Asking the Restorative Question in Response to Criminal Wrongdoing – Widening the Scope for Legal and Restorative Integration

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Declaration

This thesis is the product of my own work. Where material from other authors has been used, either paraphrased or verbatim, it is acknowledged in the text and in the references. Quotes provided by interviewees have also been included. Excepting the cited use of materials from other authors, all remaining work is my original labour and production.

Signed

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Abstract

This thesis poses a normative question. It asks how a response to criminal wrongdoing should be reframed so as to achieve justice. The question is asked in the context of debates on the role of restorative justice and within a conceptual framework that sees justice as primarily concerned with distribution. Conventional responses to wrongdoing accept that offenders must be given their deserts and treated equally, and that all persons affected by the wrongdoing must have their rights promoted and protected. What is distributed to meet these aims is mostly in the form of burdens, primarily coercively imposed punishment.

This thesis offers new insights into how well such conventional responses meet the needs of justice. It says that not all of what is required to mark such distributions as just is currently acknowledged. What is missing is a focus on removing the burdens imposed as a consequence of wrongdoing. There is an explicit failure to accept that benefits as well as burdens need to be distributed, primarily benefits of repair necessary to restore damaged individuals and relationships. What is also lacking is a more effective means to trigger crime prevention. This thesis argues that it is only by asking ‘the restorative question’ in all responses to wrongdoing that institutional responses can be rendered more effective in meeting these deficiencies.

This thesis considers the benefits that the restorative practice of justice brings to this issue. Empirical evidence gathered from sites of practice shows that restorative responses provide many missing elements. They address the need to re-establish
harmonious social relationships and to consider the imposition of necessary burdens through means other than punishment.

Restorative practice nonetheless has its own inadequacies as a form of justice practice in response to wrongdoing. These limitations are highlighted when the seriousness of the wrongdoing calls for a strongly retributive response. Consequently rather than representing a replacement discourse, restorative practice acts best in a complementary role to conventional legal justice.

Using methodology which integrates a normative/doctrinal/philosophical approach with ethnographic methods and legal and historical studies, this thesis offers a fundamental reworking of the justice response to wrongdoing. By means of this analysis, the thesis develops a set of institutional design ideas about how best to restructure the response to criminal wrongdoing. This integrated design is seen to better meet the need to give people their desert, to treat them equally, to protect their rights while at the same time promoting harmonious social relationships between them.

The integrated model developed is founded on two core propositions. The first is that the purpose of responses to wrongdoing must always be to meet retributive, restorative and consequentialist goals. The second (and more radical) proposition is that many of these aspects can be better met through restorative means. Even aspects of retribution can be satisfied through the censuring power of restorative encounters. Restoration is as much achieved by remedying personal harm as it is by restoring the normative harm which wrongdoing causes. Consequential aims of crime prevention can be as effectively
delivered through responses contextualised to the individual circumstances of those affected.

Integrating the restorative approach within conventional institutional responses requires care and inventiveness. There is a risk of diluting the protective rights-based focus of legal practice if another more personalised form of response is added. There is also the risk of overly institutionalising restorative practice and so damaging the effectiveness of the alternative responses it can bring to wrongdoing. But integration has clear benefits. Properly integrated, the restorative practice of justice will percolate up to influence the needlessly punitive responses of legal justice, and the legal practice of justice will filter down to strengthen the at times inadequate rights adherence of restorative practice. In the process, a stronger justice response to wrongdoing is delivered.
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PART ONE

DEVELOPING ANALYTICAL TOOLS FOR AN EXAMINATION OF JUSTICE PRACTICE
Chapter 1

Fashioning a More Just Response to Wrongdoing

Part One of this thesis (consisting of this and the next three chapters) establishes the conceptual framework from which to examine justice responses to wrongdoing in practice which is the focus of this study. This first chapter provides an overview of that framework and describes the methods used to develop the set the analytical tools by which to conduct the examination. These analytical tools will provide the means to ask key questions about the effectiveness of justice practice. Chapter Two outlines the process used to identify the ‘essential aims of justice’, Chapter Three does likewise with a set of ‘evaluative criteria’ used to denote particular distributions as just or unjust and Chapter Four develops a set of ‘generative mechanisms of justice’.

The particular focus which is being examined is the practice of justice in the context of responses to wrongdoing. The examination is conducted within a conceptual framework that sees justice (in all its forms) as concerned with questions of distribution. Understanding notions of justice in distributive terms is much more familiar when analysing social justice practices where the relative allocation of the benefits of social co-operation is commonplace. But it will be argued that this distributive concern holds true as much for the imposition of burdens in response to wrongdoing, as it does for the allocation of welfare benefits in response to perceived need. Finding a conceptually appropriate means to examine the nature of these distributions in the context of wrongdoing presents
particular difficulties. It will be necessary to examine certain aspects of justice that are closely linked but seldom considered in isolation. To carry out such a detailed examination it has been necessary to develop a set of distinct analytical tools. These analytical tools have been developed through asking some fundamental threshold questions about the nature of distributions made in response to wrongdoing:

- Why are *distributions* necessary to achieve just outcomes in the context of wrongdoing?
- If such distributions can be said to occur, what are the ‘*goods*’ being allocated as a consequence?
- *How* can we know such distributions are just?
- How are distributions of these ‘*goods*’ *generated* in responses to wrongdoing?

The first two questions can usefully be considered together. They involve a consideration of the purposes of distributions in response to wrongdoing and the content of those distributions. The fundamental answer to the first question is that distributions of benefits and burdens are necessary to achieve just outcomes in the context of wrongdoing because they provide the means to deliver particular outcomes – most notably to deliver retribution, to commence restoration and to achieve certain important consequentialist results (such as deterrence, rehabilitation and prevention). The nature of these outcomes will be developed as ‘the essential aims of responses to wrongdoing’ in the first part of Chapter Two. The second question asks what constitutes such goods and generates a list of the ‘benefits’ and ‘burdens’ that need to be allocated when addressing the essential aims. These are
considered in the second part of Chapter Two. Some of the benefits are broad. They can include a restored sense of dignity or relief from emotional harm. They can include the provision of a sense of security that victims may need to regain, as well as a sense of private or public catharsis that the moral wrong done to them has been confronted. Other benefits will be much narrower. The repair of damage or injury caused by the wrongdoing can be emotional as well as physical, as can the replacement of loss or the need for reparation. Similarly, the range of burdens may be equally wide, and include the censure and punishment imposed on the offender, or experienced by them as a consequence of their exclusion from society by separation or imprisonment. The totality of these ‘goods’ are referred to as ‘harm-related benefits and burdens’.

Answering the third question as to how we know whether such distributions of benefits and burdens in response to wrongdoing are just requires the application of a set of standards by which to measure ‘justness’. An unjust distribution will be identified as one that fails to give people their deserts, does not treat them equally, denies them their rights and does not confront the disharmony caused to their social relationships. Conversely, a distribution meeting each of these standards will be seen as having the potential to produce just outcomes. These standards are referred to as ‘the evaluative criteria of justice’ and are discussed in detail in Chapter Three.

The answer to the final question as to how the distribution of justice-producing benefits and burdens occurs requires a fresh examination into the means by which acts of wrongdoing are responded to. Particular social behaviours and practices will be identified as
constituting ‘communicative delivery mechanisms’ that generate an experience of a sense of justice in persons affected by criminal wrongdoing. These broad ‘behaviours’ include some that meet the particular needs for ‘accountability’ and ‘responsibility’ (telling the truth, vindicating the experience of those harmed, and expressions of remorse) and others more directly attuned to delivering ‘censure’ or ‘repair’ (such as reparation, apology or punishment). The broad group of ‘practices’ will be seen to include conduct which is consistent with guiding sentencing principles such as proportionality or deterrence, and the effect this can have on the quality and nature of any outcome reached. These combined set of ‘practices, behaviours, approaches or principles’ are referred to as the ‘generative mechanisms of justice’ and are described in detail in Chapter Four.

From the discursive process followed in the remaining chapters in Part One three analytical tools will emerge. These tools will be used at important stages in the thesis to analyse particular aspects of justice practice as regards responses to criminal wrongdoing. The analytical tools that will be developed are used to make the following assertions:

- The ‘essential aims of justice responses to wrongdoing’ are delivered by means of the distribution of ‘harm-related benefits and burdens’;
- The ‘evaluative criteria of justice’ provide particular standards by which these distributions can be judged as just or unjust;
- The ‘generative mechanisms of justice’ describe the typology of behaviours and practices through which just distributions can be generated.
These analytical devices provide the essential tools to analyse justice practice in particular contexts and to suggest potential linkages and interrelationships between different forms of response. The particular focus is with two forms of such practice – what will be termed ‘legal practice’, which refers broadly to the practice of law as a traditional means of generating just outcomes, and what will be termed ‘restorative practice’, which refers to an emergent form of response with a unique focus on the repair of ‘harm’ caused by wrongdoing. ‘Legal’ forms of response focus primarily upon establishing culpability and determining penalty. Restorative forms of response will be seen to be focused on the harm caused by the wrongdoing and establishing responsibility of ‘persons affected’ as a means to remedy that harm. These differences in approach will be discussed respectively in Chapter Five and Six and provide a useful contrast through which the workings of justice practice can be illuminated.

**The scope of the study**

The examination of the justice practice in these two institutional settings (legal practice and restorative practice) defines the scope of the study. Legal and restorative practices will be seen as markedly different forms of response, in range of application and in terms of their effect. Legal practice is a broad normative scheme applying the law to a range of contentious and non-contentious situations, and with a particular responsibility for responding to criminalised wrongdoing. By contrast, restorative practice will be seen as a much more narrowly focused response with a core emphasis on restoring relationships, though with a focus not necessarily confined to criminalised wrongdoing.
Any combination of these two practices provides potential for cross pollination. The repair focus of restorative practice will be seen as potentially able to influence and re-shape legal practice whenever the two forms intersect or meet. Similarly, legal practice will be seen to have the potential to influence (but also the risk to overwhelm) the restorative practice of justice by adding the benefit of its strict procedural architecture of rights protection and formal equality. The empirical examination of these two forms of practice and their current intersection will be used to give context to the conceptual analysis at the heart of the thesis.

Research questions

Three research questions are derived from these initial conceptual questions:

1. What *should* justice practices be striving to achieve in their responses to wrongdoing?
2. How well are these aims currently being met to achieve just outcomes in mainstream or ancillary forms of practice?
3. Can these aims be better achieved through some form of practice which integrates legal and restorative approaches?

Thesis Structure

The thesis is structured so as to address each of these research questions in turn. To do so the thesis has been divided roughly into four parts. **Part One** (this current section) describes the methods used to develop each analytical tool outlined and to consider their application to justice practice. This Part consists of the three additional chapters that follow this one.
Chapter 2 outlines the process used to identify the ‘essential aims of justice’. It describes how we reached the view that retribution, restoration and the achievement of certain consequentialist goals encapsulated what was required to be done in justice responses to wrongdoing. This view was reached by firstly considering the approach of current institutional responses and interrogating these practices to determine what ‘dealing with wrongdoing’ means. Whether the nature of ‘wrongfulness’ itself also demanded a particular quality or form of response is also considered. The second part of this analysis focuses upon the benefits and burdens that need to be distributed to achieve just outcomes. These ‘harm-related’ benefits and burdens can be combined into certain ‘bundles’ that need to be distributed whenever wrongdoing occurs. We borrow a conceptual framework for the ‘harm-related benefits’ from notions of ‘positive deserts’. A similar conceptual framework is developed for the ‘harm-related burdens’ based on notions of ‘negative desert’. The premise is that the essential aims are achieved through the generation of ‘flows’ of these benefits and burdens.

Chapter 3 outlines the process used to identify the second analytical tool. It examines the notion of ‘justice’ through an historical review and traces the origins of this concept from Plato and Aristotle to the present. This inquiry is purposive, rather than purely historical as its focus is to demonstrate that justice at its core is concerned with distribution, and that this assertion holds true equally in the case of responses to wrongdoing. Rawls’s theory of distributive justice is examined in this light as are critiques of the notion of justice as distribution, such as Nozick’s entitlement rights theory and Young’s structural critique. We defend the position that ‘distribution’ is a core concern of justice.
There is a further distinction drawn between the ‘concept of justice’ as distribution and various ‘conceptions of justice’. The latter provide different answers to what it means for a situation to be described as just or unjust. From the analysis of these different ‘conceptions’, we draw a set of ‘evaluative criteria’ which is used to denote particular distributions as just or unjust. These standards are used to provide the measures of justness needed to examine distributions made in responses to wrongdoing.

**Chapter 4** completes the analytical construction by developing a set of ‘generative mechanisms of justice’. Using as a guide a content analysis of the literatures of legal and restorative practices, we isolated particular mechanisms given repeated prominence in each practice as its means of ‘doing justice’. Drawn from this analysis is a set of mechanisms (some found as common to both practices, others seen as unique to one or other). These mechanisms are seen to provide a typology of behaviours and practices which are the causal triggers for generating experiences of a sense of justice in those affected by the wrongdoing. A set of twelve mechanisms seen as having particular generative power is identified.

From Part One is established the conceptual framework from which to examine justice responses in practice. The analytical tools developed provide a means to address the research questions posed. The essential aims provide the means to test whether current responses to wrongdoing do meet fundamental social and moral objectives. The harm-related benefits and burdens provide a means to analyse the ‘goods’ being distributed in these responses. The evaluative criteria provide a means to gauge and assess the justness of
any distributions made. The generative mechanisms provide a means to consider how such just outcomes are activated in practice. Armed with each of these analytical tools, we can better examine justice in practice in closer detail.

Part Two provides the opportunity to apply the first of these analytical tools to practice. The evaluative criteria tool is used to compare two distinct forms of practice highlighted – legal and restorative. The evaluative criteria assess the justness of their respective responses to wrongdoing. The results of these analyses are reported in Chapters 5 and 6.

In Chapter 5 the evaluative criteria are first applied to legal practice. We find that the compliance of legal practice with the justice standards is mediated by its own internal commitments to the rule of law, to formal equality and to rights protection. At first glance, these internal commitments should heighten and enhance compliance. However a number of deficiencies exist. While legal practice has good potential to meet the desert and rights standards, there is less potential to meet the equality standard fully or to meet the harmonious social relationship standard in any significant way.

In Chapter 6 the evaluative criteria are similarly applied to restorative practice to compare and consider its potential for delivering just outcomes. The compliance of restorative practice with the justice standards is also mediated by its own internal commitments to shame management, to direct emotional response to wrongdoing, and to restoring relationships. In the same way as with legal practice, there are both adherences and deficiencies in its compliance with the evaluative criteria. Restorative practice was seen to
hold good potential to meet the harmonious social relationship and the equality standards, but poorer potential to meet the standards of rights and desert.

The analysis in Part Two suggests a certain commonality in the way the evaluative criteria are met. The perceived deficiencies provide a mirror image of one another. Legal practice has good potential to meet the desert and rights standards, which are measures restorative practice meets poorly. Restorative practice has good potential to meet the equality and relationships standards, which are measures legal practice meets poorly. Both sets of deficiencies suggest a failure to provide a fully just response to wrongdoing. Their complementarity gives rise to an expectation that some combination of the two approaches might well address each deficiency. This is an issue pursued further in Part Four. The variations in compliance also raise interesting questions about what is so markedly different about the restorative generation of justice that makes its practice the obverse of legal practice in many ways. Exploring the nature of these differences is the focus of Part Three.

**Part Three** provides an opportunity to use the third analytical tool, the generative mechanisms of justice. We scrutinise the apparent uniqueness of the restorative practice of justice more closely using this device. A number of specific sites of restorative practice in three jurisdictions are selected for this comparison. Part Three consists of two chapters. It firstly describes and details the particular restorative sites of practice chosen. It then reports on the data gathered from interview data with those connected with these sites of practice as to what is unique in the generative mechanisms used.
Chapter 7 describes the method of selecting representative sites using as criteria their degree of ‘restorativeness’ and their degree of ‘responsiveness’. Each selected site is reviewed drawing on information from primary source materials and from secondary literature searches, as well as from site visits and evaluative data. The chapter provides the context for the empirical reports in Chapter 8.

Chapter 8 reports on the findings of the empirical review. It describes the particular mix of generative mechanisms identified by practitioners involved in each of nine programs as means for generating just outcomes. The views expressed by respondents are seen to tell a story about how restorative responses cultivate its distinctive sensibility of justice.

The analysis presented in Part Three suggests both a paradigmatic unity and paradigmatic shift from the way justice is generated in legal practice. There is a unity in the importance placed on responsibility, remorse, vindication and truth telling. There is a marked departure in the importance placed on the use of censure and repair, with restorative practice preferring reparation and apology over legal practice’s reliance on sanction and penalty. This analysis enlarges our understanding of the relationship between the two forms of practice. It also provides the starting point for an exploration of how the two forms of practice might be combined so as to meet the justice requirements in response to wrongdoing more fully.

Part Four considers the feasibility of such an integration. It looks at the current criminal legal jurisprudence for indications that restorative approaches are in fact accommodated in
some form in current practice. It then provides a series of design ideas about how a ‘restorative question’ model of integration might be institutionalised.

Chapter 9 examines the extent to which legal practice currently accommodates restorative justice approaches and the scope for further accommodation. Legal practice traditionally meets the essential aims in settled ways – retribution by punishment, restoration by normative repair, and consequentialist objectives by deterrence and separation. This chapter explores whether this traditional approach has altered under the influence of restorative inroads into the criminal justice system. Two types of influence are evident. In Canada, the influence can be conceptualised as a move to meeting distinct restorative objectives through conventional legal means with courts now required to *consider* restorative means of response. In New Zealand, the influence is generated by *mandating* a requirement to allow restorative objectives to be achieved outside the structure of the criminal justice process by means of encounters within restorative conferencing. Both forms of judicial accommodation produce different forms of modified justice responses.

Chapter 10 proposes a model for integrating these two forms of practice drawing upon all the insights gained. It suggests the best approach is one that first recognises and accommodates the full capacity of restorative forms of practice to deliver on the essential retributive, restorative and consequentialist requirements. This model of integration is a minimalist one. It approaches an integrated path by adding the question ‘can restorative means provide a satisfactory response to this incident of wrongdoing?’ to the conventional response equation. Asking this ‘restorative question’ has two effects – it will explicitly
highlight the need to address many currently neglected restorative-type aims and it will bring much more to the fore restorative practice’s own distinctive capacity to address retributive and consequential aims. Giving restorative approaches this wider licence is seen as the crux of any successful integration.

**A new way forward**

The analytical tools to be developed in Part One will be used to examine the practice of justice in the context of wrongdoing. The analysis this provides can allow us to gain deeper insight into how justice is done in response to wrongdoing. The analytical devices provide a means to assess the justice potential of the two particular forms of response. They are used to identify behaviours and practices seen as most effective in generating just outcomes and in explaining the distinctive mix of justice generators used in restorative practice.

But the thesis is intended to be neither simply an exploration of abstract ideas nor merely an appraisal of the strength of one or other form of institutional justice practice. The theoretical examination and the descriptive analysis are at all times directed to providing concrete solutions about how a more just response to wrongdoing can be fashioned. The thesis deliberately seeks to influence key responsible institutional actors in order to have them take incremental steps towards fashioning a more just response to wrongdoing. It provides a model for how such steps might be hastened.
Chapter 2

Identifying the aims and means of institutional responses to wrongdoing

Introduction

The conceptual framework of justice assumed in Chapter 1 is one that sees the distribution of benefits and burdens as the core concern of justice, even in situations not usually seen as ‘distributive’. This chapter explores this idea more fully in the particular context of ‘institutional responses to criminal wrongdoing’. In the process, it develops further the first analytical tool which has the two parts outlined:

- ‘the essential aims of justice responses’ – which explain the purpose of distribution in response to wrongdoing, and
- the ‘harm-related benefits and burdens of justice’ – which examine the specifics social ‘goods’ distributed in such contexts.

