal**
Acting Justice Peter W Young AO
- Australian Tax Review**
Professor Chris Evans, Professor Michael Walpole
- Building and Construction Law Journal**
John B Dorter
- Company and Securities Law Journal**
Professor Robert Baxt AO, Assoc Professor Paul Ali
- Criminal Law Journal**
Stephen J Odgers SC, Professor Mirko Bagaric
- Environmental and Planning Law Journal**
Dr Gerry Bates
- Family Law Review**
Dr Anthony Dickey QC,
Professor Hon Jennifer Boland AM
- Insolvency Law Journal**
Dr Colin Anderson
- Journal of Banking and Finance Law and Practice**
Gregory Burton SC, Professor Robert Baxt AO
- Journal of Civil Litigation and Practice**
Dr Damien J Cremean
- Journal of Judicial Administration**
Professor Greg J Reinhardt
- Journal of Law and Medicine**
Dr Ian Freckelton SC
- Local Government Law Journal**
John Mant, Mary-Lynne Taylor, Glen McLeod
- Northern Territory Law Journal**
Cameron Ford
- Online Currents**
Madeleine Davis, Elisabeth Thomas
- Property Law Review**
Professor Brendan Edgeworth, Dr Lyria Bennett
Moses, Cathy Sherry
- Public Law Review**
Professor Cheryl Saunders AO
- The Queensland Lawyer**
Andrew West
- The Tort Law Review**
Nicholas Mullany
- Workplace Review**
Jeffrey Phillips SC, Neil Napper

Also available:
Australian Legal Journals Index (online only)



THOMSON REUTERS

For further information visit
www.thomsonreuters.com.au/journalstalk
Tel: 1300 304 195
Email: LTA.Service@thomsonreuters.com

Print Post Approved PP255003/00364

Material No: 30172473



Volume
22/3
February 2013

Journal of Judicial Administration

Contemporary developments in judicial systems and court administration

FEATURING

Transforming governance and technology in civil and administrative justice
David Tait and Terry Carney

Are retributive aims achievable in a restorative justice setting?
Tony Foley

Foetal Alcohol Spectrum Disorder in children: Implications for judicial administration
Samantha Parkinson and Sara McLean

Child protection law and practice in the Northern Territory and implications for the court
Hilary Hannam

QCAT's hybrid hearing: The best of both worlds or compromised mediation?
Bobette Wolski

GENERAL EDITOR

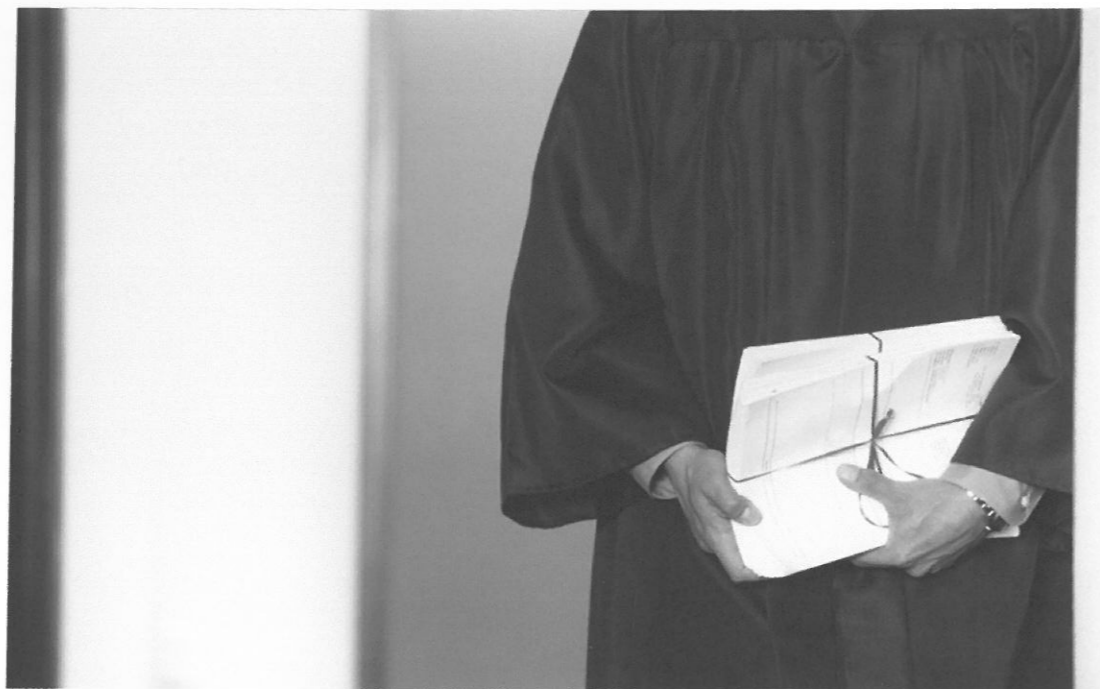
PROFESSOR GREG J REINHARDT

Published in association with the Australasian Institute of Judicial Administration