This analytical tool is developed by considering the nature of institutional responses and their influence on the priorities set when dealing with ‘wrongdoing’. We hypothesise from this analysis that there are three broad aspects that need to be addressed in any institutional response to wrongdoing – the need to deliver retribution, the need to achieve restoration and the need to facilitate certain consequentialist outcomes. Consistent with the conceptualisation of justice as distribution it is suggested that these outcomes are achieved by distributing harm-related benefits and burdens.
A distinction is drawn between the encouragement of a ‘flow’ of these harm-related benefits and burdens and the need to ‘balance’ or ‘rebalance’ them with a view to achieving equilibrium. Such distributions are not seen as primarily designed to rebalance a perceived disequilibrium caused by wrongdoing but instead to begin a process of repair. A conceptual framework for these ‘harm-related benefits’ is developed by combining the restorative justice notion of ‘maximising values’ and the related retributive notion of ‘positive deserts’. A framework for the ‘harm-related burdens’ that need to be ‘imposed’ on wrongdoers or ‘removed’ from victims and others affected is also developed in this analysis.

The assumption from all these analyses is that such distributions must always strive to be justice-promoting. A means of assessing this aspect of the distributions is provided in Chapter 3 when we develop the concept of the ‘evaluative criteria of justice’.

*Finding the essential aims of responses to wrongdoing*

**Influencing factors**

Any response to wrongdoing must address certain discrete objectives. The content of these objectives is influenced both by the institutional means in place to provide them and by the nature of wrongdoing itself. This section explores the influence the means of response (referred to as ‘justice system responses’) and the object of the response (namely ‘wrongdoing’) have on the determination of the essential aims.
Justice system responses

The notion of an ‘institutional response’ is a social construct, describing a collection of practices, roles, norms and conventions which structure appropriate behaviour within a particular sphere of activity. In our case, the institutional setting comprises the responses to criminalised wrongdoing. ‘Institutions’ in this setting provide a collection of rules, formal or informal, that actors generally follow, for normative, cognitive, material or other reasons (North 1990:3). In the case of institutional responses to wrongdoing, these rules are influenced by what is understood to be an overriding obligation to promote just outcomes. In comparison, obligations to deliver just outcomes similarly arise in ‘welfare’ institutions organised to ensure fair patterns of distribution of social or economic goods.¹ But in the case of institutions organised to respond to disputes or perceived injustices, the focus needs to be more explicitly on responding to the wrong and correcting that behaviour (Pettit 1997). Regardless of their particular form, the ‘confluences of institutional rules and interactive routines [at work in the correction process]…as well as [their] physical structures’ are all designed to influence the reaching of a just response (Young 2006:111).

It is through this ‘structure-constituting behavior’ that these institutions provide a means by which ‘members of a society effectively force their fellows to limit their actions to a range of acceptable alternatives’, by exercising control and influence over them so as to prevent or constrain harmful behaviour (Reiman 1990:213). The institution we know as the ‘criminal justice process’ forms the core institutional response to wrongdoing. This institutional form emphasises certain practices, norms and rules, most notably those that

¹ ‘Welfare’ in this sense can be seen as referring to ‘the totality of the happiness and well-being of all persons and particularly to the alleviation of the sufferings of the poor and disadvantaged’ (Young 2006). The ‘welfare system’ provides one institutional means of delivering this alleviation.
seek to achieve certain goals by applying the values and norms of the criminal law. Even when exercising broader functions such as preventing crime, maintaining public safety or expressing normative standards, the criminal justice process retains its explicit focus on delivering justice through the law.

For Rawls (1985:233), this ‘correctional institution’ facilitates the ‘capacity for [delivering] a sense of justice’ because it gives people drawn into its institutional reach the moral power ‘to understand, to apply, and to act from [and in a manner consistent with certain] standards of justice’. These standards are explicitly stated in the criminal law. By giving people this moral certainty, the criminal justice process is seen to promote lawful behaviour and to keep breaches of that behaviour grounded in justice concerns.

The familiar ‘legal practice’ which is at the heart of the criminal justice process follows this path of using law as its means to do justice. A growing alternative form of response is ‘restorative justice practice’ which in many jurisdictions can be co-located to varying extents within the criminal justice process. In some instances restorative practice fills the wider role of the ‘dominant informal justice movement’ as regards responses to wrongdoing (Roche 2003:25). The restorative form of response takes a different approach to delivering just outcomes – emphasising instead the need to respond to harm as an alternative to a strict adherence to legal rules and processes. These two forms of response – legal and restorative – have distinctive institutional features, but they do

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2 While restorative practice is new in the context of Western institutional responses to wrongdoing it has much older historical roots (Braithwaite 2002a). As a comparison, ADR (Alternative Dispute Resolution) can equally claim to have a dominant informal justice role, particularly in civil matters (Sourdin 2004). Therapeutic jurisprudence which informs the practice of many ‘problem-solving courts’ also has a dominant informal justice role but operates more as a non-traditional judicial response to wrongdoing, rather than as a separate informal justice movement (Wexler, Winick and Stolle 2000)
share an overriding assertion that they are ‘concerned with justice’; an assertion examined more closely in Chapters 5 and 6.

Both institutional forms affect the aims pursued in responses to wrongdoing in different ways. But most importantly, they each lay claim to keeping their responses grounded by justice concerns and not by promoting expediency, efficiency or some other particular moral concern. This is the first influence on our essential aims – that the institutional forms used to respond to ‘wrongdoing’ profess an overriding emphasis on justice and on ensuring that it is promoted and championed.

It is important to be clear about what is meant by an institutional response to wrongdoing ‘doing justice’. For the purposes of this thesis, ‘doing justice’ is given two distinct meanings. The first is that ‘doing justice’ is taken to mean providing an experience of a sense of justice within a response process by ‘creat[ing] a sensibility that the wrongdoing has been responded to in a just manner’, through morally appropriate behaviour (Shearing and Johnson 2005:29). The second sense is that ‘doing justice’ means providing those affected with outcomes seen to produce just and proper consequences.3

Wrongdoing

The very nature of ‘wrongfulness’ influences what is required in a response to it. ‘Wrongdoing’ is conduct that is both prohibited, and at least to some degree invasive of

3 There is some parallel here with the distinction Rawls drew between ‘justifying a particular practice’ and ‘justifying a particular outcome falling under it’. In his famous discussion on punishment Rawls distinguished between the justification of morally fitting response behaviour and the justification of morally or socially fitting outcomes, that is to say outcomes with a certain utilitarian value (1955:4-5). We are making a somewhat similar distinction between the just way people are dealt with in institutional responses and the justness of the outcomes imposed on them and others.
personal liberty. Feinberg (1984:31-6) captures this essence when he defines ‘wrongdoing’ as the ‘unjustifiable and inexcusable setback or invasion of the legitimate interests or rights of another’. This ‘setback to interest’ has as its most distinctive feature the harming of others in ways that are both wrong and rights-violating. Where there is consent to doing the harm, this may ‘strip it of its wrongfulness’, but in most cases conduct that is harmful (because it is invasive) is also rights-violating. It is this quality of violating the rights of another that gives certain conduct this element of ‘wrongfulness’.4

The requirement for ‘rights-violation’ is also a necessary element for the criminalisation of conduct. In simple terms, where certain types of wrongful harm are caused (for instance, harm extending beyond conduct which causes merely social harm, such as most cases of lying) that conduct is criminalised. Such criminalised behaviour is distinguished as mala in se – ‘things wrong in themselves’ – or in moral terms as things ‘seen as evil’ (Whitman 2003).5

Mill’s ‘harm principle’ provides a further perspective on this conceptualisation of wrongdoing. In On Liberty (1974), Mill says each individual has the right to act as he or she wishes, so long as their actions do not harm others. So, for instance, on this view an action which directly harms only the actor himself is not one in which society should intervene since the permissible motivation of ‘harm to others’ is missing.

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4 One obvious example of harmful conduct which is not ‘wrongdoing’ is the harm done to opponents in contact sports, which is not ‘wrongful’ provided it remains within permissible limits. Conversely, in other situations the wrongdoing may be such an invasion of personal liberty (slavery, for example) that the rights violation remains even in the presence of ‘consent’ (Kleinig 2009).

5 This behaviour is distinguished from a wide range of essentially regulatory offences which are criminalised not because they are ‘wrong’ in themselves but simply because they are forbidden for social or regulatory purposes. These mala prohibita – ‘things wrong only in so far as they are prohibited by the state’(Lacey 2008:102) – stand outside any explicit notion of wrongfulness but are seen as needing to attract criminal rather than civil penalties to be effective.
But as Feinberg rightly points out, the breadth of ‘harm’ to which this principle applies is far wider than purely the ‘wrongful harm’ or wrongdoing on which the criminal law focuses (1984:36). Husak paraphrases Feinberg well to capture this difference by distinguishing between what he calls ‘normative’ and ‘non-normative’ harm:

In the “normative” sense of harm, A harms B “by wronging B, or by treating him unjustly.” In the “non-normative” sense of harm, A harms B “by [merely] invading, and thereby setting back, his interest” (Feinberg 1984:34; Husak 2008:91).

The normative sense of harm is the concern of the criminal law. Otherwise, conceivably any result that anyone has ever wanted to prevent could be construed as ‘harmful’ to that individual and so forbidden (Fletcher 1978:402). The concern of the criminal law is much narrower and rests with that subset of ‘wrongful harm’ which is (sometimes morally and normatively) wrong and which is labeled here simply as ‘wrongdoing’.

The immediate question is whether the nature of behaviour reduced in this way – behaviour which is harmful and wrong – has any influence over what takes place in responses to it. The scope of this sort of harm can be clearly seen to have such an influence when we consider the effect of the harm as extending well beyond purely material, physical or psychological harm to include damage to normative or social relationships (of friends, neighbours, fellow citizens, or communities at large). The effect of this extension of harm is that any responses must of necessity address the breadth of both actual and normative harm in ways that are sufficient to ‘make it
appropriate [for the community] to desist from anger, to renew trust, and to restore [a sense of] community’ (Duff 2002:86-7). The imposition of punishment is routinely seen to be a means to address the actual harm and to communicate the necessary normative condemnation. We can conclude from this that any essential aims in responses to wrongdoing must be fashioned in such a way that they accommodate this twin need to condemn and restore, though the methods of doing so may not be reduced solely to punishment.

There are two further elements to consider about the nature of ‘wrongdoing’ that also influence responses. ‘Wrongdoing’ as we have described it has the added aspect of being a contestable term, since offenders who may objectively ‘do’ wrong often do not admit to that wrong, and where they do, they assert (sometimes quite correctly) that there was ‘wrong on both sides’ in regard to their and others’ behaviour. Such circumstances make it more difficult to fully respond to wrongdoing in particular essential ways if the presumed sharp dichotomy between ‘offender’ and ‘victim’ is missing. Offenders may admit to committing some particular incident of offending and yet deny that their actions were wrong believing such actions as ‘responsive’ to the willful behaviour of others. They may be responding to earlier inflicted harm, or a perceived ‘need’ to address the wrongdoing of others, or more broadly still, to their own adverse socio-economic conditions as compared with others (Alder 2000:113; Daly 2008:109). This missing dimension of ‘full’ responsibility needs to be added to the mix in some way when determining what is ‘necessary’ in responses to wrongdoing.

The final dimension of wrongdoing is that it extends in some situations to harm caused other than by purely individual acts. Young (2006) argues that ‘some harms come to
people as a result of structural social injustice’, and that these harms act as ‘a kind of moral wrong, distinct from the wrongful act of an individual agent or the willfully repressive policies of a state’ (2006:114). She says ‘wrongdoing’ of this kind gives rise to special response obligations. She suggests that instead of a focus confined to individual responsibility, a response must embrace what she calls a ‘social connection model’ of responsibility. Young says, for instance, that all persons who have gained a benefit from particular circumstances of social disadvantage bear some responsibility to address incidents of wrongdoing in those situations because they have contributed to its processes, either directly or indirectly (2006:105). 6 This is a difficult dimension to fit within any conventional notions of what responses to wrongdoing require, but cannot be validly ignored.

These pressures to deliver outcomes that are justice-focused and which come from the nature of institutional forms of response affect any formulation we can make of the ‘essential aims of a response to wrongdoing’. Similarly and more forcefully, certain aspects of wrongdoing itself (its rights violating nature, its concern with personal and normative harm, its potential for contestability and its scope for responsibility wider than mere individual acts) also exert strong influence on what should be aimed for in responses to wrongdoing.

6 Young (2006:107) gives the example of ‘the global apparel industry … [as] a perspicuous example through which I will explain the logic of the social connection model’. In this example anti-sweatshop activists may press claims on bulk purchasers of goods and their consumers that they have an obligation to take (social connection) responsibility for the poor conditions under which these garments are produced so as to respond to the ‘wrongfulness’ of that exploitation (1993:9).
Identifying three essential aims

With this background in mind, responses to wrongdoing are seen as needing to address both the consequences of the wrongdoing as well as the ‘morally false message …of disrespect’ implicit in that wrong. In so doing they provide a form of public blaming (Garvey 1999:1821). It is blaming of this kind which transforms the response from one that is purely personal to a form of public normative reinforcement. To do this properly, responses to wrongdoing must address two more aspects. They must emphasise offending as a breach of community standards (implicit in the criminal law where the breach is proscribed) and deal with the offender as a violator of those standards. At the same time, they must emphasise the violation of the moral rights which the wrongdoing constitutes, and deal with the harm it has caused (Bottoms 2003:103).

These two different points of emphasis often prioritise either ‘instruments of censure’ or ‘measures of remediation’ (Ashworth 1993:283). If the stronger emphasis is on breach of a collective norm, the goal will be more explicitly on censuring that breach so as to ensure ‘the maintenance or revitalization of values and norms which lie behind criminal law’ (Boutellier 2002:26). If the stronger emphasis is on the personal harm caused, the goal will be more explicitly focused on remedying that harm and restoring those hurt to something like their former state.7

These different points of emphasis provide us with the source of our first two discernible goals of responses to wrongdoing. Firstly there must always be a concern with ‘retribution’, so as to address the violation of the moral standard implicit in the

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7 In pathological circumstances, such as repeated spousal assault, a more pressing aim will be immediate safety, and within the constraints of maintaining that safety the possible transformation of the relationship to ensure ongoing safety and to restore dignity and equality.
wrongdoing. Secondly, there must also be a concern with ‘restoration’, so as to address normative and personal damage caused by the wrongdoing. In addition to these two explicit goals, it is considered that there must the further concern with achieving certain consequentialist outcomes. Consequential outcomes look more to the future that to the past behaviour and have a focus on reducing the potential for further harm by addressing the causes and aftermath of that wrong.

We are asserting that any form of justice practice needs to address each of these three overlapping, yet distinct aims. These three elements provide the content of the first analytical tool determining the essential aims of responses to wrongdoing.

**Retribution**

‘Retributive aims’ most explicitly address the moral aspects of offending. A response to wrongdoing strongly grounded in retribution will emphasise mechanisms, such as punishment and be based on principles, such as proportionality which ‘determine its standards of justice’ (Sadurski 1985:241). On this view, justice is interpreted to mean that ‘the primary state response to crime should be to punish offenders in accordance with their deserts’ (Duff 2003:43). It is usually assumed that this is so because the moral guilt of wrongdoing ‘deserves punishment for the sake of justice’. A necessary and essential connection is therefore drawn between meeting the need for retribution and the infliction of punishment. This punishment will be calibrated both in terms of comparative proportionality (relative punishment between crimes), and in terms of its commensurability (that is punishment relative to the crime itself) (Sadurski 1985:233).

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8 That there is a need to address each of these aims is not a view that many restorative justice thinkers for instance would share. Braithwaite (2002a) would dismiss the view that retribution is a necessary normative part of a justice response to wrongdoing. Braithwaite would argue that normatively retribution is neither necessary nor desirable in such a response.
But it is a narrow view which sees punishment as the sole or essential vehicle by which to achieve retribution. It is equally arguable, for instance, that the assumed ‘connection between guilt and punishment is not a logical necessity but [more] a moral postulate’ assumed by some but not by all (Sadurski 1985:237). If this is the case, a retributive response may certainly say ‘the guilty deserve to suffer’, but it does not then necessarily follow that it is punishment alone which constitutes such suffering. ‘Desert’ can still be at the core of retribution and yet be met by other means, such as ‘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 other ways deserving to suffer the denunciation of one’s wrongful conduct (Duff 2003:48-9). An approach which addresses retributive aims in this wider sense can still be seen as imposing the ‘deserved suffering’ of denunciation, without necessarily extending that ‘suffering’ to punishment or ‘hard treatment’.

This broader notion of retribution is better understood by distinguishing retribution from a purely revengeful response. In the case of revenge, the primary aim is to ‘degrade or destroy’ the offender’s person through some form of punishment. By contrast, retribution must emphasise that ‘offenders be treated with dignity insofar as the point of retribution is…to vindicate the equality of victim and offender’ (Hampton 1998:41). So, while an approach which emphasises retributive aims may extend to punishment in some instances, the sanction is imposed ‘with the offender’s negative moral deserts in mind’, not to mete out some form of proportionate revengeful harm (Barton 2000:56-7). A retributive response in its proper sense will be designed to offset and to address ill-

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9 As to ‘hard treatment’, see von Hirsch (1993) who describes it ‘visiting a deprivation’ on the offender that is burdensome or painful independently of its communicative content.
10 Barton (2003) takes a different view of the purpose of revenge, seeing it instead as a form of the ‘true’ sense of retribution of ‘getting even’. This is not a view taken here.
deserts, and so ‘restore a balance [using such] means at our disposal’, which are deserved deserts but not necessary punitive (Sadurski 1985:237).

Retribution is the first essential aim of a response to criminal wrongdoing. The censure and sanction implicit in retribution extend to desert, which can fall short of punishment.

**Restoration**

Restorative aims have a focus that explicitly seeks ‘the retrieval of an original favourable condition’ following wrongdoing (Duff 2002:84). Given that criminal wrongs are ‘public’ wrongs concerning the community as a whole, the primary restorative focus is wider than simply purely personal harm (Duff 2002:92). This necessitates a broader conception of restoration that extends to notions of restoring the ‘offender’s normative relationship with his victim as a fellow citizen, and with his fellow citizens more generally’ (Duff 2002:93). There are limitations both as regards these normative and personal harms, such that restoration may need to be narrowed so that there is not a requirement ‘to restore the status quo…[since] what has been done, often cannot be undone’ (Sadurski 1985:227).

Achieving this aim of restoration requires some ‘process of moral communication’ by which the normative repair can be effected (Duff 2002:97). In a legal form of response, punishment is often seen as this communicator, with actual and normative damage ‘repaired’ simply as a consequence of punitive sanctions imposed on the offender. Punishment in this sense is seen to provide the expressive and prudential means to reshape or ‘restore’ damaged relationships. For the wrongdoer, punishment also provides the necessary gateway for reintegration into the community (Kiss 2005:13).
For the victim, punishment may signal that their harm ‘counts’, and that the community acknowledges that their interests and well-being have been violated. In this way, the necessary outcome is achieved because punishment communicates the effect of the breach on the shared moral environment and reaffirms the importance of the breach of that normative standard (Reiman 1990:196-7).

But in fact punishment is once again limited in its actual reparative effects. The necessary moral communication required for restoration can often be more effectively produced through the condemnation of the act by persons directly or indirectly affected, together with some tangible form of repair. This process of restoration is achieved instead by communicating normative censure directly rather than simply relying on the remote communicative power of punishment. The restoration of personal harm can be addressed by reparation, either in the form of symbolic recognition (by apology or other gestures of remorse) or by more tangible forms of material reparation.

Restoration is the second essential aim of a response to criminal wrongdoing. Restoration has a wider scope to bring into effect the necessary normative and personal repair than simply through the imposition of punishment.