Volume 22 • Number 3 • Pages 117-168

Journal of Judicial Administration

Thomson Reuters



INDIVIDUAL CHAPTERS FROM EXPERT EVIDENCE NOW AVAILABLE TO DOWNLOAD

For over 15 years, Thomson Reuters has been publishing *Expert Evidence*.

This six-volume masterwork is a modern classic, providing all the legal and subject specialist knowledge required to prepare and conduct litigation that relies on expert testimony.

Each chapter is written by an expert in the field, and provides the perfect primer for preparing and cross-examining witnesses.

Now all 75 technical chapters are available individually, in PDF format, for a flat fee of \$39.60 (including GST) per chapter.

To browse topics, and purchase chapters for immediate download, visit www.thomsonreuters.com.au/expertevidence or call 1300 304 195.



Journal of Judicial Administration

GENERAL EDITOR

Professor Greg J Reinhardt

Executive Director, Australasian Institute of Judicial Administration

Member of Faculty of Law, Monash University

THOMSON REUTERS EDITOR

Jodie Lee

The mode of citation of this volume is
(2013) 22 JJA page

**PUBLISHED IN ASSOCIATION WITH THE
AUSTRALASIAN INSTITUTE OF JUDICIAL ADMINISTRATION**

Subscription Information

The *Journal of Judicial Administration* comprises four parts per Volume.

For further information on how to subscribe

Visit www.thomsonreuters.com.au
Tel: 1300 304 195
Email: LTA.Service@thomsonreuters.com

Advertising inquiries

Contact Helen Sykes on (02) 8587 7462 or email a.parsons@thomsonreuters.com

Editorial inquiries

Tel: (02) 8587 7000

Customer service and sales inquiries

Tel: 1300 304 195 Fax: 1300 304 196
Web: www.thomsonreuters.com.au
Email: LTA.Service@thomsonreuters.com

Head Office

100 Harris Street PYRMONT NSW 2009
Tel: (02) 8587 7000 Fax: (02) 8587 7100



THOMSON REUTERS

© 2013 Thomson Reuters (Professional) Australia Limited ABN 64 058 914 668
Published in Sydney

ISSN 1036-7918

Typeset by Thomson Reuters (Professional) Australia Limited, Pyrmont, NSW

Printed by Ligare Pty Ltd, Riverwood, NSW

JOURNAL OF JUDICIAL ADMINISTRATION

Volume 22, Number 3

February 2013

ARTICLES

Transforming governance and technology in civil and administrative justice – *David Tait and Terry Carney*

How can technology provide better access to civil and administrative justice? This article argues that reforming the organisational design of justice is an essential first step, by developing a graduated set of procedures that filter disputes and complaints, managing them in a consistent and, where appropriate, systemic way. Such a system requires online (or telephone) filing of matters, tracking software to follow individual cases and reporting systems to detect patterns. Australian jurisdictions have proceeded a long way down this path, offering a sharp contrast to litigation-prone justice processes in some other common law systems, although perhaps less systematic and orderly than some civil law systems. The ombudsman model provides a mechanism for handling complaints against large agencies, whether in the public or private sector; tribunals provide an accessible forum for most disputes; and accident and disability claims are increasingly decided through administrative processes based on professional assessments of need. While new technologies can allow greater centralisation of justice procedures, the authors argue that such technologies can also promote more localised and dispersed justice procedures, taking as an example the “tribunal in a box” model developed by the Victorian tribunal system. 119

Are retributive aims achievable in a restorative justice setting? – *Tony Foley*

One of the challenges in doing justice in response to serious criminal wrongdoing committed by young people is to meet the need for retribution. The risk is that in meeting this need the primary needs of restoration and rehabilitation are lost or diminished. Much has been written about the capacity of diversionary programs to restore affected parties and to address consequential outcomes such as deterrence, rehabilitation and protection. But little regard has been given to their capacity to also do much of the “work” of retribution. Acknowledging that retribution is much wider than simply punishment, and includes bringing offenders to account, denouncing their behaviour, providing public vindication for victims and setting reparation and sanctions, means that diversionary programs have much to offer. This article argues that much of the work can be done through diversionary programs such as circle sentencing, family group conferencing and restorative panels which involve contact between those affected by wrongdoing. The article examines the “retributive scope” of diversion by reporting the views of facilitators, conference convenors, judges and others involved in programs in a range of jurisdictions. The article suggests that many of the requirements of retribution are better met through such non-punitive approaches. 130

Are retributive aims achievable in a restorative justice setting?

Tony Foley*

One of the challenges in doing justice in response to serious criminal wrongdoing committed by young people is to meet the need for retribution. The risk is that in meeting this need the primary needs of restoration and rehabilitation are lost or diminished. Much has been written about the capacity of diversionary programs to restore affected parties and to address consequential outcomes such as deterrence, rehabilitation and protection. But little regard has been given to their capacity to also do much of the "work" of retribution. Acknowledging that retribution is much wider than simply punishment, and includes bringing offenders to account, denouncing their behaviour, providing public vindication for victims and setting reparation and sanctions, means that diversionary programs have much to offer. This article argues that much of the work can be done through diversionary programs such as circle sentencing, family group conferencing and restorative panels which involve contact between those affected by wrongdoing. The article examines the "retributive scope" of diversion by reporting the views of facilitators, conference convenors, judges and others involved in programs in a range of jurisdictions. The article suggests that many of the requirements of retribution are better met through such non-punitive approaches.

INTRODUCTION

There are three broad aims that must be addressed in any institutional response to wrongdoing – the need to deliver retribution, the need to achieve restoration and the need to address the consequences of wrongdoing through measures addressing deterrence, protection and rehabilitation.¹ This article focuses on the first of these, the need for retribution. It considers the extent to which this need can be met through means other than the traditional vehicle of punishment meted out in a criminal justice setting. It argues that a wider notion of retribution – one that recognises the requirements for censure, remorse, denunciation and vindication, alongside punishment – can often prove more effective. Paradoxically, perhaps, this is particularly pronounced if such retribution is delivered within a restorative justice setting.

RETRIBUTION AS PUNISHMENT

An essential part of any institutional response to wrongdoing must be to address the "morally false message ... of disrespect" implicit in that wrong and in so doing provide a means of public blaming.² It is this blaming that transforms the institutional response from one akin to the purely personal to one which provides a form of public normative reinforcement. For this process to work effectively, responses to wrongdoing must countenance two interconnecting aspects of retribution. They must first emphasise offending as a breach of the community standards implicit in the (criminal) law and provide the means to deal with the offender as a violator of those standards. At the same time, they must

* Dr Tony Foley, ANU College of Law. This is a revised version of a paper presented at the AIJA Doing Justice for Young People – Issues and Challenges for Judicial Administration in Australia and New Zealand Conference, Brisbane, 23-25 August 2012. Comments welcome to tony.foley@anu.edu.au.

¹ von Hirsch A, Ashworth A and Roberts JV (eds), *Principled Sentencing: Readings on Theory and Policy* (3rd ed, Hart Publishing, 2009); Zehr H, *Changing Lens: A New Focus for Crime and Justice* (Herald Press, 1995); Edney R and Bagaric M, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007).

² Garvey S, "Punishment as Atonement" (1999) 46 UCLA Law Review 1801 at 1821.

acknowledge the violation of the moral right which the wrongdoing constitutes for the individuals affected and deal with the harm caused as a consequence of that wrong.³ Both of these are aspects of retribution.

Traditional retributive responses seek to address the moral aspects of offending but in ways which are strongly grounded in mechanisms such as punishment, with the nature and extent of the sanctions determined by principles such as proportionality. This perspective assumes that the moral guilt of wrongdoing "deserves punishment for the sake of justice" and that a necessary and essential connection can be drawn between meeting the need for retribution and the infliction of punishment. Thus punishment is calibrated both in terms of comparative proportionality (relative punishment between crimes) and in terms of commensurability (punishment relative to the crime).⁴