**Consequentialist aims**

As well as seeking to achieve retribution and restoration, responses to wrongdoing must also address the consequences and causes of that wrongdoing. These consequentialist aims therefore have a different focus in that they seek to achieve instrumental goals rather than goals of teaching ‘morally correct’ lessons or in repairing normative or actual harm. Consequentialist aims have an explicit forward-looking focus since they
endeavour to reduce the occurrence of criminal wrongdoing through removing the desire, opportunity or need for future offending. Their main purpose is that as a result of exposure to an institutional response, the likelihood of reoffending can be reduced in some significant way. The most common consequentialist theory of utilitarianism supports this reasoning since it asserts that the utility of ‘imposing criminal penalties…[can] outweigh their costs’ because reduced offending will be socially beneficial (Luna 2003:208).

A core consequential aim is the imposition of rehabilitative measures tailored so as to match an individual’s criminal behaviour and his or her receptiveness to potential ‘treatment’ with a view to reducing reoffending (Sherman, Gottfredson, MacKenzie, Eck, Reuter and Bushway 1997). The rationale for such measures is that they will counteract the factors that caused the initial conduct and lead to desistence. Enthusiasm for responses which emphasise rehabilitation have waxed and waned in recent decades with ‘treatment [for a time seen as] no longer plausible as the chief aim’ in responding to wrongdoing (von Hirsch 1993:71). But more recently, rehabilitation has recaptured some of its ground as better evidence emerges that some programs are in fact effective (see Cullen and Gilbert 2009). The initial loss of faith was due in part to concerns that ‘imposing’ treatment, rather than ‘inflicting’ retributive measures meant less stringent regard for proper normative procedures and constraints. There were also concerns that this had resulted in a ‘fail[ure] to provide adequate safeguards to protect offenders from being treated unjustly’ (Dignan 2002:170).

However, broad consequentialist aims such as deterrence, rehabilitation and protection are an important part of any response to criminal wrongdoing. They address most
directly the need to give communities a ‘credible guarantee of future right-doing’ which should be at the heart of any institutional response (Shearing and Johnson 2005:35). Providing means to meet consequentialist goals is the third essential aim of a response to criminal wrongdoing. The specifics of the three essential aims identified can be tabulated for convenience as follows:

Table 1. The essential aims of justice responses to wrongdoing

<table>
<thead>
<tr>
<th>Retribution</th>
<th>Restoration</th>
<th>Consequential</th>
</tr>
</thead>
<tbody>
<tr>
<td>The offender needs to experience</td>
<td>Those affected need to experience</td>
<td>The community needs to experience</td>
</tr>
<tr>
<td>denunciation of their wrongdoing</td>
<td>personal and relational restoration through reparation</td>
<td>deterrence through censure; and penalty</td>
</tr>
<tr>
<td>self-censure of remorse and censure of others</td>
<td>repair of normative harm through censure</td>
<td>rehabilitation, through education or treatment</td>
</tr>
<tr>
<td>the pain of sanction, extending to punishment</td>
<td>repair of relational harm, personal or normative</td>
<td>protection, through constraints on behaviour, including exclusion</td>
</tr>
</tbody>
</table>

11 Braithwaite (2007:105-6) points out that incapacitation need not refer only to imprisonment but can include other formal constraints on behaviour such as ‘conditional sentences’ (‘served’ in the community) or restraints on practising a profession or filling certain managerial positions. This can also extent to informal restraints on behaviour monitored by family members (such as routine reporting of behavioural compliances, or being required to reside with, or be accompanied by particular people).
This list of specifics provides a means by which to assess how well particular justice practices respond to wrongdoing. In such responses these aims are achieved through the distribution of certain harm-related benefits and burdens. The next section considers the content of this second part of the analytical tool.

**Finding the benefits and burdens**

**Distribution not balancing**

The theoretical framework established in Chapter 1 saw justice in all its forms as a concern with distributing social benefits and burdens, in such a way as to maximise liberty. This primary ‘concern’ was no different when the focus was on justice responses to criminal wrongdoing as compared with the distribution of welfare benefits. However many scholars reject this conceptual extension, saying that even if responses to wrongdoing do constitute a ‘redistribution’, any such allocation cannot be governed purely by distributive principles. This is so because the criterion for determining the share of division of necessity must move from ‘due’ to ‘moral worth’ and this is not a ‘justice question’. Rawls (1971), for instance, takes this view. The argument is that what is at play in responses to wrongdoing is not simply a question of justice but wider moral questions of blame or responsibility that are necessarily outside the scope of distribution. But there are others who see this critique as an artificial narrowing of the distributive concept. Sadurski’s (1985) analysis of justice, for instance, lends support to our claim that a response to wrongdoing can in fact be conceptualised as distributive (1985:221-58).

If such responses are accepted as distributive, however the purpose of such distributions is not to ‘restor[e] an overall balance of benefits and burdens’ in the unfair advantage
sense (Morris 1968; Finnis 1980). While responses to wrongdoing may be concerned with disturbed benefits and burdens, their aim is not to ‘rebalance’ the disturbance so as to recreate some real or ideal equilibrium. This is very often simply not possible given that there may well be no pre-existing parity or equality to re-establish. Rather, distributions made in the context of wrongdoing are better conceptualised as processes of creating ‘flows’ of benefits and burdens seen as necessary to meet the essential aims identified.

The unworkability of any notions of rebalancing can easily be illustrated by examining the idea that imposing a painful disadvantage on wrongdoers will ‘rebalance’ the wrong they have caused. It is assumed that a narrow set of benefits (those concerned with ‘rights’ to life, liberty, security, property etc) is foremost ‘guaranteed by the rules of the criminal law’ (Sadurski 1985:225). It is also assumed there is an opposing burden of self-restraint on all persons. When wrongdoing occurs, this benefit/restraint scenario is disturbed. The restraint burden is lifted by the wrongdoer’s actions and has the effect of ‘limit[ing] the victim’s liberty’ (Sadurski 1985:226-7). The wrongdoer acquires both some of the victim’s benefits (a share of their liberty) and a new benefit for themselves (a new ‘non-self-restraint’). Any response to the wrongdoing must therefore react to this cumulative imbalancing and redistribute burdens so as to nullify the illegitimate benefits. In this regard the bundle of undeserved benefits for the wrongdoer and the bundle of unfair and undeserved burdens for the victim both need to be rebalanced to renew the earlier equilibrium.

12 A number of legal philosophers, most principally von Hirsch (1976; 1985) came to reject the ‘balancing of benefits and burdens’ as the aim of responses to wrongdoing.
The difficulty that Braithwaite and Pettit (1990) and others see with this conceptualisation of wrongdoing is that the core burden (the self-restraint that comes from being law abiding) is not really a burden at all for most people. It offers ‘no actual inconvenience in its adherence for the bulk of the population’ (1990:158). Similarly, the benefit acquired by the offender (his or her new unrestricted liberty) is not really advantageous to most people. It is not a freedom that most would regard as a benefit worth offending in order to gain (1990:159). This is a similar intuition in most religions that being virtuous is itself a benefit, not a burden.

Additionally as suggested, there may never have been an ‘equilibrium …there to restore’ in the first place (Braithwaite and Pettit 1990:159). Young (1990) makes this argument strongly in her work on restrictive social structures seen as creating pre-existing mal-distributions of benefits and burdens. In Young’s view, an unjust social structure entails a ‘transfer of energies, whereby the servers enhance the status of the served’ by being robbed of a substantial part of their social benefit (Young 1990:52). The converse is that the privileged beneficiaries acquire some of the exploited person’s benefits (part of their power, energy and opportunities) and are thus able to reduce some of their own burdens (impositions on their own energies or opportunities). But if the assumed response when wrongdoing occurs is to attempt to restore pre-existing equilibriums this will merely restore the pre-existing imbalance (returning the disadvantaged to their disadvantage, the privileged to their privilege). It will not act to recreate any sort of renewed just balance.

The contrary argument made here is that there should certainly be a re-distribution of benefits and burdens following (criminal) wrongdoing, but this distribution should not
have a focus on recreating equilibrium. Instead some process of activating ‘flows’ of benefits and burdens is what is necessary in order to meet the need for retribution, restoration and consequential aims.

The next section develops what is suggested as a taxonomy of the particular benefits and burdens which need to ‘flow’. It is argued that in responses to wrongdoing the focus of distribution must be with ensuring that these ‘flows’ of benefits and burdens occur, either ‘towards’ or ‘away from’ persons affected.

**Identifying harm-related benefits and burdens**

The harm caused by wrongdoing ‘must be restored through [some form of] social action’ involving a process of distribution (Llewellyn and Howse 1999:357). All such forms of action are powered by the same ‘moral intuition’, that by distributing benefits and burdens the damage done by wrongdoing can be remedied (Llewellyn and Howse 1999:373).

The term ‘harm-related’ is used to capture the idea that the purpose of such distributions relates to obligations and entitlements created as a consequence of wrongdoing, rather than as a consequence of creating social or economic equality. Such distributions address the sort of “how can…?” questions that Bottoms (2003:97) posed:

*How can victims, having suffered a perhaps traumatic shock, be brought again into something like their prior set of social relationships and activities, regaining their self-esteem and confidence to live their lives without undue anxiety?*
How can offenders, having been rightly censured (perhaps severely) for their offence, nevertheless be reintroduced into society so that they – and the society – may ‘move on’ after the offence?

We examine distributions of these ‘harm-related’ benefits and burdens in this light as one means of achieving such restoration.

**Harm-related benefits**

A justice response in itself provides a kind of benefit – ideally the benefit of being treated justly when one is affected by wrongdoing. Weil (1951) sees this benefit as a ‘kind of nourishment’, which is a notion Gaita repeats when he says:

*If we are treated justly then we receive not merely certain natural benefits or goods, but also just treatment as a distinct and irreducible object of gratitude.*


As well as this overall benefit of ‘just treatment’, more specific benefits also need to flow. A useful starting point to categorise these benefits is Braithwaite’s (2002b; 2002d) set of the ‘maximising values’, which he specifically ascribes to restorative practice, but which have broader application. Also useful are the insights of desert scholars, most notable Ashworth (1983) and von Hirsch (1993), about what is constituted by the notion of ‘positive deserts’.

From these two sources we identify a list of specific harm-related benefits. The overall benefit of ‘just treatment’ can be seen to extend to the more specific benefits of:
Repaired, or restored –

- human dignity
- property loss
- safety/injury/health
- human relationships
- communities
- emotions (feelings of fear, hate and shame; feelings of vindication)
- freedom, and
- compassion or caring (extracted from Braithwaite 2002d:569).

As well as these, there are the benefits of positive desert:

Realised, or released –

- public catharsis
- victim satisfaction, and

All of these benefits are not realisable or appropriate in every response to wrongdoing. The actual mix in a particular response to wrongdoing will be determined at least in part by the emphasis the form of justice response places on the relative importance of the retributive, restorative and consequentialist aims.

13 There is also some similarity in these lists with Edney and Bagaric’s summation of what they see as ‘the things that are actually conductive to happiness’ which have been disturbed by criminal behaviour and need rectification as a consequence. Interestingly, they say the extent of such disturbances should form one ‘proper’ basis for determining criminal sanctions (2007:105-6).
In summary, the benefits that may need to flow in responses to wrongdoing in order to meet the essential aims would include the following:

**Table 2. Harm-related Benefits**

<table>
<thead>
<tr>
<th>Harm-related benefits</th>
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</thead>
<tbody>
<tr>
<td>Repaired or restored</td>
</tr>
<tr>
<td>• Safety, injury, health</td>
</tr>
<tr>
<td>• Loss</td>
</tr>
<tr>
<td>• Relationships</td>
</tr>
<tr>
<td>• Sense of community</td>
</tr>
<tr>
<td>• Personal dignity</td>
</tr>
<tr>
<td>• Emotional relief from feelings of fear, hatred and shame</td>
</tr>
<tr>
<td>• Sense of vindication</td>
</tr>
<tr>
<td>• Sense of freedom</td>
</tr>
<tr>
<td>• Sense of compassion, caring</td>
</tr>
<tr>
<td>• Release of public catharsis</td>
</tr>
<tr>
<td>• Victim’s sense of satisfaction</td>
</tr>
<tr>
<td>• Offender relief</td>
</tr>
</tbody>
</table>

These specifics can summarised as the distribution of the benefit of ‘repair and restoration’ and the distribution of ‘normative vindication’. 
Harm-related burdens

Acts of wrongdoing also clearly impose burdens as a consequence of the injustice done. Gaita (1991:77) captures this burden when he says:

*A person who is the victim of injustice suffers not merely a determinate form of natural harm [that is, a burden], but also the injustice of it, which is a separate and irreducible cause of his torment.*

The purpose of any response to wrongdoing must be to manage the burdens created by wrongdoing in a way that ensures they ‘flow away’ from victims for the work of repair of harm to begin. As suggested, the ‘retributivist slogan that ‘the guilty deserve to suffer’ misses the full scope of what these burdens can constitute (Duff 2003:48). A wrongdoer clearly deserves to ‘suffer’ something ‘burdensome and painful’, but this can equally be the burden ‘of being censured, of remorse [or] of making reparation’ (Duff 2002:97). Feeley (1979) recognised that much of the burden suffered by a wrongdoer is in fact those practical and mundane consequences that flow from involvement in the legal response process (specifics such as lost time, perhaps lost employment, expenses, unwanted publicity and general inconvenience). Other burdens similarly flow as a consequence of the release of harm-related emotions, particularly emotions of shame endured by both offenders and victims (Braithwaite 1989). The distribution of all these burdens must in some way be managed and controlled in a response process.

The burdens that need to flow (or to be dissipated) to address the injustice of wrongdoing include:
• the self-censure of remorse
• the censure of others
• symbolic reparation
• material reparation
• imposition or acceptance of sanction or punishment
• emotional burdens (feelings of fear, hate and shame), and
• burdensome consequences arising from the response process itself (Feeley 1979; Duff 1986; Braithwaite 1989; von Hirsch 1993).

In summary, the burdens that need to be managed or distributed in order to meet the essential aims of responses are seen as including the following:

Table 3. Harm-related Burdens

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<thead>
<tr>
<th>Harm-related burdens</th>
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<tr>
<td>Accepted or imposed</td>
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<tr>
<td>• Self censure of remorse</td>
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<tr>
<td>• Censure of others</td>
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<tr>
<td>• Symbolic reparation</td>
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<tr>
<td>• Material reparation</td>
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<tr>
<td>• Punishment</td>
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<tr>
<td>• Emotional burden of managing fear, hatred and shame</td>
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<tr>
<td>• Practical and personal consequences created by the response process</td>
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The specific burdens can be summarised as the burdens of ‘censure and sanction’ imposed on the offender, and the relief from burdens suffered by the victim through their vindication and their reparation.

These two sets of factors constitute the ‘harm-related benefits and burdens’ seen as needing to flow in responses to wrongdoing. Any justice response to wrongdoing must distribute some mix of these benefits and burdens so as to achieve the essential aims identified. The purpose of these distributions is not to reach equilibrium, or to determine a particular ‘amount’ of a benefit or burden that should be allocated but simply to generate flows that can achieve the essential aims. Provided these distributions adhere to the requirement to give people their deserts, treat them equally, protect their rights and promote harmonious social relationships between them they have the potential to be just. These ‘evaluative criteria of justice’ which we introduced in Chapter 1 will be developed in more detail in Chapter 3. It provides our means by which to regulate appropriate ‘flows’ of these benefits and burdens in a way that is just.

**Conclusion**

This chapter has developed the first tool by which to analyse the practice of justice. The process used to identify the ‘essential aims of justice responses’ which provide the means to explain the purpose of distributions in response to wrongdoing has been outlined. The process of discovering the ‘harm-related benefits and burdens of justice’ which provide the specifics of the ‘goods’ that need to be distributed to meet such purposes has also been outlined.
It is argued that through generating a flow of these benefits and burdens that the retributive, restorative and consequentialist requirements set can be met. Any justice system response to wrongdoing which fails to generate these flows are seen as failing to deliver just outcomes.

In rejecting the need to achieve equilibrium in such distributions the requirement to determine the proper ‘amount’ of these flows was not discounted. It has been suggested that such proper flows can be gauged when distributions are giving people their deserts, treating them equally, protecting their rights and promoting harmonious social relationships between them. These ‘evaluative standards’ are discussed in more detail in Chapter 3. Following in Chapter 4 we will complete the development of the analytical tools by describing the process used to identify the social behaviours seen as essential to generating just outcomes. Once equipped with this full set of analytical tools, Part Two can then report on their application to two different forms of justice practice – legal and restorative.
Chapter 3

Identifying the evaluative criteria of justice

Introduction

The purpose of this chapter is to identify the evaluative criteria of justice. In the process it examines more closely the assumption thus far made that the primary concern of justice is with the distribution of benefits and burdens. These are clearly interrelated notions – one says justice is concerned with distribution, the other provides a means by which the justness of any such distributions can be measured. To do both these things the chapter firstly examines the core concept of justice and then differentiates and enlarges upon various theoretical suggestions or ‘conceptions’ about how ‘justness’ can be assessed. It is from these conceptions that the ‘evaluative criteria’ we are seeking are developed. The chapter also contrasts distributions which form the core concern of justice with distributions that serve other purposes, such as efficiency or utility.

This review constitutes a purposive rather than an historical examination of justice discourse, though it begins of necessity with the Ancients, primarily Plato and Aristotle. It traces from there what is essentially a direct line to modern formulations of justice, particularly that of Rawls’s ‘justice as fairness’ theory (1971). The review begins with the historical notion of justice as ‘entitlement’, but dismisses entitlement as providing an inadequate explanation on its own of the core meaning of justice. The chapter then consider other formulations of justice as ‘more than entitlement’, principally those of Rawls and the critiques of his theory in Nozick’s entitlement rights theory and Young’s
structural critiques. The chapter considers these revisions but returns to the view that ‘distribution’ does provide the best summation of justice’s core concern. From this it proposes a definition of justice in terms of distribution which provides the framework for later evaluations of justice practice.

This core meaning of justice is contrasted with various conceptions of what marks ‘justness’. These ‘conceptions’ provide various answers to the question ‘When do we know whether distributions of harm-related benefits and burdens made in response to wrongdoing are just?’ Finding answers to this question involves the consideration of a number of possible standards or measures, some of which rejected as inappropriate (those which measure justice in terms of utility, reciprocity and need) and others which are accepted as measures of justness given their greater explanatory power (justice measured as desert, equality, rights and harmony). It will be concluded from this analysis that an unjust distribution in the case of responses to wrongdoing is one that does not give people their deserts, does not treat them equally, denies them their rights and does not encourage harmony in social relationships between them.

**Conceptualising justice**

Analysing the concept of justice is a daunting task because such a process must of necessity take into account ‘the immense variety and complexity of [justice’s] meanings, applications and ideological associations’ (Campbell 2001:9). To narrow the focus somewhat we begin by accepting that justice is not concerned with all human conduct, or indeed with all distributions. Justice is seen to have its own distinct and limited moral terrain.
Confining the analysis to this particular moral terrain permits a clearer picture of the distinctiveness of justice to emerge. This approach also puts aside (for a time) concerns about what makes a situation just and what institutional arrangements best achieve just outcomes. This two-step process is formalised by firstly using the term ‘concept of justice’ to represent justice’s core meaning so as to separate this meaning from the ‘conceptions of justice [seen to be] deployed to determine that certain types of situation are just or unjust’ (Campbell 2001:10). Focusing first on the meaning of justice also meets the need to justify the conceptual emphasis on distribution at the heart of the thesis.