WIDER NOTIONS OF RETRIBUTION

The common view of retribution sees punishment as its sole or essential vehicle. But if a wider notion of retribution is countenanced it does not deny that a retributive response should say "the guilty deserve to suffer", but what they should "suffer" is up for debate. Deservedness remains at the core of retribution and yet it can be met, for instance, by "deserving to suffer remorse ... which is necessarily a painful process, [or deserving] to suffer censure from others ... [which] if taken seriously, must [also] be painful", or in deserving to suffer the denunciation of one's wrongful conduct by those whom one values or holds in high regard (emphasis added).⁵ The suffering can equally be the burden of making reparation (symbolic or material) as it can be the burden of being punished.⁶ Feeley recognised, for instance, that much of the burden actually suffered by a wrongdoer in a traditional justice response is, in fact, "practical inconvenience" as a consequence of involvement with the legal process; burdens such as lost time, perhaps lost employment, costs and expenses, loss of reputation, all of which are burdensome impositions but not intended as "punishment" as such.⁷ A form of response which can countenance retribution as being addressed in these wider terms can still impose on an offender "deserved suffering", but without the imposition always needing to extend to punishment or "hard treatment".⁸ Responses to criminal wrongdoing which address this wider conception of "retribution", perhaps surprisingly, include alternative forms of response such as restorative justice.

Restorative justice practices

The factors that make a response to wrongdoing "restorative" are neatly encapsulated in Roche's four "restorative value prescriptions" – participation, personalism, reparation and reintegration.⁹

Participation

"Participation" refers to the encouragement of those most affected by wrongdoing to involve themselves directly in responding to the harm caused, usually through a face-to-face "restorative encounter". Participation allows those affected to "collectively on a consensual basis [contribute to deciding] how to deal with the aftermath" of the offending.¹⁰ Such practice ideally promotes direct participation above indirect involvement, but they are graduations or degrees of involvement.

³ Bottoms A, "Some Sociological Reflections on Restorative Justice" in von Hirsch A, Roberts JV and Bottoms A, *Restorative Justice and Criminal Justice* (Hart Publishing, 2003) p 103.

⁴ Sadurski W, *Giving Desert its Due: Social Justice and Legal Theory* (Reidel, 1985) p 233.

⁵ Duff RA, "Restoration and Retribution" in von Hirsch, Roberts and Bottoms, n 3, pp 48-49.

⁶ Duff RA, "Restorative Punishment and Punitive Restoration" in Walgrave L, *Restorative Justice and the Law* (Willan Publishing, 2002), p 97.

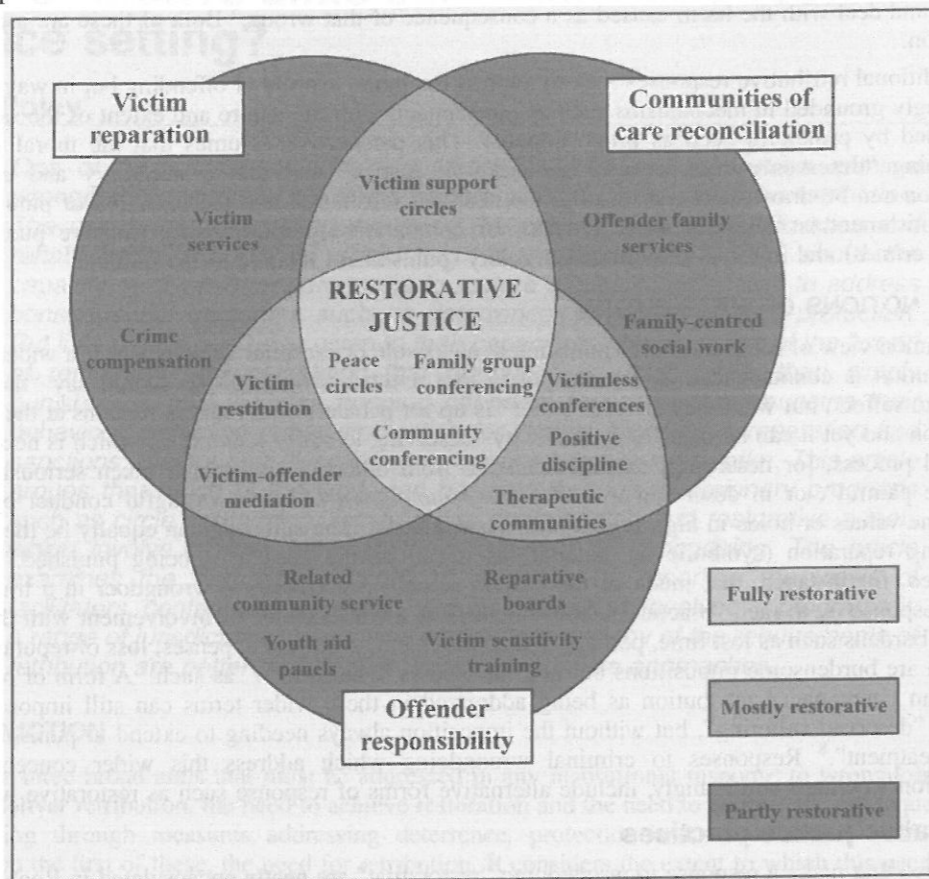
⁷ Feeley M, *The Process is the Punishment* (Russell Sage Foundation, 1979).

⁸ As to the distinct meaning of "hard treatment" see von Hirsch A, *Censure and Sanctions* (Oxford University Press, 1993), who describes it "visiting a deprivation" on the offender that is burdensome or painful independently of its communicative content.

⁹ Roche D, *Accountability in Restorative Justice* (Oxford University Press, 2003). Roche drew on Van Ness's statement of the foundational principles of restorative justice in drafting his own value prescriptions: Van Ness DW, "New Wine and Old Wineskins: Four Challenges of Restorative Justice" (1993) 4 *Criminal Law Forum* 251 at 259.

¹⁰ Roche, n 9, p 30.

Reproduced below is McCold and Wachtel's "restorative practices typology" model:¹¹



Where the presence of victim, community and offender overlap as they do in "peace circles, family group conferencing and community conferencing", the process is seen as "fully restorative" in a participatory sense. Other categories are classified as "mostly restorative" or "partly restorative" where lesser degrees of direct participation occur. There is a clear emphasis on a face-to-face "restorative encounter" being the ideal form of restorative response to wrongdoing.

Personalism

"Personalism" reflects the restorative perception that wrongdoing is first and foremost a violation of people and their relationships. On this view, the focus of any justice response should be the impact of that offending on the victim, the offender, their families and the wider community. This contrasts with a traditional criminal justice focus where "the physical and emotional damage crime does [may be] suppressed, if not completely ignored" in lieu of the normative damage to the social fabric.¹² Restorative practice promotes personalism above perceptions of the offence as a public wrong.

Reparation

"Reparation" refers to the emphasis restorative practice places on repair, specifically on repair of the harm caused by wrongdoing. Its core focus is on the identification and repair of such harm, whether it be material, physical or the many less tangible emotional harms such as "loss of dignity, happiness,

¹¹ McCold P and Wachtel T, "In Pursuit of Paradigm: A Theory of Restorative Justice" (Paper presented at XIII World Congress of Criminology, Rio de Janeiro, 10-15 August 2003 reproduced at www.iirp.edu/article_detail.php?article_id=424 viewed 18 December 2012.

¹² Roche, n 9, p 27.

confidence, security, personal power, and sense of self-worth".¹³ This again contrasts with a criminal justice focus on sanctions or penalties designed to provide normative repair. Restorative practice instead promotes reparation above sanctions as its means of expressing censure.

Reintegration

"Reintegration" refers to the focus in restorative practice on assisting offenders to rebuild ties with their community rent by wrongdoing.¹⁴ Restorative processes emphasise "the responsibility of the wider community to ensure offenders are accepted and included" in order to re-promote community harmony "with an eye to prevent future offending".¹⁵ Restorative practice promotes opportunities for reintegration above a focus which is purely on punishment or rehabilitative measures.

Achieving retribution through restorative means

If the necessity of punishment as the means to achieve retribution is uncoupled in responses to criminal wrongdoing this opens up attention to different aspects of the response. It can be useful to conceptualise the delivery of retribution in these circumstances in terms of a distribution of a series of "harm-related burdens and benefits". Distribution is a useful conceptual structure because at its core we are describing a process of justice.

All acts of wrongdoing impose burdens simply as a consequence of the injustice they represent. The purpose of any retributive response is to manage and, if possible, remove these burdens. This can be done by imposing burdens on the wrongdoer which can encompass the wider notion of what "the guilty deserve to suffer" suggested above.¹⁶ On this analysis a wrongdoer deserves to suffer burdens which are "burdensome and painful", which may include but not be confined to punishment. But the distribution of such burdens forms only part of what retribution entails; certain benefits (vindication, emotional release etc) must also flow to those affected by the wrongdoing with a view to alleviating or compensating for the suffering victims and others affected have endured.

It is suggested that the focus of any distribution must be to ensure that there are "flows" of burdens and benefits, either "towards" or "away from" the various persons affected. In essence, what is distributed are burdens of "censure and sanction" (imposed on the offender), and benefits of relief through vindication and the removal of burdens (flowing largely to the victim).