The concept of justice – a core of ‘entitlement’

Dworkin’s question ‘What is justice about?’ produced for him a myriad of answers (Dworkin 1978:135). Justice for the ancient Greeks was however much simpler, and was essentially about virtue. Justice was their ‘first virtue’, a virtue which stood above all others in rank and importance. But justice was also their ‘chilly virtue’ since it regulated ‘the dealings of those who are strangers to each other, and who look to each other neither for intimacy nor for unrequited assistance’ (Ryan 1993:16). This separateness from the ‘warmer virtues’ of affection was for the Ancient Greeks what first gave justice its moral distinctiveness.

Early classical scholars saw justice very much in these personal terms and their precepts of justice – live in a morally upright manner; do harm to nobody; render to each what is due – reflect this focus on the personal.14 It was Aristotle (384-332 BCE) who first expanded the notion of justice beyond a purely individual moral attribute. In

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14 These precepts have maintained a long history, appearing again in Ulpian (d. 228) and included later in Justinian’s Institutes published in 533.
Nicomachean Ethics Aristotle drew a distinction between justice in this individual sense which includes ‘all the habits and dispositions of a good citizen’ and justice in a more societal sense as the ‘one single and discrete virtue’ of the state (Aristotle:Bk V,ss2). Plato (c427-347 BCE) anticipated the same distinction and recognised that the acts of an ‘individual agent’ could not be fully understood in isolation from ‘the nature of justice in the “larger letters” of the state’ (Plato:Bk IV 443d; see Miller's analysis in 1987:373). Plato’s prescription in the Republic (paraphrasing Simonides) that ‘justice consists in rendering to every man his due’ (Plato:Bk IV 433) captures this wider societal aspect.\(^ {15}\) The requirement to give people their entitlement as distinct from a purely personal requirement to act in a particular moral manner provided their refinement of the crux of justice’s moral separateness.

The development of the concept of justice is seen as an enlargement of this primacy given to societal entitlement. Claims of entitlement were seen to bring with them a ‘capacity to demand’ which made justice distinctive from other moral virtues such as ‘humanity, benevolence, charity, generosity and hospitality’ where demand would be misplaced (Mautner 1996:289).\(^ {16}\) By comparison, justice can ‘make the most stringent demands of all the moral virtues’, demands that simply could not be made of generosity or benevolence (Ryan 1993:11). The moral criticism voiced when conduct is labeled as ‘unjust’ indicates instead a recognised failure to deliver on a perceived entitlement. A demand for justice that asserts this perceived entitlement, expresses more an obligation to have the injustice corrected and thereby the lost moral status quo returned (Hart 1961:164). It is this capacity for demand that forms the second basis for justice’s claims.

\(^ {15}\) A slightly different translation – ‘the constant and perpetual will to render everyone his due’ – cited in Miller (1987) highlights the sense of justice as being a virtue in need of constant and vigilant maintenance.

\(^ {16}\) ‘Hospitality’ is the term Kant uses to refer to the basic ‘moral respect’ owed to all persons (Bix 2006:103).
to moral separateness. The importance of ‘entitlement’ to justice sits alongside its quality as a societal rather than purely an individual virtue, as the second conceptual debt owed to the Ancients (Lerner 2002).

In modern times, Maslow (1970) recognised this same supremacy in his hierarchy of needs where he gives justice the status of ‘a precondition for the satisfaction of basic needs’. Others press this recognition further and suggest that ‘justice is so fundamental, that a case could be made for it to be construed as a basic need’ such that ‘its observance [is] agreed to be basic to social life’ (Maslow 1970; Ryan 1993; Taylor 2003; 2007).17 Either way, the notion of a demandable entitlement to the maintenance of particular ‘publicly agreed terms of social co-operation’ clearly sets justice apart from other precepts and contributes in large part to its claims to moral separateness (or in some guises moral ‘superiority’) (see Rawls 1971:3-6; Bix 2006:105).

The entitlement aspect is well illustrated in the way people recognise and respond to the absence of justice (Shklar 1990:15). Certain forms of conduct evoke a sense that an injustice constituting a moral evil of varying gravity has occurred and that this requires correction (Allen 1999:335). On this view, a person’s sense of justice mandates that a failure to act in the appropriate moral manner when an injustice has occurred gives rise to legitimate demands for a remedial moral response and these demands must be met by society.

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17 Lerner (2002:21) argues that humans have two markedly different ‘senses’ of justice – a ‘normative’ sense which matches reasoned discourse of justice and an ‘intuitive’ sense which is more reflective of a primitive, emotional urge to judgment. In an interesting approach Davis (2007a; 2009) has applied Lerner’s Just World Delusion principles to examine the imposition of criminal sentences.
This brief historical context is of necessity confined to only certain aspects of the concept of justice but it is sufficient to provide the first milestone of its conceptual development. This is that the core aspirational essence of justice has to do with delivering a perceived sense of entitlement. Questions clearly remain as to what else besides this quality of entitlement sets justice apart as a unique moral claim.

**The concept of justice – more than entitlement**

Giving entitlement the status of the core concern of justice in some ways obscures rather than reveals its full distinctive moral territory (Campbell 2001:10-12). Describing justice only in entitlement terms obscures the legitimate role other moral values, such as liberty, efficiency or utility also play in determining a person’s entitlement. A concept of justice therefore needs to be more finely focused in order to ‘deepen the furrows of difference’ between justice and other moral concerns. One useful distinction comes from Hart (1961) who considered justice as a precept that aims instead ‘to create among individuals a moral and, in a sense, an artificial’ ‘balancing’ so as to offset pre-existing or imposed imbalances or disproportions and thereby make people ‘morally more alike’ (Hart 1961:165). While Hart seeks to move the conceptual boundary of justice beyond mere entitlement, he later confessed ‘to an itch to go further’ than this to explore precisely what justice principles would suggest such a ‘moral balancing’ should entail (1968:22). But it was left principally to Rawls (1971) to make this refinement in his own focus on the underlying process of distribution.
Rawls’s distributive justice

Rawls’s (1971) theory of justice as fairness revived the notion of ‘distribution’ as central to the conceptual meaning of justice. In this seminal work *A Theory of Justice* he conceptualised justice as a set of principles for ‘assigning rights and duties in the basic institutions of society’ and for defining ‘the appropriate distribution of the benefits and burdens of social co-operation’ so to meet those rights and duties (1971:4,10). While in later work (such as *Justice as Fairness* (1985; 2001)) he stressed more explicitly that his theory was intended as a political conception of justice ‘worked out for a specific kind of subject, namely, for political, social, and economic institutions’, it nonetheless had re-established notions of distribution as the central concern of justice more broadly (1985:224). Rawls’s particular focus was on the distribution of a set of ‘primary goods’, such as liberties, opportunities, rights and wealth, but his re-emphasis on the foundational idea of ‘just distributions’ has nonetheless come to delineate the core meaning of justice itself.

The foundation which Rawls gives to distribution has deep historical roots. In large measure it is a refinement of Locke’s contract theory. For Enlightenment philosophers like Locke and later for Rousseau, the ‘social contract’ was the source of political legitimacy, regardless of whether the political structure itself was one of representative or monarchial sovereignty (Locke 1970; Rousseau 1990). Rawls revived this notion of ‘contractarianism’ and used it as a means to ‘demonstrat[e] the morality of certain principles of justice’(Sadurski 1985:60 emphasis in original). The core of Rawls’s argument develops from his ‘reflective equilibrium’ notion where he asserted that the principles produced in the ‘original position’ are just, because that process itself is based upon reasoned debate. It is through a process of ‘reflective equilibrium’ that
principles of justice can be derived from a hypothetical social contract among imaginary persons in a situation where temptations to further one’s own specific interests are eliminated (1971:48-51). As Sadurski notes, ‘the justificatory force of the original position consists in the creation of circumstances in which only the power of reason moulds a contract’, and as a consequence the principles produced should of themselves be just and fair (Sadurski 1985:59). By removing other influences so as to create ‘an imaginary, more rational and more moral world’, a situation is reached in which the force of moral argument will always win the day. Any principle produced by arguments generated within this imaginary world is therefore perforce produced by fully rational human beings agreeing on principles acceptable to all. Principles so produced will then be reasonable and just.

It is from such a ‘thought experiment’ that Rawls sees two ‘justice principles’ as emerging which more fully explain what should constitute a ‘just’ distribution (1971:11). His first principle is that distributions should always provide a limited set of ‘equal basic liberties’, which include political liberty, freedom of speech and assembly, freedom of conscience, the right to hold personal property and the right to fair treatment under the law (1971:53). The principles of justice assert that this set of ‘goods’ should be distributed according to an ‘equal liberty principle’ where each person has an entitlement consistent with their most extensive basic liberty, provided it is compatible with similar liberty for others (1971:53-5). Rawls’s second principle, ‘the difference principle’, would alter the distribution in the face of social and economic inequalities so that distributions would need to be re-arranged in a way that is ‘to the greatest benefit of the least advantaged’ (1971:54).
The core idea that emerges from Rawls’s analysis is that such distributions should be focused on a set of ‘primary goods’ so as to provide people with entitlements consistent with their most extensive basic liberty. Maximising ‘liberty’ then becomes the criterion to determine just entitlements, not utility or efficiency or some other moral virtue (1971:12-3). Any human ‘situation’ or transaction will be gauged as just or unjust depending upon the extent to which its distributions maximise liberty. Though Rawls’s precise formulation of ‘goods’ requiring distribution so as to achieve this outcome has long been debated, there is nevertheless a critical consensus that his emphasis on distributions which maximise liberty ‘catches something important about our current notions of justice’ (Ryan 1993:13).

This brings us to our second milestone about the nature of justice – that distributing benefits and burdens in a way that maximises liberty is at its conceptual heart.

**Critiques of distribution**

There are a number of strands of criticism of the centrality Rawls gives to distribution which warrant comment. Sandel (1982), who pioneered the ‘communitarian’ ideology, takes issue firstly with its concentration on the individual that these distributions necessarily imply. He argues that the way questions were posed in the ‘original position’ unnecessarily prioritises the primacy of individual autonomy and misses entirely the stronger ‘ties of culture and particularity which give our lives meaning and

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18 Rawls’s theory has long been taken to demark a fair distribution of benefits and burdens as one of the core elements of the concept of justice. In his earlier famous article ‘Two Concepts of Rules’ he does consider a number of justifications for the distribution of punishment (1955). But his concept of justice remains an essentially ‘political’ one when politics is understood more broadly as ‘public decision-making regarding the distribution of goods’ (Weber 1947).

19 ‘Communitarian’ is a convenient label to identify a wider ideology which seeks ‘to get away from the stark individualism’ of liberal rights and regards all values as embedded in a particular social or community culture (see Kennedy 1993; 2000).
content at their core’ (Sandel 1982:17; see too Campbell 2001:111). Giving such primacy to individuals Sandel argued ignores the centrality of community and an individual’s obligations and involvements in that community. The communitarian critique however is seen as more a critique of the way distributions take place, rather than any centrality given to distribution *per se* (though it does reject the primacy given to requiring distributions to necessarily maximise liberty). Communitarians assert that distributions should not be an individual entitlement, but should reflect instead some form of ‘central distribution’ in place of situations where ‘what each person gets, he gets from others who give to him in exchange for something’ (Sandel 1982). Nonetheless, the centrality of distribution is not displaced.

A second line of criticism is more substantial and asserts that the distributive focus of justice only applies to ‘social’ forms of justice and not to its ‘corrective forms’, such as responses to wrongdoing (see Barnes 1984).20 The distinction made between such ‘forms’ of justice has long shaped philosophical debate (Spader 1988). There is a strong line of argument that questions of distribution and rectification are confined to situations of ‘social’ justice and so necessarily exclude questions of ‘corrective’ forms which are more concerned with responding to wrongs and unacceptable harms (Zipursky 2005:133). But this division is seen as artificial. Campbell rightly asserts that ‘justice in all its manifestations [has] to do with questions of distribution’ (2001:22). It is clear that the effect of distributions of economic, social and power imbalances will always cloud the operation of corrective justice, and that this will be particularly pronounced in ‘corrective’ responses in the sphere of criminal law (Bix 2006:104).

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20 Aristotle explained this distinction in terms of mathematical metaphors. Distributive justice is geometric since it involves proportionality in any distribution or allocation. In comparison, corrective justice is arithmetic since it involves adding back that which has been taken, or subtracted, from someone by wrongdoing (Zipursky 2005:133).
Accommodating these two criticisms therefore is reasonably simple, but a more sustained critique of distribution as the core of justice is offered by Nozick (1974) and others. Nozick sees Rawls’s theory as confining the focus of justice too narrowly onto ‘artificial’ re-distributions of social benefits and burdens at the expense of pre-existing and ‘natural’ entitlements which should not be disturbed.21

Nozick’s ‘rights conception of justice’

Nozick’s (1974:160) ‘historical entitlement conception of justice’ appears fundamentally at odds with the assumption that justice is about distributing benefits and burdens. As Campbell says:

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\text{a major feature of Nozick’s theory [is] that the pursuit of all such patterns of benefits and burdens is a violation of rights since it inevitably involves taking away goods from some and redistributing them to other people in order to establish the pattern (Campbell 2001:63).}
\]

Nozick’s view is that any ordered or ‘patterned’ distributions, no matter what it is based upon, will always involve violations of rights. This is because maintaining patterns necessarily means ‘continually interfere[ing] to stop people from transferring resources as they wish to, or ‘interfere[ing] to take from some persons resources that others …chose to transfer to them’ (Nozick 1974:163). So, neither assessing a distribution on the basis of what Nozick refers to as ‘time-slice principles’ (that is, what is best at any

21 There is also an opposite strand of critique that says that justice’s distributive reach spreads much further than simply welfare and correctional situations and in fact intrudes more deeply into human affairs. Putman (1995), for instance, argues there is insufficient regard given to the reach of justice into family life, the workplace and the relationship between these two spheres.
given single moment) (1974:153), or assessing a distribution based on ‘end-result principles or end-state principles’ (that is, what is best in terms of outcome) can properly be the basis for justice (1974:155). Instead, ‘a distribution [can only be] just if it arises by just steps from a just initial position’ without any preconceptions of ‘what pattern will emerge’ as a consequence (Schmidtz 2006:202,203). For Nozick, whether a pattern of distribution is just ‘depends upon how it came about’ so justice reverts to being ‘about’ historical entitlement (Nozick 1974:153).

One simple response to this argument is to say that Nozick is not rejecting the notion of justice as distribution but merely arguing that such distributions should always be based on predetermined criteria. In this sense he is returning ‘entitlement’ to the foreground, though a new version of entitlement based on rights rather than due. This however does fail to acknowledge that there are more ‘proper’ evaluative criteria than simply respecting rights, on which to base entitlement. Entitlement can also be evaluated in terms of desert, equality, need ‘or some other favoured criterion’ (Campbell 2001:64).

But Nozick’s critique of distribution goes further than this, as Schmidtz’s (2006:208) analysis makes clear. According to Schmidtz, Nozick provides a theory of justice which is a theory of entitlement in which distribution is rejected entirely. For Nozick, individuals have ‘natural rights’ to property, life and liberty which give rise to entitlements of non-interference with those rights, that is to say a right to be left alone and uncoerced (Campbell 2001:58-9). Because of this ‘natural’ or historical position no distribution is necessary to ‘allocate’ entitlements (since they already exist), and the state should have no justification in ‘redistributing’ benefits and burdens so as to reach some ideal equality. Justice is simply a matter of not violating these pre-existing
entitlements. Implicitly, if any re-distribution is required it should be based on re-creating the historical rights, not on considerations of general welfare or benefits to others because that would simply ‘use one …for the benefits of others’ (Nozick 1974:33). Nozick’s view is that no pattern, howsoever arrived at, should be imposed and whatever pattern happens to be there in the first place should be left alone undisturbed (1974:155).

There are real problems with substituting this historical entitlement assumption as a descriptive or normative principle as Nozick proposes. His rejection of distribution lacks the necessary normative power in situations where rectification is in fact needed. Nozick concedes this to some extent in recognising situations requiring ‘the rectification of justice in holdings’ (1974:152). Re-distributions are often justified on grounds of restoring rights or entitlements, as well as more widely. To effect rectification on just terms requires justice to distribute as broadly as necessary, and this will often entail more than merely re-establishing historical entitlements. Iris Marion Young (1990) asserts that to confine rectification to historical entitlements alone will simply act to perpetuate injustice.

**Young’s structural critique**

Young herself also rejects the notion of reducing justice simply to questions of distribution. She sees justice as much about how people are treated, as about the share of benefits and burdens they may receive (Young 1990; 2000; 2006). She is right in seeing these two notions as different – ‘the ideal of equal treatment is not the same thing as the idea that we ought to have equal shares’(Schmidtz 2006:112). Young’s argument is that it is by unequal treatment, not by unequal sharing that we signal the lack of
mutual respect which is indicative of injustice. If this is the case, instead of focusing solely on justice as distribution or re-distribution, we should begin first by addressing issues of unequal treatment, especially those born of hierarchical social structures (Anderson 1999:313). Accepting such a view would however displace the prominence we have afforded thus far to distribution in our analysis.

Young’s (1990:26) critique is that justice ‘must involve evaluating not a distributive outcome but the social structures that enable or constrain individuals’ in relation to such distributions. She said attempting to ‘stretch’ the distributive concept of justice to account for these wider aspects of justice will fail because in some situational factors – such as power, opportunity or decision making situations – it is not possible to reduce people’s capacity simply to questions of distribution (1990:9). Such potential constraining social structures and relationships stand separate and apart from distribution and need to be properly accounted for in any comprehensive concept of justice. In Young’s view, a sounder concept than ‘distribution’ is one that begins instead with addressing the reality of ‘domination and oppression born of class, race and gender’. She says attending to ‘difference’ in treatment inherent in those distinctions is more critical because these constraints prevent what might otherwise be fair distributions from being just (Young 1990:4).

Young’s focus is primarily on institutional conditions which are limiting in this way, in particular ‘two forms of disabling constraints’, domination and oppression (1990:149). ‘Domination’ refers to the structural exclusion of people from any authentic role in deciding how to conduct their own lives. ‘Oppression’ refers to those systematic institutional processes which prevent individuals and groups from having or exercising
opportunities ‘necessary for the development and exercise of [their] individual capabilities’ (1990:39). Within this framework, ‘injustice [occurs] where domination leads to oppression’ (Campbell 2001:207). These restraining conditions are borne of social assumptions that are not necessarily ‘the result of a few people’s choices or policies’, but are simply embedded in ‘the normal processes of everyday life’ (1990:41). Such structural oppression may not be consciously or intentionally exercised, but rather may be an exercise of power in a wider Foucaultian (1977) sense. Moreover such oppression can be the ‘effect of often liberal and “humane” practices of education, bureaucratic administration’, and not of deliberate policies of exploitation (Young 1990:41). The improper institutional conditions that produce this oppression flow from the fact that ‘some people exercise their capabilities under the control, according to the purposes, and for the benefit of other people’ (1990:49). This process has the effect of systematically transferring ‘the powers of some persons to others’. What is required of justice in these circumstances cannot be simply re-distribution, but more starkly an overall elimination of the institutional forms that ‘enable and enforce this process of transference’ and their replacement with more enabling forms (1990:49-50).22

Young’s view is that these underlying constraints in the form of domination which exclude people from controlling their own life choices, and oppression which prevent people from acting upon their life opportunities should be the real concern of justice. This is because these institutional constraints preclude people from making the most of any benefits distributed to them (and prevent them from managing their burdens to the

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22 This economic concept of exploitation can be widened to embrace sexual and racial oppression. ‘Women’s oppression consists partly in a systematic and unreciprocated transfer of powers from women to men’ where ‘their energies and power are expended, often unnoticed and unacknowledged’ for the benefit of men (Young 1990:50-1). Racially specific exploitation occurs in terms of segmented labour markets where oppressed racial groups are confined to menial work lacking in autonomy which ‘entail a transfer of energies whereby the servers enhance the status of the served’ (1990:52).
least disadvantage). Unless the structural assumptions are addressed, a focus on justice as distribution will simply re-create unjust outcomes.