Burdens which could deliver the necessary "censure" and "sanction" of retribution can include:

Harm-related burdens
Accepted or imposed –
• Self-censure of remorse
• Censure of others
• Symbolic reparation
• Material reparation
• Punishment
• Emotional burden of managing fear, hatred and shame
• Practical and personal consequences created by the response process

¹³ Roche, n 9, p 27.

¹⁴ Roche, n 9, p 29.

¹⁵ Roche, n 9, p 29.

¹⁶ Duff, n 5, p 48.

Benefits which can also affect the necessary “repair” of harm or “restoration” of harmonious social relationships may include the following:

Harm-related benefits
Repaired or restored – <ul style="list-style-type: none"> • Safety, injury, health • Loss • Relationships • Sense of community • Personal dignity • Emotional damage • Sense of vindication • Sense of freedom • The release of public catharsis

The focus of this article is on how effective restorative justice processes are in addressing this need, specifically with respect to three core burdens (censure, remorse, punishment) and the core benefit of vindication.

RESTORATIVE CAPACITY TO ADDRESS RETRIBUTIVE AIMS

In a series of 50 face-to-face interviews conducted in Canada, New Zealand and in a number of Australian jurisdictions, restorative practitioners (convenors, facilitators, program managers) or others (lawyers, judges, magistrates) involved directly in the programs or in the use of the programs were asked about the retributive possibilities of restorative processes.¹⁷ Interviewees were asked to consider the scope for restorative practices in delivering these requirements of retribution.¹⁸

Scope to generate censure and remorse

Deliberate overt **censure** was not reported as a core behavior in restorative practice. The process was seen more as delivering censure indirectly “by adding the missing piece of ‘impact on others’...not [by] telling offenders how wrong they are, [but by] getting them to reach this view themselves”.

The trigger for taking on this role of self-censure was seen as “being made aware of the harm caused to the victim”. This awareness was seen to flow partly from the physical presence of victims in the conference. When victims were present the awareness was generated by victims saying such things as “I feel really angry because you have done this to me”, or from the presence of supporters, often the offender’s own supporters or families. Censure in these terms was consistently seen as “having an effect on the offender ... which even though it is not public can be stronger than that provided in the criminal justice system”. Censure was also seen to affect the offender because it “gave him a sense of relief as an answer to [his or her] debilitating feelings of guilt. This censure was not structured in as a preconceived outcome [rather] its beginning came where the topic is raised by the victim [first saying] ‘I want you to know that what you did was totally unacceptable and wrong’”.

Overt censure was not specifically programmed into the process because it “implies something being done to the offender as compared with the wrongdoer being involved as an active participant in a process”. In fact, different conceptualisations of what “censure” involved were offered as to what might be occurring in a conference – “a better description of what happens rather than censure is ‘reproach’ in the sense of ‘look what you’ve done!’...offenders [are better at] buying into this”. Overt censuring in terms of “publicly denouncing harmful behaviour” was seldom evident in the process, but self-censure engendered by the reproach of “look what harm you have done!” was seen as critical.

¹⁷ Views were obtained from facilitators, conference convenors, judges and others involved in programs including: New Zealand’s Family Group Conferencing, Canada’s province-wide Nova Scotia Restorative Justice program; and Australian neighbourhood-focused programs, such as the Collingwood Neighbourhood Justice Centre.

¹⁸ Extracted comments from interviews in the possession of the author are presented in italics.

Remorse was also implicit in restorative practice, in part because its processes are seen as “social rituals which allow the person responsible to say ‘I no longer stand by what I did’”. One implicit indicator of genuine remorse was seen to come from “the offender’s motivation to participate [in the process itself] ... and fully admit the wrongdoing ... [by] putting in place ways for this not to happen”. More tangible indications also came from “saying such things as ‘I do not want to continue along this path’”, or more simply “by offering to shake hands in the conference or by going a bit further to do something to indicate their remorse”. A particular advantage of restorative processes was that such expressions of remorse could be more readily “validated” by the participants directly involved in the process themselves.

A different conceptualisation of what “remorse” entailed was also used to describe what was occurring in restorative processes, such as “expressions of vulnerability, [so that] when people show this instead of being defensive, it opens up opportunities for discussion”. A number of comments recognised that many offenders “do not have an enormous capacity to feel a lot of remorse” and therefore it was seen as important to assist offenders “to build the capacity for empathy and understanding”. These rituals of reproach for “censure” and expressions of vulnerability for “remorse” both entail the imposition of retributive pain which is part of what offenders deserve to suffer.