But Young’s argument is open to ‘distribution with modifications’. Young’s minimal prescription for overcoming the narrowness of distribution is to add two discrete requirements – that the institutional conditions under which the distribution is made are fair and that the distribution itself is fair. She says institutional conditions should ‘contain and support’ the scope of individuals to ‘develop and exercise [their] capacities and express [their] experience’ and ‘participate in determining [their] action[s] and the conditions of [their] action[s]’ (1990:37). What this means is that if the distribution itself appears to be just when measured against distributive criteria what is also needed is that the distribution does not perpetuate underlying justice-preventing institutional oppression and domination in how it operates (Young 1990:8).

Young’s strong critique of distribution forces us to ask whether the structural constraints which Young identifies can be accommodated within the distributive framework so that their oppressive effect is not ignored, but rather recognised as a set of particularly heavy burdens which have to be ‘distributed away’ to the largest extent possible. While Young rejected any such accommodation as simply amelioration rather than change (citing affirmative action programs and the like as ineffectual), institutional mal-distributions are at least then addressed openly while not removed entirely (Young 1990:150).

There is no simple answer to Young’s critique that forms of domination and oppression in institutional constraints should first be eliminated before justice can pursue its
distributive course. But in spite of Young’s skepticism, it is argued that this elimination can be incorporated conceptually as distribution too since these social constraints are burdens of which no one should have a share. Young might well argue that justice should be concerned first with restructuring, but it is asserted that these transformations can begin by ‘distributing away’ as much of the burden as possible.

**The concept of justice defined**

In spite of the strength of some of these critiques of distribution as the core concern of justice it is retained as our conceptual framework. The notion of justice is seen as a concern for the distribution of social benefits and burdens in ways that maximise liberty. For the purpose of this study, justice is defined in these terms namely:

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\text{Justice is a moral value concerned with the distribution of the benefits and burdens of social cooperation in ways that maximise liberty.}
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The notion that such distributions should ‘maximise liberty’ warrants some brief attention itself. Liberal notions of justice promote a distribution of benefits and burdens that maximises *negative* liberty, in the sense of the absence of interference from others. It is possible to trace to the early liberal thinkers this obligation to respect the liberty of others as a core of justice (it is traceable at least to Locke 1970; Kant 1981). Republican

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23 Waldron makes a similar argument in *Dignity and Rank* (2008). He says that in modern times everyone should have the benefit of the dignity and respect (as embodied in the notion of human rights) where once it may have been the preserve only of those of rank or nobility. Following this line of argument in a similar way no one should now have the burdens borne of domination and oppression which are often the lot of those born without such privileges.

24 Young’s contention that reinforced institutional injustices are often reinforced by ‘just distributions’ has an interesting parallel in Kennedy’s similar critique that human rights reforms work to reinforce rather than remove unjust legal orders (2002:129). Charlesworth (2002) makes this critique sharper by reframing it as a question of ‘how international lawyers participate in sustaining an unjust legal order while they also seek the role of effective humanitarian reformer’.
notions of justice similarly support distributions for this purpose but reframe the aim to one of protecting *positive* liberty. Positive liberty is not the absence of interference by others but rather the mutual promotion and protection of one another’s freedoms (see Sunstein 1990; Pettit 1997). This distinction is usefully sharpened by referring to such mutually protected freedom as ‘dominion’ or non-domination, rather than using the more familiar term of liberty (Braithwaite and Pettit 1990). However in either guise, distributions of benefits and burdens should promote a core set of rights and freedom which protect liberty.

Defining justice in the terms selected gives a central role to distribution which remains the core with respect to distributions in response to wrongdoing. Placing distribution at the core of these responses highlights the need for some means of determining whether these distributions are just. The attention now turns to a consideration of various ‘conceptions of justice’ from which suitable means of ‘assessing’ distributions as just can be framed.

**Conceptions of justice – finding evaluative criteria**

The second focus of this chapter is to explore the different views as to how to determine what is a ‘just distribution’. From this will be drawn our second analytical tool, the evaluative criteria of justice.

Each conception or standard of justice has a different focus and measures a different aspect of what it is to be just. A typical standard like the ‘equality standard’ focuses for instance on what people have in common that defines their equality. In contrast, a ‘desert standard’ focuses on what distinguishes people so as to differentiate their
entitlements. But regardless of the precise choice of standards made, none alone provides ‘an overarching standard to which [all] the others [must] reduce’ (Schmidtz 2006:17). Different distributions privilege one or other standard (or suggest a combination of several) as the appropriate measure by which to judge the justness of a situation.

Schmidtz’s (2006:168-9) adaptation of Hart’s distinction between primary and secondary rules provides a useful means of clarifying the distinction being made. For Hart ‘primary rules’ are rules of conduct which ‘we normally think of as the law’ and which define legal rights and obligations. By contrast, ‘secondary rules’ (in particular rules of recognition) identify or tell us what is lawful in particular circumstances (Schmidtz 2006:167). In determining what is just (seen here as a primary rule) in a particular situation, we need secondary rules that ‘do the recognising’ of what is a just outcome. The various standards of justice (seen as secondary rules) provide these rules of recognition though they are ‘more than one map, with none guaranteed to be unerring’. While some aspects of justice will always be fixed (in the view expressed earlier justice will always be about distribution), how to measure their justness is never fixed. Determining the justness will always move from prioritising one rule to another as justice norms shift or as particular circumstances demand (Schmidtz 2006:178-80).

The objective is to identify a set of rules of recognition which best ‘measure’ just distributions in the context of responses to wrongdoing. Four particular criteria are privileged above others for this purpose. The selection is necessarily a contentious one. It has as its starting point the set of ‘values’ traditionally recognised as being the
‘canons of distributive justice’ (see Rescher 1966; Deutsch 1969; Perelman 1980). This canon provide potential answers (albeit conflicting ones) to the distributive dilemma of how to allocate to each person his or her ‘due’ in terms of social goods. Campbell (2001) selects some of the same criteria to structure his discussion of ‘What is Just?’.

This range of values to assess just distributions can include:

- utility
- reciprocity
- need
- desert
- rights
- equality, or
- the ‘common good’ (which we will rephrase as promoting ‘harmonious social relationships’).

These standards provide a possible measure of the justness of distributions. Each is reviewed as a possible measure divided into two groups – those considered but rejected, and those accepted as the basis of the evaluative criteria of justice.

**Conceptions considered but rejected**

Some measures were seen as either unsuitable generally as standards of justice, or specifically as unsuitable as measures in the case of responses to wrongdoing.

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25 A generally accepted list of the traditional canon include – to each according to his need, to each according to his merits, to each according to his productivity, to each according to his abilities, to each according to his efforts, to each according to his needs, to each according to his rank or status, to each according to supply and demand, to each according to his right or legal entitlement and to each according to the greater good of the greater number (Spader 1988:590).
Justice as utility

Utilitarianism suggests the core test to apply to a distribution is one that ‘work[s] to achieve maximum possible satisfaction of the preferences we find distributed in our community’ (Dworkin 1984:162). But this lacks clarity as to what ‘maximising aggregate satisfaction’ actually captures. A distribution measured against this standard at best tests how well the aggregation of people’s self-regarding behaviour has been achieved. Mill’s ‘proof’ of utilitarianism (Mill 1974)– that people do individually care about the satisfaction of their own preferences – makes clear that maximising satisfaction does not necessarily result in a just distribution. Braithwaite and Pettit (2000:147) argue that even though the ‘guiding star [in distributions of social goods] should be something that all individuals care about in their own case’, it does not follow that rational choice will necessarily equate to just choice. What Campbell describes as the ‘generally anti-utilitarian flavour of justice’ (2001:49) means that a distribution that best promotes utility is not likely to be one that best promotes justice.

Justice as reciprocity

The notion that returning a ‘favour’ can provide a sound basis for assessing the justness of a situation at first seems unlikely. Reciprocity asserts that part of the answer to the question of how people should treat each other is that they should return favours (Becker 1986). But using this approach as a means to determine the justness of a distribution would have some disturbing implications. If someone has done me a favour, I ‘owe’ him for what he has done for me. More pertinently, if I have done someone harm, I ‘owe’ him for what I have done to him. Becker (1986:3) says reciprocity in this negative sense mandates a disposition ‘to make reparation …[in proportion to] the harm we have done’. What this may mean in circumstances of wrongdoing is that justice can
in fact be met when the obligation to make up for the ‘disfavour’ of the wrong is also met.

But there are obvious problems with applying reciprocity as a measure of justness. Firstly, the reciprocity measure is necessarily confined to that class of persons ‘who can [in fact] do each other favours’ (Buchanan 1990:226). It is also confined principally ‘within the context of the history of a personal relationship’, rather than in wider social or normative contexts in which institutional responses to wrongdoing sit (Schmidtz 2006:81). Where the obligation to reciprocate is negative in the sense of ‘returning bad for bad’, the potential for abuse is so wide as to constitute ‘a dangerous and complex practice that no society simply can celebrate’, and which has little affinity with promoting just outcomes (Schmidtz 2006:80).

As well in Schmidtz’s view, a reciprocal sense of justice eschew equality (that people should be treated similarly because they are human) or desert (that people should be treated differently because of what they have done) in favour of the more simple fact that the people have a ‘shared history’, with ‘the history the parties share’ being the determinant of justness (2006:77-8). The difficulty Schmidtz recognises with this approach is that any reciprocal connection between benefactor and reciprocator assumes the existence of a ‘cooperative relationship[s] for mutual advantage’ such that ‘when people reciprocate, they teach others around them to cooperate’ (Schmidtz 2006:78). This ability to generate cooperativeness certainly has potentially valuable benefits in the mutually advantageous relationships it creates. But overall, reciprocity as a measure of justice is not a sufficiently attuned barometer where the overall social character of a response rather than its purely personal character is important.
Justice as need

Maslow’s (1970) theory of a hierarchy of needs places the physiological need for food, clothing and shelter at the core of human need, with safety, belonging, esteem, and self-actualisation representing various other levels of need leading at its apex to the need for spiritual transcendence. A need-based conception of justice would necessarily measure justice by the extent to which its outcomes satisfy various levels of need. The difficulty with such a conceptualisation is that it is likely to be focused on seeking out additional benefits rather than allowing for the need to distribute burdens, so that distributions in response to wrongdoing would be essentially one-sided (Spader 1988:603). Also, though Maslow’s pyramid sets up a hierarchy, it merely suggests than in some contexts certain needs are more urgent, such as obviously rudimentary survival during a famine or natural disaster, rather than necessarily more important (Schmidtz 2006:164-5). This presents the difficulty of how the satisfaction of different levels of need could be ‘balanced’ once the needs move beyond ‘attainment of urgent ends that are widely if not universally desired’ (Galston 1980:163). Assessing the justness of a distribution according to how well it meets needs would simply induce ‘people to do what manifests need rather than what meets need’ and in the process leave genuine need unmet, and therefore justice undone (Schmidtz 2006:167).  

26 Testing the justness of a distribution by how well it maximises the satisfaction of needs therefore is dismissed as an inadequate measure. While any notion of justice is necessarily concerned with the amelioration of disadvantage ‘this does not mean that “need” as such must be the prime criterion [by which] an acceptable conception of justice’ should be judged (Campbell 2001:116).

26 A better way to actually meet needs may be to provide social structures that reward exercises of productive capabilities (for instance, efforts towards social repair following wrongdoing) by virtue of which needs are directly or indirectly met.
These three potential means of measuring the justness of distributions have been discarded as inappropriate measures. This leaves those measures which say a distribution based variously on desert, equality, rights or the ‘common good’ (reframed as promoting harmonious social relationships) as better means of assessing the justness of these distributions.

**Other conceptions considered and applied**

This section discusses the measures adopted as the basis for the preferred evaluative criteria. The satisfaction of each of these criteria is seen as necessary for a distribution to be just as each suggests a specific moral connection with justice.

**Justice and desert**

Justice in the Ancient Greek sense of ‘accomplishing the work of living well’ can be measured in simple desert terms. That is so both in a positive sense where the individual says ‘I deserve this in virtue of my hard work’, and in a negative sense where the individual says instead ‘the deprivations I am suffering are undeserved’ (MacIntyre 1985:249). Enlightenment philosophers such as Locke, would enlarge on the positive sense and suggest ‘people deserve to have those items produced by their toil and industry’ since ‘the products (or the value thereof) [are] a fitting reward for their effort’ (as cited in Lamont and Favor 2007). Moreover, ‘what is seen to count [in the case of positive desert] is conscientious effort which has socially beneficial effects’ (Sadurski 1985:116). Conversely, what is seen to count in a negative sense is that persons affected by wrongdoing demand to be relieved of undeserved burdens placed upon them.
Whether a person has taken on a burden that ‘involves some effort, sacrifice, work, risk, responsibility, inconvenience and so forth …which has socially beneficial effects’ is an obviously relevant criterion in determining his or her distribution of benefits and burdens (Sadurski 1985:116). In this sense, desert does provide a measure as to whether ‘the balance of benefits and burdens in each person’s life [are] equivalent to the balance in the lives of other members (see Campbell 2001:164).

But there are difficulties with justice measured simply as ‘desert-based-on-effort’ in the context of responses to wrongdoing (Sadurski 1985:223). If a person takes on a burden, this may provide a legitimate basis for their positive desert, but such a position does not accommodate situations where structural injustices in fact prevent people from making the effort to take on the additional voluntary burdens (in the sense of ‘obligations’) for which they may then gain desert. The same is true in the case of negative desert, where a person’s ‘just deserts’ for wrongdoing provide no scope for pre-existing disequilibrium which may have precipitated events culminating in offending. Desert cannot simply ‘allocate good results to good persons without enquiring how much they can do about their goodness’, nor can the reverse apply (Ryan 1993:9). Distributions which give people their strict positive or negative desert do connote some sense of justice but may leave underlying unjust social constraints relatively untouched (Sadurski 1985:226).

Allowing for these deficiencies, desert does have qualities which make it a robust measure of the justness of distributions in responses to wrongdoing. Defined in the following terms for responses to wrongdoing, ‘desert’ provides our first evaluative criterion of justice:
The desert standard measures justice by the extent to which people are treated according to what they deserve, so as to address the wrong done to them (in a sense of positive desert) or, by them (in a sense of negative desert).

While measuring ‘the maintenance of a pattern of distribution’ in desert terms is accepted as having merit as a justice standard (Campbell 2001:155), it cannot stand alone given that it tells only part of what is required. The second criterion of ‘equality’ adds one further necessary perspective.

Justice and equality

Justice as equality refers to equal treatment in the sense of how people fare relative to each other in distributions, rather than in terms of purely mathematical equality. We have traced to Aristotle and Plato an early acceptance that distributions which treat people equally are just, though not necessarily proportionally equal (Barker 1959:337). The Aristotelian conception of equality had these twin elements of ‘the equal treatment of equals’ and ‘the unequal treatment of unequals’. These aspects recognise that while ‘all humans may be equal as moral entities, each is unequal to the other in abilities, efforts, achievements’ (Spader 1988:592). As a consequence, in order to maximise equality it may also be necessary to treat ‘unequals according to their relevant inequalities’ (Benn 1980:31). This will mean greater allocation of benefits to individuals or groups to ensure that their treatment is in fact equal (Vlastos 1970:49).

27 In arguing against rigid sentencing guidelines and mandatory minimum penalties Tonry (1996:14-20) implicitly recognises that the justice as equality standard is only partly met in practice. It can mean that while the ‘treat like cases alike’ component is satisfied by focusing attention on the wrongdoing and on the wrongdoer’s criminal history. But the companion component of ‘treating unlike cases differently’ is often not satisfied because real differences between wrongdoers (personal backgrounds, effects of punishment on them and their families etc) are often disregarded.
The Kantian ethic acknowledges this same idea that providing ‘similar’ justice ‘requires not equality but rather differentiation in distribution or treatment’ (Stone 1980:16). Strict equality needs to be tempered to take account of ‘justifiable differences’ and the ‘structuring of justice-precepts corresponding to these differences’ (Stone 1980:16).

Hart (1968:51) recognised that ‘the pressures of gross forms of economic necessity’ are an obvious factor of ‘difference’ that need to be taken into account in determining responsibility for wrongdoing.

‘Equality’ seen in this dual sense provides a potentially robust evaluative standard for measuring distributions in responses to wrongdoing. Needing to accommodate existing inequality may mean having to address differences in terms of gender, race or class (Minow 1990:20). Gilligan (1982) famously argued that the concept of justice itself needed to be enlarged to accommodate a wider range of moral qualities central to women. Later critics rejected her suggestions of incorporating qualities such as ‘caring’, seeing this as merely reinforcing the narrower range of moral qualities which women were ‘allowed’ to embrace in a patriarchal society (see MacKinnon 1989; Daly 1999). However, this does not discount the fact that to treat women the same as men in the context of criminal offending for instance may well mean treating them unequally. Treating women (and other more marginalised groups) justly in terms of the equality standard means ‘treating them appropriately, given their circumstances and their offending patterns’ (Hudson 2003:140).

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28 Allowing for ‘difference’ in terms of justice refers to those differences existing as a consequence of gender, class, race and culture. Two broad schools of thought – critical theorists and discourses of identity scholars – represent the most recent attempts to do accommodate difference into justice as equality. The guiding principle of critical theory is to examine an area of social life with a view to attaining an ‘enhanced emancipation in the future’ (Vlastos 1970:61). ‘Discourses of identity’ theorists provide a broad description of social analysis in terms of identity and sexuality.
Allowing for these qualifications, equality also provides a legitimate justice standard for assessing the justness of distributions made in response to wrongdoing. Defined in the following terms for such responses, equality provides the second evaluative criterion of justice:

*The equality standard measures justice by the extent to which people are treated equally, with proportionate equality tempered so that actual treatment is equalised.*

The equality standard similarly cannot stand alone as a measure of what is required to produce a just outcome. The third criterion of ‘rights’ adds another further necessary perspective.

**Justice and rights**

The rights standard sees distributions which treat people according to their rights and which give effect to those rights as just. Conversely, a distribution which invades or denies those rights is unjust (Campbell 2001:76,88). When measured against this standard, a distribution is considered ‘just if, and only if, it is prescribed exclusively by regard for the rights of all whom it affects substantially’ (Vlastos 1970:60).  

The origin of the idea that protecting rights yields just outcomes is traceable at least to Locke. The source of such rights in Locke’s view is ‘natural’ – that is to say people have rights ‘by virtue of [their] humanity’ (West 2001:xi). Rights act in this sense to

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29 Using this test, Aristotle’s claim that slavery is just is easily rebutted on the basis that the institution of slavery necessarily denies the right due to all human beings of personal and political freedom (Sandel 1982).
protect and enhance the pursuit of individual conceptions of the good life. The foundational set of rights are the ‘Lockean pre-political entitlements, namely the right to life, liberty and property’ (Buckle 1991:168). The ‘natural law rights’ (most obviously the right to life and liberty) act to protect the dignity and ‘humanness’ of human life. This conception of rights was given expression in early normative pronouncements such as the 1776 American Declaration of Independence (as ‘the right to life, liberty and the pursuit of happiness’) and in the 1789 French Declaration of the Rights of Man and of the Citizen (as the ‘right to liberty, property, security and resistance to oppression’).

Rights in more modern formulations are essentially social constructs or ‘normatively protected interests’ (Campbell 2001:52) that provide the ‘background guarantee’ that certain entitlements will be adhered to if, and when, the usual affective bonds break down or are unformed (Waldron 1992). Rights in this sense are notions about the conduct of human action designed to give to the more general principle of ‘right conduct’ its explicit content (Almond 1991:262). Importantly, the effect of granting rights is to give individuals the moral power or capacity to compel and constrain action based on these rights. As Grotius (1583-1645) explained in an early conceptualisation, ‘a right becomes a moral quality of a person’ and gives that person moral power and capacity to act in certain ways and to compel certain actions in others (Grotius 1.1.iv).

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30 More obliquely, the right to property acts in a similar protective way ‘to secure us against the physical elements, the aggression of others or the tyranny of the state’ (West 2001:xii).
31 Montesquieu (1689-1755) in The Spirit of the Laws famously provided one of the means of guaranteeing these rights in his key tenets of republicanism. He said despotism borne either of the tyranny of kings or of the majority can best be constrained by political institutions where there is a ‘separation of power’ between bodies exercising legislative, executive and judicial powers.
32 One expression of rights (specifically that of ‘human rights’) lies somewhere between the purely natural conception and the positivist notion (Almond 1991:261). Feinberg (1973:85) defines human rights as ‘generically moral rights of a fundamentally important kind held equally by all human beings, unconditionally and unalterably’. Human rights appear in both detailed contemporary universal declarations as well as in National Bills or Codes of Rights. Some have legal force, for example the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. Others, for
As we saw, Nozick (1974) makes a strong argument that rights provide the soundest measure of justness. He sees rights as providing entitlements to be left alone, in the sense of ‘uncoerced in any manner which violates these rights’ (Campbell 2001:58). This overarching entitlement to be left alone makes for a standard that asserts there are ‘things that we ought not to do to other people, no matter how beneficial the consequences might be [for society or for us]’ (Campbell 2001:58). Preventing this interference from occurring is one way to produce just outcomes. Applying such a standard would constrain the type of distributions that could be made when responding to wrongdoing. But Nozick pressed the supremacy of rights further by arguing that determining the justness of distributions based on other standards should defer to protecting the fundamental moral interests embodied in rights (Nozick 1974:206). The view reached here is that no single standard has this overarching supremacy.

A more telling challenge to rights is that rights provide a standard that is too individual-based allowing insufficient scope for the importance of community connections. As we considered in discussing the concept of justice, communitarians like MacIntyre (1985) and Sandel (1984) argue for a standard which is more accommodating of a ‘situated self’ who is a person open to the influence of community connections rather than a person who is the Kantian ‘unencumbered self’. Communitarians assert that rights remain important as a standard of justice but that a balance should be struck between individual rights and community obligations and responsibilities such that in some instances individual rights will defer to community rights. MacIntyre’s (1985) critique

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33 Some sees Aristotelian republicanism as the original source of the concept of the embedded self in which to act morally is to act as the ‘good citizen’ (Rowe 1991:130).
of rights is stronger still. He rejects the universal attribute of rights, arguing instead that rights always remain entirely contextual, so that ‘what justice demands in this context, what rights are operative in this context’ is never fixed but always open to discourse (Hudson 2003:106, emphasis in original). If rights lack this universality, this necessarily undermines their usefulness as a measure of justice. Kennedy (2002:109) makes a somewhat similar critique when he says that rights tend to ‘foreground [issues] of participation and procedure’ which may act to interfere with a substantively just distribution.

Allowing for these concerns, the rights standard is seen to provide another sound measure of justness which addresses some of the deficits identified with respect to the equality standard. Rights by their nature involve adopting the ‘viewpoint of the “others” to whom something (including, inter alia, freedom of choice) is owed or due’ (Finnis 1980:205). This quality has the potential to compensate for the injustices of strict equality. There is still however the risk that by ‘particularizing the rights standard to a community, a tradition or a particular set of circumstances’ in order to accommodate difference, the positive attribute of universality will be lost (Walzer 1994:4; Bix 2006:114-5).

Given these limitations, it is argued that rights do constitute an appropriate standard by which to judge the justness of distributions. Defined in the following terms for responses to wrongdoing rights provide the third evaluative criterion of justice:
The rights standard measures the justness of a distribution in terms of the extent to which the distribution renews and protects the rights of all affected by wrongdoing.

The rights standard similarly cannot stand alone as a measure of justness. The final criterion of promoting ‘harmonious social relationships’ emphasises the last additional, though markedly different, perspective.

**Justice and harmonious social relationships**

The measure of justice as promoting harmonious relationships has its origins with the Ancients. Both Plato and Aristotle developed the precept of justice beyond the Socratic ideal of the personal to embrace the manner in which all elements of society should be arranged. The purpose of such ‘arrangements’ was to create overall social harmony. It is argued that the extent to which distributions contribute to this social harmony provides a further necessary measure of justness.34 Because this measure has less theoretical currency our discussion of it is of necessity more detailed.

An emphasis on maintaining social harmony has its origins as part of the Ancient Greek notion of *arête* or ‘virtue’, which term encompasses all that was necessary for human beings to perform their full social function (Rowe 1991:123). In the context of Ancient Greece, only a privileged few could perform their full social function to lead ‘whatever life one judges that one desires’ (Reiman 1990:63).35 Four conditions or ‘moral qualities’ were necessary to allow this, three of which were under the control of the

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34 Compare this with the theory of justice that Reiman (1990) defends – that a system of justice is one that satisfies the social ‘requirement’ that people need to protect themselves against the subjugation of others.
35 Of course only a limited group of ancient Greeks (those adult, free and male) had ‘the possibility of living in more than one kind of way’ (Plato: fn p204).
individual with the fourth socially controlled (Plato:Bk IV 428e).36 This fourth quality overlay each of the other ‘personal’ virtues and was inherent in the organisation of the *polis* itself to add a stabilising political effect (Plato:Bk IV 430d). This virtue (which Plato in fact called ‘justice’) consists in those social arrangements which facilitate one in ‘minding one’s own business’, ‘doing the job one is most naturally suited for’, or ‘doing the things that belong to oneself’ (Plato:Bk IV 440b).37 When properly provided, such arrangements bind ‘together all the elements [of society]…into one, temperate and harmonious’ whole (Plato Bk IV 443e). The more personal aspects of this ‘virtue’ are associated ‘with finding a mean between extremes; with ‘justice’ adding the balance in terms of social harmony (Ryan 1993:8).

The Platonic measure of social harmony has resonance in later traditions. Cicero (106-43 BCE) in *De officiis* proposed a similar set of cardinal virtues which for him constituted ‘moral goodness’. Cicero’s view was that the particular social virtue of ‘justice’ held society together and allowed people to pursue ‘the common good’ (Ryan 1993:9). The Ciceronian notion of justice was that where there were breaches of the common good there must be a means to rectify these breaches so as to restore sound social relationships (Ryan 1993:10). This means of rectification provided a measure of

36 As to those qualities under the control of individuals were ‘wisdom’, ‘courage’ and ‘discipline’. ‘Wisdom’ is the quality ‘to be found with those who possess… good judgment and wisdom’ and in the *polis* the elite guardians embody this specific virtue (Plato:Bk IV 428d). This wisdom is manifest in the way individuals take account of ‘all the moments of [their] whole life in judging how to act’ when following a particular ‘possibility of living’ (Reiman 1990:62). ‘Courage’ is the ‘ability to retain safely in all circumstances a judgment about what is to be feared, which is correct and in accord with law’ despite facing adversity in that endeavour (Plato:Bk IV 430b). Courage is the virtue specific to the ‘auxiliaries’ or warrior elite. ‘Discipline’ or temperance reflects Plato’s insistence on the element of self-control or self-restraint as central to performing the functions of a human being. Such discipline is the specific virtue of the plebian producers. This self-control allows ‘the naturally better element [to] controls the worse’ (in an individual) or ‘the desire of the less respectable majority’ to be controlled by ‘the desires and the wisdom of the superior minority’ (in the state) (Plato:Bk IV 430c & 431d).

37 A more recent translation suggests that the Greek phrase most commonly given the conventional meaning of ‘minding your own business’ is better captured by the modern catch-phrase of ‘doing your own thing’ (Campbell 2001:7).
justice, such that the justness of a situation was to be measured by the extent to which it sought to maintain or restore social harmony.

Of the modern canons of distributive justice, the prescription that comes closest to reflecting this standard is that which sees benefits and burdens being distributed ‘to each according to the greater good of the greater number, or common good, or public interest’ (Spader 1988:590). This prescription holds that the interests of the community in establishing relationships of harmony should take precedent over the interests of individuals. This also has resonance with Durkheim’s view that a response to wrongdoing should always seek to reinforce social cohesion (Durkheim 1933; Freiberg 2001a:273). Dworkin (1978) makes the same claim about the ‘grounding moral principle’ of his theory of rights (Campbell 2001:70). He says the very foundation of justice is that every person has a right to be treated with ‘equal consideration and respect’ so as to maximise social harmony (Dworkin 1978). There is resonance too with Young’s (1990) view that the justness of a distribution should be gauged by the extent to which it creates social relationships devoid of ‘arbitrary bias or exclusion’.

Recent theorists of restorative justice provide a different perspective about what it means to ‘promote social harmony’. Braithwaite (1999a:6) sees social harmony as based on a sense that justice has been done from a republican perspective. More broadly, other restorative justice thinkers see the core normative concern of justice as ‘restoration’, framed in terms of restoring ‘relationships of social equality’. Restoration so framed de-emphasises a necessary focus upon the repair of actual ‘personal or intimate relationships’ in preference to wider social repair so that ‘each party has their rights to dignity, equal concern and respect satisfied’ (Llewellyn and Howse 1998:24).
These three elements of dignity, respect and concern can provide useful indicia from which to construct the harmonious social relationships measure (Llewellyn 2002:289).³⁸

**Dignity**

The protection of ‘human dignity’ is strongly connected with historical notions of justice. Feinberg argues that in the activity of claiming rights ‘as much as any other thing’ human dignity must be asserted and promoted (1970b:257). In this sense, the dignity of persons is placed at the core of what it is to treat people justly (Campbell 2001:49). Kleinig (2009:10) asserts that society should act ‘to secure human dignity both as an individual quality and a social value’ and ‘should support social structures that foster and acknowledge such dignity’. Davis (2007a) more specifically suggests that dignity performs the core function of doing justice in the criminal law.

The key element in all these formulations is that dignity respects a ‘capacity to be directed by moral considerations’ (see Meyer 1987). Kant extends the idea of personal autonomy to encompass this notion of ‘moral agency’ where people are guided by considerations of morality rather than simply motivated by expediency or utility (Kleinig:11-12). Kant in his 1785 *Groundwork of the Metaphysics of Morals* had argued that whatever is concerned purely with human inclination or need has a ‘price’, while ‘that which [is concerned with] an end in itself …has an inner worth, this is, dignity’ (Waldron 2008:30).

³⁸There is little analysis in this literature as to what these terms actually mean. Nowhere in her work does Llewellyn (see variously Llewellyn and Howse 1998; 1999; Llewellyn 2002; 2006; 2006a) consider their actual content. Acorn (2004:23) who draws on Llewellyn’s work as ‘the most theoretically sophisticated and persuasive writing there is on [this] topic’ (though only as a straw horse with which to demolish the notion of ‘right-relationship’) does not define the term. Braithwaite (1989; 2002a) does not give these indicia any sustained attention.
It is this dignity with its ‘value beyond price’ that adheres in every human being and can be represented as the first mark of a relationship of social equality. Dworkin (1984) encapsulates this view that the objective value of a human life is to meet a person’s own special responsibility for how that life is lived, qualities he says ‘together define the basis and conditions of human dignity’ (2006:10).

There is also a close connection between dignity understood in these senses and the ‘language of respect’ which forms the second element in a construction of the harmonious social relationships standard (Waldron 2008:18). ‘Concern’ can also be dealt with under the same heading.

**Respect and Concern**

Kant argues that it is because persons are ends in themselves that they deserve to be treated as objects of equal respect (Kant 1981). The idea of ‘respecting’ conveys (as Waldron expresses it) ‘some sense of deferring to her, making room for her, listening to her, [or] allowing her will rather than one’s own to prevail’ (2008:18). Drawing these threads together suggests a relationship of ‘respect’ is one which recognises that an ‘extensive and diffuse deference is due’ to a person simply because they are human (2008:19). Reiman moreover suggests this ‘moral imperative of respect’ is an element of justice since it binds all rational human beings so as to facilitate their own individual pursuit of sovereign interests (Reiman 1990:123-4). This is the essence of the nature of respect as it relates to the promotion of harmonious social relationships. ‘Respect’ in these terms entails a mutual recognition of the inner worth of others, and their common entitlement to deference in pursuit of their sovereign interests.
Concern is also understood in much the same way as being an entitlement to equal attention and regard. This notion of ‘concern’ suggests a social requirement to ‘act in ways that respect, [and] so leave intact, others’ capabilities to act’ in order to fulfil their individual potential (O'Neill 1991:178).

Bringing together these threads, distributions that promote social relationships characterised by qualities of dignity, respect and concern are seen as just. This fourth conception of justice is markedly different from the other standards, and so necessarily more contentious. Reiman cautions that a similar Aristotelian emphasis on harmony could easily be dismissed as encouraging ‘a condition of psychic well-being’ and seen as little more than ‘a corrective to modern-day ethical relativism’ (Reiman 1990:101,102). But measuring justice by the additional yardstick of harmony adds a standard that focuses directly on ‘enabl[ing] each person to realize his sovereign interest to the greatest extent possible compatible with the same [realization] for everyone else’ (Reiman 1990:82; see too Burnside and Baker 1994). This is an aspect of justness otherwise neglected in the other standards of justice. There is some contemporary expression of this standard in many indigenous community-based justice responses, particularly in Canada and New Zealand. In New Zealand, the modern recognition of Maori philosophies of justice has influenced that country’s criminal justice practice towards embracing concepts of social harmony. One New Zealand judge specifically noted ‘[indigenous] harmony…requires many things, including an attitude of respect for others, a desire to mend the tear in the fabric of the community caused by crime, and a belief that the law is there for the benefit of all’ (McElrea 1998:62).
The relationship conception of justice is markedly different from the other three selected measures of desert, equality and rights. Measuring responses to wrongdoing in terms of how well they promote harmonious social relationships however has the potential to capture an unmissed aspect of what it means to be just. Like the other standards, it too cannot stand alone as a complete measure of what is a just outcome. Defined in the following terms for responses to wrongdoing, harmonious social relationships provide the final evaluative criterion of justice:

*The harmonious social relationship standard measures justice by the extent to which distributions promote relationships of social equality characterised by dignity, respect and concern.*

Each of the measures selected prioritises a particular aspect of what constitutes a just outcome. All four measures need to be met in any institutional response to wrongdoing for a distribution to be considered fully just. These measures provide the set of ‘evaluative criteria’ which we will use to measure the justness of distributions made in response to wrongdoing in particular contexts.

**Conclusion**

This chapter has developed the second analytical tool which will be used to analyse the practice of justice. How well a distribution delivers justice in institutional practice can be measured against these criteria. It has been suggested that a just distribution is one that gives people what they deserve in both a positive and negative sense. Added to this is the requirement that a just distribution treat people equally, though not necessarily in a proportionate sense but in a sense that accommodates their differences. It is recognised that allowance need to be made for structural inequalities that affect the pre-
existing ‘share’ of benefits and burdens that persons affected bring to wrongdoing. As well, a just distribution is characterised as one that treats people in a manner consistent with their rights and gives effect to those rights in its responses. Finally, and more controversially, we identified a just distribution as one that promotes harmonious social relationships between persons affected by wrongdoing.

To first isolate these evaluative criteria, the moral claims of justice itself were separately analysed. It was asserted that justice in all its guises is concerned with distribution, and that the particular focus of such distributions is to maximise liberty. How well this unique moral claim can be met in the practice of justice in response to wrongdoing will now be considered in the context of two institutional settings in Part Two. Before we move to this consideration the process by which we developed our final analytical tool, the generative mechanisms of justice, is described.
Chapter 4

Identifying the generative mechanisms of justice

Introduction

The purpose of this chapter is to develop the final analytical tool, the generative mechanisms of justice. It outlines the conceptual notion of ‘generative mechanisms’ and describes the process used to identify the particular mechanisms at work in justice practice in response to wrongdoing.

This analytical tool is designed to answer the third research question, namely ‘how are distributions of the harm-related benefits and burdens generated in order to produce just outcomes?’. The behaviours described include some that open the gateway to accountability and responsibility (it is suggested truth telling, vindication and expressions of remorse are important here) and others which are more attuned to delivering censure and repair (it is suggested reparation, apology and punishment are core means).

The chapter does this by identifying mechanisms given particular prominence in each of legal and restorative practices using a content analysis of the literatures of these practices. From this analysis, we distil a set of mechanisms (some common to both practices, others unique to one form or another) which will be referred to collectively as ‘the generative mechanisms of justice’.
The typology of behaviours and practices identified is then examined more closely in terms of their particular justice qualities, the importance placed on each mechanism by both practices and the communicative power each mechanism is seen to bring as a justice generating method.

**Methodology**

The content analysis of the respective literatures is designed to extract an initial set of elements from which the justice-generating mechanisms can be identified. The analysis begins with selected criminal legal practice texts from which we isolate a set of ‘defining features’ of such practice. A selection of restorative practice texts is similarly analysed to isolate the defining features recurrently identified as important to that practice. A comparison of these two sets produces a surprisingly large degree of commonality. To this list of common features, some others are added – punishment from the legal practice list, and reparation, apology and forgiveness from the restorative practice list – because these elements are given particular prominence in each practice. It is from this augmented list that we find our set of the core means by which justice is generated in institutional responses to wrongdoing. The particular strength of the generating power ascribed to each mechanism in the respective practices is compared and contrasted.

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39 The content analysis methodology used consisted in selecting those texts consistently cited as authoritative by criminal law teachers. The index and any cited content were examined for consistently referenced ‘behaviours’ or ‘principles’ described as ‘justice generating’ based on the descriptor – ‘practices, behaviours or approaches seen as influencing an experience of a sense of justice or instrumental in achieving just outcomes’.
Identifying generative mechanisms of justice

The notion that there are specific social behaviours that can generate particular outcomes owes much to the sociological theories developed by Merton in the 1960s. Merton defined social mechanisms as ‘social processes having designated consequences for designated part of the social structure’(1968:43). More recently, interest has been revived in the explanatory power of mechanisms by Hedstrom and Swedberg (1996; 1998) who argue that the ‘understanding [of social processes] is enhanced by making explicit the underlying generative mechanisms that link one state or event to another’ (1998:12). They argue that there is a broad typology of such ‘mechanisms [that] produce observed associations between events’ and that the discrete behaviours or social rituals at play in particular situations are thus both identifiable and distinctive (Hedstrom and Swedborg 1996:281).

These ‘mechanisms’ are more simply ‘behaviours’ that bring about certain outcomes through the individual actions of people involved in the process. As Elster frames it more explicitly, these mechanisms are ‘causal agents’ that act as triggers to generate certain effects or outcomes (1989; 2007). Braithwaite and Drahos (2000) used the explanatory power of mechanisms in their analysis of global business regulation. They distinguish between ‘higher-order mechanisms’ (broad behavioural factors, such as rational choice or social norm behaviour) and ‘lower-order mechanisms’ (individual actions, such as coercion, capacity building and modeling) as a means to categorise the influences at play which regulate corporate behaviour. The lower-order mechanisms were seen to operate more at an ‘actor design’ level than at a broader institutional level (2000 15-6). It is these lower-order triggers, seen to involve ‘one or more actors (state

40 Braithwaite (2002d:571) describes the same phenomena as the effect of ‘explanatory dynamics’ (such as reintegrative shaming) which provide conditions under which certain outcomes can flow.
Generative mechanisms also bear some conceptual similarity to ‘coping mechanisms’ which are common in descriptions of motivational posturing theory. Motivational postures are simply ‘coping behaviours’ through which individuals send social signals to one another in order to communicate and maintain their preferred social distance in certain personal or institutional situations (Braithwaite 1995). The important similarity for our purposes is that such postures are not confined simply to ‘behaviours’ in the sense of observable conduct they also extend to ‘conglomerates’ of social phenomena which consist more widely of ‘beliefs, attitudes, preferences, interests, and feelings’ that together communicate the preferred social relationship which an individual wishes to adopt (Braithwaite, Murphy and Reinhart 2007:138). In much the same way, our ‘generative mechanisms’ are not simply ‘behaviours’ per se but rather ‘conglomerates’ which consist of both social actions and moral practices. This description better encompasses the influence and effects of attitudes, principles and beliefs. It is this ‘conglomerate’ of ‘behaviours’ and ‘principles’ that is more accurately descriptive of the kind of justice generating triggers we are tracking.