Scope to generate punishment and vindication

By comparison **punishment** was not seen as “the goal of restorative justice. [Instead] the goal was seen as restoring relationships”. To describe the difficult aspects of restorative justice processes as punishment was not seen as accurate. Respondents did report that persons affected by the wrongdoing bring strong emotions to the process, including anger, vindictiveness and hatred. But their responses suggest that while “perhaps these emotions give grounds to form a view that punishment should be an outcome – those interviewed did not see that happening often”. Victims may well have “punishment on their minds” at the outset of the process, but these feelings were reported as perceptibly shifting in the preparatory stages as “accountability not punishment” was stressed.

The perception was that “punishment by its nature was not merely a descriptor for something unpleasant, but of something imposed with the intention of inflicting pain”. Such imposition was seen as “antithetical to restorative justice”. These processes were not structured around the imposition of punishment because the focus was “about the vindication of the victim”. The justice “business” of a restorative process was not seen as “the inflicting of pain but rather [about] attempting to give a moral lesson of respect”.

The resolution outcome plan described in most programs was often seen as potentially onerous given that it “holds the offender accountable and the offender may agree [to do certain things] to make amends. But these obligations are not seen as punishment”.

The crucial difference being drawn between punishment and these “burdensome amends” was “how this outcome or consequence ...was arrived at. An offender accepting a sanction voluntarily was not seen as the same as an imposed outcome”.

It was recognised in restorative processes that to utilise punishment as a retribution-generating mechanism would mean that “all the panoply of proportionality, rights protection, legal representation etc would then need to be brought into play [with the potential effect of] damaging the restorative process itself”. The view was that while punishment is on the minds of participants when they begin the process it is seen to soon fade from a central role.

Vindicating behaviour was seen as a way of relieving affected persons from the emotional burdens imposed on them by the offending. Vindication was seen to provide a way for “the conference group to acknowledge that the victim has done nothing wrong. [Victims] gained satisfaction from hearing this, and this assisted [the development of] their feelings of safety that these events will not reoccur”. In this regard, restorative conferences were seen as “forums designed for vindication; as the very *raison d’être* for the conference because they offer an open acknowledgement that the victim’s experience is regrettable and morally wrong”.

This restorative emphasis on “validation, vindication and voice [meant that victims] see the focus is being shifted to them – to what they would like the offender to do”. This gives victims “a voice when they would not otherwise have one, in an environment where they are going to be cared for”. The restorative process was seen as particularly appropriate to provide this relief. The vindicating behaviour meets “the most basic needs that victims experience – acknowledging their harms and needs, combined with an active effort to encourage offenders to take responsibility, make right the wrongs, and address the causes of their behaviour”. Vindicating behaviour was seen as a critical tool to communicate to victims that the wrongdoing was not of their making and provided relief from feelings of responsibility.

The fundamental difference with restorative practices was that punishment was neither the means for expressing censure, nor the way of expressing the blame crucial to doing the work of vindication.

SCOPE FOR THE RESTORATIVE GENERATION OF RETRIBUTION

Drawing together the threads of these narratives, restorative justice processes were reported as having the capacity to deliver many of the burdens and benefits needed to generate retribution:

- Self-censure was a defining means of generating retribution. Restorative practice rejected overt censure and substituted instead a form of reproach which brought an offender to a state of self-censure.
- Expressions of remorse act as a catalyst for opening up dialogue that can assist victims in their process of healing and recovery. By doing so, remorse generates a flow of harm-related benefits and burdens that need to flow to those affected.
- Restorative practice did not use punishment to deliver retribution. Punishment was not its means to express censure. Restorative practice highlights instead the expressive powers of the process and of the symbolic (apology etc) and material reparation which can flow from it.
- Restorative practice as a process provides vindication in its open acknowledgment that the harm experienced by the victim was wrong and reprehensible. Such behaviour can assist the recovery of victims by restoring their feelings of safety and security and by giving them normative affirmation.

HARNESSING THE GENERATIVE POWER OF RESTORATION

The present author’s suggestion is that the generative power of restorative justice can be accommodated within a traditional criminal justice response in two ways.