A systematic method was needed to isolate this set of the justice generating mechanisms at work in responses to wrongdoing. The method applied is a adaptation of the ‘difference discovery method’ which Parker (1999:230) herself developed from the snowballing techniques of Minichiello and colleagues (1990:80). Her approach provides a useful way to capture these ‘practices, behaviours, approaches and principles’ which can be identified as having justice generating power. As indicated, this information is
extracted from content analyses of the literatures of the two forms of practice in which the later empirical inquiry is focused.

Two broad search terms were employed for this inquiry. The term ‘criminal justice’ was used to isolate a criminal legal practice subset within the vast legal justice literature from which a representative selection of core texts could be selected for analysis. The term ‘restorative justice’ was used to isolate a similar selection of restorative justice practice texts for analysis.

**Features identified as potentially generative in legal practice**

The selected set of core criminal justice texts was examined firstly to identify the recurrent set of general ‘defining features’ of legal practice referred to in that literature. The search for fresh features to add to the list ceased when no new significantly different features were being uncovered. By using this constraint, it is argued that the sampling strategy has successfully isolated what can be regarded as general defining features of legal practice.

This set of features contained a number of factors (e.g. social control and regulation) seen as important to the broader role of legal practice but more strictly relevant to its non-justice regulatory functions. The features isolated also contained factors (e.g. rights articulation and impartiality) which were plainly justice related but have relevance to

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41 The representative criminal law texts examined were:
Fisse, B. *Howard’s Criminal Law* (1990)
Fletcher, G. *Rethinking Criminal Law* (1978)
Murphy, P. & Stockdale, E. *Blackstone’s Criminal Practice* (1994)
legal practice’s broader justice role than simply to responses to wrongdoing. Some features identified (such as truth seeking and fact finding) were features that were clearly relevant to both criminal and non-criminal practice.

To facilitate the categorisation of features that are particular to legal responses to wrongdoing, this set of ‘defining features’ was divided into two further groups – those seen as descriptive of legal practice’s functions more broadly (‘General features’), and those seen as descriptive specifically of responses to wrongdoing (‘More specific wrongdoing features’). It is this latter group which is to be the source from which to build the ‘generative mechanisms’ we are seeking to isolate.

The full defining features of legal practice thus appear now in Table 4 as two distinct groups:

- the general features of legal practice, and
- the features seen as more specific to responses to wrongdoing.
Table 4. Features of legal practice

<table>
<thead>
<tr>
<th>General features</th>
<th>More specific wrongdoing features</th>
</tr>
</thead>
<tbody>
<tr>
<td>Due process / procedural fairness</td>
<td>Accountability</td>
</tr>
<tr>
<td>Truth seeking / fact finding</td>
<td>Responsibility</td>
</tr>
<tr>
<td>Contestability</td>
<td>Truth seeking / fact finding</td>
</tr>
<tr>
<td>Legality / adherence to rule of law</td>
<td>Censure</td>
</tr>
<tr>
<td>Social control / protection</td>
<td>Remorse</td>
</tr>
<tr>
<td>Rights articulation/ protection</td>
<td>Punishment</td>
</tr>
<tr>
<td>Formal Equality</td>
<td>Vindication</td>
</tr>
<tr>
<td>Rationality</td>
<td>Deterrence/prevention</td>
</tr>
<tr>
<td>Legitimacy</td>
<td>Proportionality</td>
</tr>
<tr>
<td>Regulation</td>
<td>Desert</td>
</tr>
<tr>
<td>Fairness / impartiality</td>
<td>Rehabilitation</td>
</tr>
<tr>
<td>Rule application</td>
<td>Denunciation</td>
</tr>
<tr>
<td>Objectivity</td>
<td>Reparation</td>
</tr>
</tbody>
</table>

At this point of the analysis, the items included in the ‘more specific wrongdoing features’ column are flagged as potential justice generating mechanisms relevant to legal practice. It is these features alone which are thought to be more relevant to responses to criminal wrongdoing.

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42 As we indicated ‘truth seeking/fact finding’ were seen to be important in both general legal practice and in specific responses to wrongdoing.
Features identified as potentially generative in restorative practice

A similar content analysis of a set of core restorative justice texts was used to identify its practice’s general defining features. From this analysis a number of recurring features was also identified in the same way. The analysis again ceased when no new significantly different features were being uncovered. Many of the features isolated as relevant to restorative responses to wrongdoing were seen to be the same as those given prominence in legal practice.

The defining features of restorative practice were similarly broader than purely justice promotion. The qualities isolated also contained normative prescriptions and lesser supererogatory elements described as desirable but non-essential to its justice promotion. Distinctively, the qualities isolated also contained features more descriptive of purely restorative, rather than justice generating functions. However, no attempt was made to sharply distinguish these ‘justice’ and ‘restorative’ features as it was a strong theme of this literature that its form of justice was promoted by and through restoration itself.

The full defining features identified in restorative practice appear in Table 5.

43 The texts examined were:  
Braithwaite, J. Restorative Justice and Responsive Regulation (2002a)  
Table 5. Features of restorative practice

<table>
<thead>
<tr>
<th>Features of restorative practice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accountability</td>
</tr>
<tr>
<td>Censure</td>
</tr>
<tr>
<td>Punishment/consequences</td>
</tr>
<tr>
<td>Deterrence/prevention</td>
</tr>
<tr>
<td>Truth telling</td>
</tr>
<tr>
<td>Forgiveness</td>
</tr>
<tr>
<td>Repairing relationships</td>
</tr>
<tr>
<td>Transformation</td>
</tr>
<tr>
<td>Social connectedness</td>
</tr>
<tr>
<td>Enabling social justice</td>
</tr>
<tr>
<td>Empowerment</td>
</tr>
</tbody>
</table>

From this second stage of the analysis, all features included in this list are flagged as potentially justice generating mechanisms relevant to restorative practice.

**Isolating a generic set of generative mechanisms**

Both the practices examined profess to provide justice responses to criminal wrongdoing. Inductively, any commonality in their respective defining features should indicate features potentially relevant to promoting this experience of justice. The results obtained from these two analyses were therefore cross-matched to highlight this commonality as a further step in isolating justice generating mechanisms. The features which appear in the legal subset of ‘more specific to wrongdoing features’ in Table 4 were cross-matched to the features appearing as ‘features of restorative practice’ in
Table 5. Through this process of cross-matching, it was possible to divide the legal and restorative features into two simple lists – those for which there was commonality, and those which appear to only define restorative practice.

Table 6 shows these results of this cross-matching divided as follows:

- the defining features common to both practices (bolded),
- the features given particular prominence only in restorative practice (italicised):

Table 6. Features of legal & restorative practices

<table>
<thead>
<tr>
<th>Features of legal &amp; restorative practices</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Common features</strong></td>
</tr>
<tr>
<td>Accountability</td>
</tr>
<tr>
<td>Responsibility</td>
</tr>
<tr>
<td>Censure</td>
</tr>
<tr>
<td>Remorse</td>
</tr>
<tr>
<td>Vindication</td>
</tr>
<tr>
<td>Consequences/Punishment/ Sanction</td>
</tr>
<tr>
<td>Deterrence/Prevention</td>
</tr>
<tr>
<td>Truth telling</td>
</tr>
<tr>
<td>Proportionality</td>
</tr>
<tr>
<td>Reparation</td>
</tr>
</tbody>
</table>

44 It is important to note that the emphasis of a defining feature may however be quite different for each approach. For instance, ‘proportionality’ was seen as important in different degrees in both practices, but legal practice viewed proportionality more in terms of sanctions proportionate to culpability whereas restorative practice saw it more in terms of proportionate repair (Van Ness 1999).
This process of cross-matching was the third stage of the analysis designed to identify a set of ‘justice generating mechanisms’. These ‘mechanisms’ are social behaviours seen as acting as triggers to ‘cause’ a certain effect or outcome (Elster 1989). In the case of this analysis, they are behaviours which trigger an experience of a sense of justice in the context of wrongdoing. In this case the triggers are seen to operate more frequently at an ‘actor design’ level in such responses (Braithwaite and Drahos 2000). Triggers will contain ‘conglomerates’ consisting of social behaviours and principles guiding that behaviour, in our case the promotion of justice (Braithwaite, Murphy et al. 2007).

Table 6 is our first clear step towards identifying features which appear to have the particular ‘flavour’ or quality seen as ‘justice promoting ability’. To move from our current generality to a more strict focus on this distinctive quality requires a further level of abstraction. This involves selecting those common features (and a few of the distinct restorative practice features) seen to have a particular potential for producing just outcomes. Describing how two such features were selected can help to clarify how this particular ‘generative’ quality was isolated.

Isolating ‘accountability’ for instance as one such generative mechanism involved a recognition of a particular aspect of being ‘called to account’ in relation to wrongful conduct. This is a more focused aspect of accountability than simply showing one has complied with external requirements, or with institutional or personal standards which is its meaning (Roche 2003:41-2). It is similar with ‘apology’. The particular quality of apology identified is a recognition that acceptance of responsibility for wrongful conduct requires some overt form of acknowledgment. Such an apology is more focused than simply seeking to excuse impolite or socially inappropriate conduct. A similar
intuitive process was followed for each of the other ‘common features’ to determine whether they also have similar recognisable justice qualities.

**Table 7** displays the results of this intuitive process of teasing out a distinctive set of features seen to have a specific justice generating capability. This will be the final stage of the analysis by which we arrive at a selected set of justice generative mechanisms. Most of the features in Table 7 come from the ‘common features’ column of Table 6. Two features, that of ‘apology’ and ‘forgiveness’ are added from the ‘restorative features only’ list. Bottoms (2003:94) had identified apology as a crucial social ritual leading to ‘the restoration of prior social relationships’ in restorative practice which as we have surmised suggests apology also has justice generating capacity. Forgiveness is dealt with much more ambivalently in the literature. The practice of forgiveness is certainly ascribed particular moral power, though it is unclear whether this is justice generating. In the legal literature forgiveness tends to be more specifically excluded, being seen as ‘a virtue which should not be accorded legal recognition’ (Edney and Bagaric 2007:177). However in the context of responses to collective violence, Minow (1998:14) ascribes substantial power to forgiveness as a means to ‘avoid the self-destructive effects of holding onto pain’, to ‘strengthen community’, to ‘establish or renew a relationship’, to ‘heal grief’ and ‘break down cycles of violence’. These ‘forgiveness effects’ are seen as particularly powerful and it may be that they are also justice conducive.

The result of this intuitive process provides the set of ‘practices, behaviours, approaches and principles’ seen as potential justice-generating triggers in institutional responses to wrongdoing. These are displayed in **Table 7**.
Table 7. Justice generative mechanisms

<table>
<thead>
<tr>
<th>Justice generative mechanisms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accountability</td>
</tr>
<tr>
<td>Censure</td>
</tr>
<tr>
<td>Punishment</td>
</tr>
<tr>
<td>Deterrence/Prevention</td>
</tr>
<tr>
<td>Truth telling</td>
</tr>
<tr>
<td>Apology</td>
</tr>
</tbody>
</table>

It is noteworthy that many of what are now described as ‘mechanisms’, rather than simply ‘features’ had prominence in both practices. Traditional legal responses to wrongdoing give prominence to practices like punishment, or to principles like proportionality. But more surprisingly these behaviours which do not appear ‘restorative’ are also given prominence in the restorative practice literature. Gramsci’s concept of cultural hegemony helps to explain this apparent anomaly. Gramsci (1971) suggested that dominant social ideas are maintained partly through consent of those in subordinate groups which remain actively complicit in their subordinated status. In the particular case here, the hegemonic values of the dominant legal justice system may still be pervading restorative practice in the belief that they are simply ‘common sense values’ rather than specific legal values (Joseph 2002). If this is the case, it is only as such practices mature that their own unique value system with marked departures from the hegemonic set will become evident.
Putting aside these reservations, from this series of analyses a set of social mechanisms has been developed which can be applied to explain how an experience of a sense of justice is generated in institutional responses to wrongdoing. The next section of this chapter provides a discussion about each mechanism and a definition of each. These definitions are those used in the empirical inquiry into justice practice reported in Part Three. The discussion considers the nature of each mechanism more closely and considers the views expressed by scholars in the respective literatures about the justice promoting potential of each mechanism for their own practice.

**Justice generating mechanisms**

A review of the individual mechanisms permits a closer comparison of the different priority given to each mechanism within legal and restorative practices. For convenience the comparison deals with the mechanisms largely in pairs, based on some perceived degree of similarity or effect. The discussion also introduces the idea that there are essentially two ‘gateways’ that need to be opened by the mechanisms in responses to wrongdoing in order to do justice and that the mechanisms play different roles in opening each gateway in each practice.

**Accountability and Responsibility**

‘Accountability’ and ‘responsibility’ sit well together as generative mechanisms because they both address the threshold issue of accepting blameworthiness seen as fundamental to beginning any process of responding to wrongdoing.

**Accountability** is used in the literatures in two distinct senses. Firstly, accountability describes the requirement for the wrongdoer to give an account of what has happened
and to have that account subject to contestation ‘inside any process of deliberation’.

Secondly, and more commonly, accountability is used in the sense of ‘holding a wrongdoer to account’ by, or on behalf of those affected by the wrong. The assumption is that by doing so those adversely affected by the wrongdoing can begin to experience a sense of relief.

The definition of accountability captures these two meanings:

Accountability means the offender giving a public account of his/her responsibility for the wrongdoing which stakeholders in the injustice accept and which the offender is held to own.

In a similar way, the notion of responsibility is used in the literatures either in a passive sense of ‘taking responsibility for something done in the past’, or in a more active sense as ‘taking responsibility for putting something right into the future’ (Bovens 1998; Braithwaite 2006:42). The assumption made in the literature (particularly in the restorative practice literature) is that if wrongdoers take responsibility in the more active way then persons adversely affected by wrongdoing will be more likely to be able to begin to experience a sense of justice.

The definition of responsibility captures this twin meaning:

Each of these definitions was used with informants interviewed in the empirical study reported in Chapter 8.

For example, an active acceptance of responsibility for his offending is seen as the core therapeutic gateway for addressing abusive behaviour by violent or sexually abusive men (Jenkins 1990).
**Responsibility** means having the offender actively accept responsibility for their wrongdoing and its consequences through confronting them with those consequences.

The two forms of practice place different degrees of emphasis on these two factors in their justice practice.

**In legal practice**

**Accountability** and **responsibility** were seen as central generative mechanisms in criminal legal practice. Accepting responsibility is constituted by an admission in which the wrongdoer is then publicly held to account (Cane 2002:32-4). If such responsibility is not admitted legal practice provides the means of assessing culpability to make that determination. Legal practice’s focus is primarily upon determining and ascribing ‘legal liability-responsibility’ for the action based largely upon ‘intention’ (Hart 1968:215-22). In this sense responsibility is accepted for ‘an action done intentionally or deliberately in order to bring about a result’ (Duff 1990:99-100; Golding 2005:228). This emphasis on testing conduct against established criteria of legal culpability (intention, liability, mens rea etc) has the effect that once established, responsibility tends to then be essentially passive. Offenders are held to account in the second ‘classic sense of accountability’ and this gives rise to a passive expression of responsibility rather than demanding from offenders that they provide a personal account of what has occurred (Roche 2003:42).

**In restorative practice**

**Accountability** and **responsibility** are also seen as important generative mechanisms for restorative practice. In this form of practice there is more a focus on active
responsibility (Braithwaite and Roche 2001; Braithwaite 2002c:156). Active responsibility occurs as part of the deliberative process designed to have offenders answerable ‘publicly’ (or at least to the public of those ‘persons affected’) for their wrong. Offenders are therefore required to provide an account of their actions which is subject to contestation until such time as that ‘account has been accepted by the stakeholders in the injustice’ (Braithwaite 2006:34). Roche (2003) suggests that the deliberative nature of this practice makes that accountability more effective because of its immediacy. The deliberations are seen to have ‘the virtue of [the] authenticity of emotional communication’ judged crucial to a full acceptance of responsibility (Braithwaite 2006:38). The literature discloses some empirical support for this assertion that persons affected do perceive offenders as being ‘held accountable’ as a consequence of their participation and that this can aid the experience of a sense of justice (see Maxwell and Morris 1993; Bonta, Wallace-Capretta and Rooney 1998; Poulson 2003).

In summary, in both processes mechanisms which provide for offender accountability and which facilitate expressions of responsibility by offenders and others within institutional responses are seen to potentially contribute to an experience a sense of justice. While this is true for both practices, the way they each utilise these mechanisms is quite different.

Censure and Remorse

Censure and remorse are seen as core generative triggers that promote accountability. **Censure** was understood as referring to behaviour which conveys disapproval and denunciation publicly which has two discrete purposes. Firstly, this is to provide...
vindication to persons affected by the wrongdoing and secondly to act as a prompt to a wrongdoer to recognise that he or she has done wrong. In the first instance, censure provides the recognition that the victim has not only been harmed but has also been wronged. This restates the victim’s ‘moral standing as a human being who demands our concern and respect’ (Gaita 1991; Duff 2002:88). In the second instance, censure is seen to provide an important step in an offender’s own awakening understanding of the character, seriousness and implications of the wrong they have done (Duff 2002:88).

The definition of censure captures these purposes:

_Censure means to publicly denounce harmful behaviour and declare it as wrong with a view to having the wrongdoer recognise his or her wrong._

In a similar way, _remorse_ was understood to refer to behaviour through which wrongdoers could express sorrow for what they have done. This was seen as distinct from expressing mere sorrow for the effects the wrongdoing has had on their own situation. Gaita (1991) analysed remorse more deeply as a moral phenomenon which involves what he called ‘the suffering recognition’ of wrongdoing which occurs as a result of the acknowledgement of one’s guilt. In his view, the conditions which gives rise to feelings of remorse are more to do with a recognition of moral responsibility than with the acceptance of the actuality of blameworthiness (1991:44-5). Gaita says the need to express remorse arises as a consequence of these feelings of moral responsibility and that these feelings can be felt independently of any necessary
acceptance of culpability. If this is the case, it is arguable that it is not necessary to feel blameworthy in order to recognise the necessary moral responsibility which activates remorse.

Remorse is also an emotion which ‘sticks with us in a way that is radically different from other forms of suffering’ (Gaita 1991:47). This is said to be because remorse focuses on what kind of person we have become (as a consequence of the wrongdoing) as distinct from what kind of person we think we are more generally. Gaita asks why should this realisation be so distressing, so like what he calls ‘a kind of dying to the world’ (1991:48). He offers two reasons for this. He says that unlike other suffering, genuine remorse cannot be shared. It is ‘the discovery of a dimension of ourselves that [we] cannot enter into common and consoling fellowship with others’ (1991:49). We are denied the consolation of saying that what we have done has also been done by others, since our offending is only our own. As well, the recognition of what we have become has meant we are (at least temporarily) ‘placed elsewhere’ and cannot simply excuse ourselves by saying what we have done is ‘only human’ (1991:50). The effect of this exclusion can be emotionally devastating, though it is often misconstrued as mere self-absorption and therefore dismissed or treated suspiciously.

Remorse properly expressed was seen to have positive potential in providing an awakening and recognition of the victim’s own individual harm. This was common to both practices. The recognition of the necessity for some sort of response to an expression of remorse was seen as crucial to its potential to begin the process of justice.