1. Restoratively reframing the sentencing rhetoric

One alternative is to reframe the existing sentencing prescriptions in ways that specifically require courts to utilise the capacity of retribution to be delivered restoratively. This has occurred, for instance, in New Zealand’s 2005 sentencing reforms which reframed the *Sentencing Act 2005* (NZ) (s 7) to require courts to:

- to hold the offender accountable for harm done to the victim and the community by the offending;
- or
- to promote in the offender a sense of responsibility for and an acknowledgment of that harm; or
- to provide for the interests of the victim of the offence ... (emphasis added)

These requirements have been construed by courts in ways that allow for many sentencing objectives to be addressed through ancillary restorative processes preceding final judicial sentencing. In *R v Sami* (2006) DCR 128,¹⁹ for instance, the New Zealand District Court matched each sentencing requirement to what had been achieved through “a conference with a direct face-to-face meeting with the victim”. The court said of the offender (at [26], emphasis added):

He has already been held accountable in that face-to-face way for harm done, and he has been held accountable in a way to promote a sense of responsibility for harm and some personal acknowledgement of that harm. The conference has also provided for the interests of the victim by making things easier for her and her family ...

¹⁹ An attempted purse-snatching case heard 14 October 2005 (McElrea J).

Such a prescriptive reframing of sentencing jurisprudence can give specific scope for the restorative generation of elements of retribution. The final sentence still remains a court-sanctioned order but can take account of the retributive elements delivered within a restorative framework. It still allows the court to impose further and stronger retributive measures if warranted with the necessary denunciation and censure communicated by sanctions involving potential restrictions on liberty (such as house arrest, curfew, electronic monitoring or imprisonment), with the extent of any restrictions dependant on the severity of the wrongdoing.

2. Using a restorative type encounter

A second alternative is where a restorative encounter itself provides the full means to address retributive aims simply through “bringing together all persons affected by wrongdoing”. The encounter process meets the need for retribution – through denunciation and censure communicated in the process directly, and through remorse expressed directly to the persons affected through an appropriate distribution of burdens and benefits.

The process can also address aspects of the other aims of responses to wrongdoing. The need for restoration can be explored in the conference and recognised symbolically through apology, and met materially by reparation.²⁰ Consequential aims can also be met, including:

- the need for deterrence through censure and agreed restrictions on behaviour;²¹
- the need for rehabilitation by agreement to participate in treatment programs; and
- the need for prevention through agreed constraints on behaviour, by the mobilisation of community and police knowledge to craft creative crime prevention measures designed to provoke attitudinal change.²²

CONCLUSION

A two-step alternative approach such as that described above gives scope for restorative practices to address the specifics of retribution in as wide a manner as possible. When a restorative-type sentence is informed by conference outcome, the management of the responses remains with the court but imposed conditions can be framed with a restorative focus. When a restorative form of encounter itself constitutes the entirety of the response its management will be returned (at least for a time) to the persons affected, with the difficult retributive aims of denunciation, remorse and censure delivered in the encounter. Both these suggested approaches allow scope to also address restorative and consequential aims. The big leap of faith for courts and policy-makers is to recognise the scope of restorative approaches to satisfy many aspects of retribution, in some instances without the need for punishment, outside or ancillary to a traditional court approach.

²⁰ Angel’s research has indicated participation in restorative conferencing can significantly reduce PTSS (post traumatic stress symptoms), especially for female adult victims of serious crime: Angel CM, “Effects of Restorative Justice Conferences on Post-traumatic Stress Symptoms Among Robbery and Burglary Victims: A Randomised Controlled Trial” (Paper presented at The Ninth Annual Colloquium of The Campbell Collaboration, Oslo, Norway, 18-20 May 2009). Gal’s (2011) work suggests restorative encounters may also better address the needs of child victims that criminal justice approaches can: Gal T, *Child Victims and Restorative Justice: A Needs-Rights Model* (Oxford University Press, 2011).

²¹ Shapland’s (2008) evaluation of United Kingdom randomised use of restorative conferencing in combination with “conventional justice” has confirmed significant reductions in reoffending rates for serious offenders can occur as a result of the encounter: Shapland J, Atkinson A, Atkinson H, Chapman B, Dignan J, Howes M, Johnstone J, Robinson G and Sorsby A, *Restorative Justice: The Views of Victims and Offenders* (Ministry of Justice, London, 2008).

²² Specifically, measures designed so as to begin the transformation of organisational, school or family cultures on matters like violence and alcohol abuse. Restorative approaches can provide an effective vehicle for such contextual crime prevention. Braithwaite has argued that “there are many individuals with preventative capabilities who can be rendered responsible for mobilizing those capabilities through a restorative justice dialogue”: Braithwaite J, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002) p 111. There is strong empirical evidence of this occurring.