Kennedy (2008) provides an interesting example of phenomenon in respect of US soldiers involved in the Second Iraq War. He cites reports of the soldiers feeling ‘overcome’ by remorse for killing civilians in combat, even though they accepted the deaths were consistent with existing rules of engagement and so do not hold themselves as culpable. Their remorse seems to suggest the soldiers had in fact retained a sense of moral responsibility even though not feeling morally or legally blameworthy.
The definition of remorse captures these aspects:

**Remorse** means the offender feeling sorry for what they had done, wishing that it had not occurred and expressing that they were sorry.

Censure and remorse are recognised as generative mechanisms in each form of practice, though once again they are given different weight and importance in each.

**In legal practice**

**Censure** as a generative mechanism was seen as important in legal responses principally because it served the purpose of confirming the offender ‘as a responsible person who has committed a wrongful act’ and therefore deserving of condemnation (Walgrave 2000a:177). But censure was not seen necessarily as ‘a technique for evoking specified [moral] sentiments’ in the offender (von Hirsch 1993:10).

Legal practice’s assumption is that wrongful conduct ‘deserves’ a certain response expressive of censure or reprobation (von Hirsch 1993:6). Its perspective is that there ‘should be a reprobative response to the core conduct’ involved in the wrongdoing (von Hirsch 1993:9 emphasis in original). The legal conception of censure involves addressing the victim’s needs by acknowledging the conduct which caused them harm as wrong (rather than simply injurious) and by singling out a particular offender as the agent responsible for that wrongdoing (Narayan 1993). This message of censure is seen to be ‘embodied in the prescribed sanction’ and therefore often ‘delivered’ via punishment (von Hirsch 1993:11). The use of a penalty to deliver censure is also seen as
allowing the degree of censure to be properly calibrated to reflect the level of reprehensiveness of the conduct and so express a particular degree of condemnation.

Expressions of remorse were also seen to contribute to just outcomes in an instrumental sense in legal practice. In all the Australian legal jurisdictions, for instance, ‘contrition, repentance and remorse after the offence are mitigating factors leading …to some, perhaps considerable reduction of the normal sentence’ (Neal, 1982:314). But reservations have often been expressed in the literature and in practice about the generative power of remorse. There were seen to be ‘fundamental problems with remorse as a mitigating factor… [since] it is often indistinguishable from expedience or self-pity’ (Edney and Bagaric 2007:175). The concern was that such expressions of remorse may not in fact be genuine ‘since it requires no tangible exertion or demonstrable behavioural change’ to express remorse and it remains therefore largely subjective and assumed (Edney and Bagaric 2007:175). The view expressed in the literature was that if the difference between feigned and real remorse remains so elusive, then it was not behaviour that should properly be relied upon to generate just outcomes.

**In restorative practice**

Censure was also seen as an important generative mechanism in restorative practice. Restorative practice takes a somewhat instrumentalist view of censure using it as the practice of blaming a wrongdoer not so much because the community is normatively ‘entitled’ to do so, but with the intention of strengthening the offender’s inhibitions against reoffending in the future (Braithwaite and Pettit 1990). There is criticism in

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48 Illustrative examples are the *Crimes Act 1914* (Cth), section 16A(2)(f) which says ‘the degree to which the person has shown contrition for the offence’ is a ‘relevant’ factor and the *Sentencing Act 1991* (Vic), sections 5(2C) which that ‘in sentencing an offender a court may have regard to the conduct of the offender on or in connection with the trial as an indication of remorse or lack of remorse on his or her part’. 

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some quarters that in this restorative notion of censure there is then more of an appeal to a wrongdoer’s desire to avoid further disapprobation than any intention to increase his or her capacity for moral self-assessment (von Hirsch 1993:24-5).

Nonetheless, the form of dialogue that restorative practice facilitates between offenders, victims and other affected persons does provide a potentially effective form of normative discourse through which to convey censure. This is both because the process ‘afford[s] an opportunity in which both victims and offenders are able to participate constructively’, and because the discourse itself is likely to be ‘a moralistic form of discourse that offenders may find harder to reject’ the censure conveyed (Dignan 2003:144).

Importantly, a core part of the restorative purpose of censure is the means it offers to vindicate the experience of victims. The restorative process also uses censure to attempt to redress the inequality of the power relationship of the offending in a way that can vindicate the value of the victim without the need to denigrate the wrongdoer (Hampton 1998:39). For such an approach to work there must be ‘strong procedural safeguards to ensure that the power relationship of the crime is not recreated’, or that a substitute power imperative against the offender is not now imposed through the process (Hudson 2003:183).

**Remorse** was also seen as an important generative mechanism for restorative practice. There are reports of empirical studies of restorative processes (in particular the South Australian Juvenile Justice (SAJJ) youth conference program) which indicate that more than half the young offenders can be objectively identified as being either ‘fully’ or
‘mostly’ remorseful in their response (2003:224). These expressions of remorse were seen as contributing significantly to an experience of a sense of justice by persons affected who also participate in the conferences.

In summary, processes which allowed for censure of the offending and which facilitate expressions of remorse can contribute to the development of a sense of justice in persons affected by the wrongdoing. This is true in both forms of practices, although once again the role given (particularly to the expression of remorse) in either practice is markedly different.

**Punishment and Vindication**

Punishment and vindication are related generative mechanisms in that the imposition of punishment is often seen as a core means of vindicating the victim and reaffirming their worth as individuals. Garvey argues that it is essential to ‘vindicate the victim’s worth through punishment’ in some tangible way (1999:1844).

**Punishment** is seen to serve these two interlocking functions – a censuring function and a preventive function. In doing the work of censuring, punishment expresses or underlines the disapproval or disapprobation the wrongful conduct warrants. In terms of its preventive function, the threat of punishment provides a prudential reason for desistence for this wrongdoer (in the future) and for other potential wrongdoers contemplating similar offending (von Hirsch 1993:13). However, these two functions are so intertwined that penalties are said to ‘both constitute the hard treatment and express the reprobation’ in one step (von Hirsch 1993:14). However there is some acceptance that blame can be expressed in ways other than punishment. Walgrave, for
one, argues that sanctions which impose ‘an obligation to repair’ and are not designed to inflict hardship can be equally effective in expressing approbation (2002:199). But in many forms of response, the punishment of a wrongdoer is seen as crucial to giving persons affected by that wrong a sense of justice through approbation expressed by imposing hardship.

The definition of punishment captures these various functions:

**Punishment** means a sanction which involves a deprivation imposed with the intention of expressing censure for harm done and preventing or dissuading future offending.

In a related way, some means of vindication of the wrong done to persons affected is central to justifying or reaffirming their individual worth. The restorative practice literature in particular asserts that censuring of the wrongdoing by other participants (in either formal or informal processes) serves as a means to do this. This is more starkly illustrated in responses to widespread politically-sanctioned wrongdoing where ‘many victims conceive of justice in terms of revalidating oneself, of affirming the sense “you are right, you were damaged, and it was wrong”’ (Minow 1998:60). Being vindicated in this way gives victims a sense of justice through this personal revalidation, which is often effected through the imposition of sanctions on the wrongdoer. Vindication is also understood in a sense separate from personal vindication and refers to the ‘vindication of the law’ in the sense of confirming or reasserting its normative content.

The definition of vindication emphasises the core sense of personal vindication:
Vindication means taking seriously the concerns of persons affected in a way that helps them to feel that it is they who have been wronged.

Punishment and vindication were given different weight as generative mechanisms in legal and restorative practices.

In legal practice

Punishment (and the calculation of the amount of such punishment) has a core generative role in criminal legal practice. Punishing someone involves ‘visiting a deprivation (hard treatment) on him [or her], because he [or she] supposedly has committed a wrong’ (von Hirsch 1993:9).⁴⁹ Such punishment (which Lacey characterises more as ‘unpleasant consequences’ (1988:7)) is regarded as essential to the expression of censure so as to communicate (to both victim and offender) that a wrong has been done and has now been properly addressed. Punishment is seen to induce in the offender ‘the pain of condemnation and of recognized guilt’ (Duff 1992:53-4). This in consequence can act as a means to reshape or correct the normative damage to relationships between victims, offenders and the community.

Part of punishment’s justice character is dependent on its amount being properly calibrated to the severity of the wrong done and the offender’s culpability for that wrong. This assumes offences can be ranked according to their relative seriousness and that this ‘seriousness, in turn, is composed of [determined amounts of] culpability and harmfulness’ (Ashworth 1993:288). The calibration of the ‘correct’ amount of

⁴⁹ The phrase ‘hard treatment’ has its origins with Feinberg (1970).
punishment is seen as essential to satisfy the ‘strict obligation to punish in a particular way’, and to a particular degree (Allen 1999:327).

In a criminal justice response, punishment also has instrumental purposes. This more ‘rehabilitative punishment’ imposes the deprivation consequential on wrongdoing with a purpose other than purely penalty. The further ‘essential purpose of such punishment should be to achieve restoration’, primarily in the sense of restoring normatively damaged community standards (Duff 2002:82). Punishment in this sense is also geared in legal practice ‘towards the pursuit of broadly restorative outcomes – notably compensation orders and reparation orders’ (Dignan 2002:183).

**Vindication** as a generative mechanism is also seen as important to justice generation in legal practice. What ‘happens’ to the offender in terms of sanction provides vindication of the rights of the victim and of other persons affected. The content of ‘what happens’ to the offender can extend to both the burden of the pre-trial and court process itself in terms of time, expense and stress as well as any overt sanction actually meted out to the wrongdoer through the process (Feeley 1979).

**In restorative practice**

**Punishment** has a much less central role in restorative practice. In the main, restorative practice eschews punishment as its primary means of responding to wrongdoing. But some restorative justice thinkers express an alternative view that restorative-type sanctions are in fact ‘alternative punishments’ which cannot be disguised as merely ‘alternatives to punishment’ (Daly 2000:34). On this view, ‘tasks, restrictions or

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50 The Supreme Court of Victoria in sentencing the offender for murder in *DPP v Dupas* (2007:para 16) said ‘this trial was a vindication’ the rights of the victim and suggested the *Sentencing Act 1991 (Vic)* be amended to add as a specific purpose of sentencing ‘the vindication of the rights of victims’.
deprivations imposed on an offender in consequence of a criminal act, are [all] punishment’ (Hudson 2003:187). Punishment therefore covers ‘anything that is unpleasant, a burden or imposition’ (Daly 2000:39). So paying compensation, attending a counseling session, paying a fine or having reporting conditions will all act as ‘punishments’ to those who must take on these commitments.

Daly argues further that the work of punishment in delivering censure is also crucial to restoration (2000). However, the key difference she draws is that while restorative practice does not exclude punishment, punishment is certainly not its vehicle for generating justice. She emphasises this distinction by saying ‘I am not arguing …that justice is done when punishment is delivered’, merely that punishment is implicit in any sanctions imposed (2000:40)).

On this view, punishment seen in terms of retributive censure does form some part of what occurs in a restorative justice process (Daly 2000:40). However, the punishment is not the justice, nor is justice done through punishment being delivered. For Daly, ‘punishment can be seen to make restorative justice possible’ since the censure crucial to restoration may not otherwise be seen as effective (Daly 2000:48).

However, the mainstream restorative practice literature disputes whether punishment is necessary to express censure. Walgrave (2000:178), for instance, argues that not all punishments in fact express blame, since in some cases punishment is seen by an offender more as a rationally balanced risk rather than as a penalty. While accepting that wrongfulness needs to be censured, restorative practice refutes that this censure is best expressed by punishment. The core argument is that censure which is conveyed through...
punishment deals with the person externally and does not attempt to elicit the necessary ‘moral sentiments of repentance’ (von Hirsch 1993:7). Shearing and Johnson (2005) suggest instead that providing to victims ‘a credible guarantee of future right-doing’ which delivers the message that ‘this will not happen again’ meets many of the key requirements of censure sufficiently, without the need to also impose punishment (Shearing and Johnson 2005:35).

By comparison, vindication is seen as a key element in restorative processes. To be effective such vindication requires the presence of others from whom persons wronged can ‘receive acknowledgement and validation’ which forms ‘a central element of the healing process’ (Minow 1998:71). It is through censuring the wrongdoer’s acts that other participants in the process will begin the process of vindication of the worth of persons harmed which is crucial to their restoration.

In summary, punishment was seen as a core justice generating mechanism in legal practice, but not so in restorative practice. The vindication of persons directly or normatively harmed by wrongdoing was seen as a core means of generating justice in both forms of practice, though the form such vindication takes in each is different.

**Deterrence and Proportionality**

Deterrence and proportionality are generative mechanisms which operate as principles affecting behaviour rather than as behaviours in themselves.

**Deterrence** as a principle seeks to dissuade further offending and in so doing provide a sense of justice when it is effective. Any such prevention may be a product of the form of response itself (including the ‘pre-trial’ steps in the determinative process), as well as
the effect of any sanctions or conditions imposed or agreed. Measures designed to deter wrongdoers are also seen as affecting the future behaviour of other unrelated persons so as to dissuade them from similar offending.

The definition of deterrence captures these various senses:

**Deterrence** means an intended effect of a response in reducing the tendency of the offender to re-offend, and an effect of a response in reducing the general tendency of other people to offend in this way.

The principle of proportionality suggests that practices which correctly manage the degree of response produce important justice generating effects. For instance, von Hirsch (1993:6) contends that the principle that ‘sanctions be proportionate in their severity to the gravity of offences’ is itself a basic element of justice. In this legally conventional sense, proportionality seeks to maintain consistency by linking censure with the objective seriousness of the criminal event. An alternative conception of proportionality which is evident in the restorative literature makes the linkage between the severity of the harm caused and the degree of restorative effort required to address that harm. On either view, ensuring that sanctions are proportionate in their severity to the gravity of the wrongdoing or the degree of restoration required is seen as potentially justice generative.

The definition of proportionality captures these dual aspects:
**Proportionality** means the principle of sanctions being proportionate in their severity to the culpability of the wrongdoing done, or the degree of restorative effort required to remedy the harm done.

Deterrence and proportionality are generative mechanisms given markedly different weight in legal and restorative practices.

**In legal practice**

Legal practice gives wide prominence to the principle of **deterrence**. In the case of responses to wrongdoing it embraces a rationally deliberative model of deterrence which assumes the likelihood and severity of punishment will affect decisions to offend (Zimring and Hawkins 1973).\(^{51}\)

Legal practice likewise embraces the principle of **proportionality**, particularly in accepting that if sanctions need to be imposed there must be some means of correctly managing the amount of sanction. The amount of punishment is variously set by the degree of the offender’s culpability, by the degree of ‘treatment’ needed to promote desistence or by the degree of actual or normative harm caused by the offender. Overriding these different anchors will be a controlling restraint of ‘upper limits’ of penalty (Tonry 1994; Ashworth 2002:586).

Criminal practice’s application of the principle of proportionality is guided primarily by the answers to two related questions (von Hirsch 1993). The first asks ‘how much sanction is justified?’. The answer offered is that as wrongdoing becomes increasingly

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\(^{51}\) Zimring and Hawkins (1973) highlight this model as relative ineffective, particularly as it relates to the use of incapacitation to reduce levels of offending in the community more generally (cited in Tonry 1996:107).
more serious the amount of sanction also needs to be progressively increased to
‘signif[y] a greater degree of disappropriation’ (von Hirsch 1993:15). The second
question asks ‘is there a particular quantum of sanction that is the “deserved penalty”
for this particular offence given its degree of seriousness (von Hirsch 1993:18)?’. In a
purely objective sense, there can be no such ‘right amount’ of sanction since ‘the
amount of disapproval conveyed by penal sanctions is [simply] a convention’ and not a
calculable amount (von Hirsch 1993:19). Instead the use of some basis of relativity for
calculating the quantum of penalty is substituted so as to provide useable comparative
gravity graduations (Kleinig 1973).

In spite of its obvious limitations, the principle that ‘sanctions be proportionate in their
severity to the gravity of offences’ provides substantial justice generative power in legal
practice (von Hirsch 1993:6). Legal practice seeks to overcome some of the limitations
by suggesting proportionate consistency can be best retained by linking censure strictly
to the objective seriousness of the criminal event. A just legal response says an offender
deserves some degree of punishment, and that the degree can be ranked in terms of its
relative seriousness, with ‘seriousness’ being judged against a combination of the
offender’s culpability or blameworthiness and the harmfulness of the conduct
(Ashworth 1993:288).

**In restorative practice**

Restorative practice also recognises **deterrence**, seeing the ‘most important function of
deterrence is to channel justice into restoration’ so as to support the credible guarantee
of future right-doing that justice demands (Braithwaite 2002a:121). The ‘dialogic social
control’ which characterises much of restorative processes is seen to have potential
power in achieving effective deterrence because it involves ‘many [people] beyond the
criminal who can be deterred [so as ] to prevent the crime’(Braithwaite 2002a:121).

Restorative practice emphasises this active form of deterrence that encourages ‘third parties [families, friends etc]…because of their sense of social responsibility, their caring for an affected party, or because they have [the] power’ to contribute their influence in a way that can reduce the likelihood of reoffending (Braithwaite 2002a:121).

But restorative practice eschews proportionality as a justice generating mechanism. There is some call in its literature for the substitution of a standard of ‘restorative proportionality’, whereby a linkage is made between the severity of the harm caused and the degree of restorative effort required to right that harm (see Van Ness 1999:274-5). Proportionality in this sense anchors the degree of response to the degree of harm. But using this link between the ‘severity of the material, relational and social harm’ and ‘the degree of restorative effort required by the offender’ can have real difficulties in implementation (Walgrave and Geudens 1996:376). One difficulty is the potential for an extreme degree of sanction when the degree of harm caused by wrongdoing is itself extreme (Braithwaite 2005). If the link is drawn between the harm caused and the effort required, with the degree of sanction to be gauged by ‘persons affected’ then adequate guidelines at least need to be strictly in place to avoid unwarranted severity (Van Ness 1999:274).52 Balanced against these difficulties there may be some potential benefit in that the degree of culpability and the extent of harm caused by the offence are likely to be made more apparent through a deliberative process (Erez 1999).

52 Van Ness (1999) suggests tort law or a desert-based scale be used to gauge how the offence and any sanction impedes the standard of living of the typical person (von Hirsch 1993). The latter method has resonance with Braithwaite and Pettit’s (1990) use of dominion as the target for measuring the harm of criminal conduct in terms of the diminishment of liberty caused by the offending and likely to be caused by imposing sanctions on the offender.
But risks remain where the anchoring point subordinates culpability to consequences (Feld 1999:38). Victim involvement may play a destabilising role where the views of victims are disparate or contradictory, or where some are more forgiving and others more vindictive (Ashworth 2002:586).

There is an alternative suggestion on which to base restorative proportionality. This approach uses instead a consequentialist anchor coupled with fixed ‘upper limits’ as an overriding constraint (Braithwaite 2002c:152-5). In this modification the proportionate standard is the likely consequences of the sanction itself in terms of justice promotion (Braithwaite 2002c:152). A sanction can then be set in such a way that addresses the issue of what response is best to increase ‘community safety’ or ‘social harmony’ or an ‘improved sense of personal safety’ in the aftermath of the offending (Braithwaite 2002c:153). This alternative linkage can remove the risk of excessive sanctions to ‘match’ the harm done and substitutes instead a level of sanction more likely to provide the desired credible guarantee of future protection.

In summary, applying the principles of deterrence and proportionality were seen as capable of contributing to an experience of a sense of justice to different degrees in each practice. The importance placed on deterrence as a generative mechanism was common ground to both but only in legal practice was a prominent role given to the principle of proportionality.

**Truth telling**

Truth ‘finding’ or truth ‘telling’ is seen as an essential justice generating mechanism. In legal practice, the notion of ‘truth’ is largely confined to ‘accurate accounts by
competent people of what they genuinely believe from sensory experience’ to have occurred (Frankel 1978; Johnson 2002:17 n11). Markel expands the meaning of truth outside the law further to include ‘four faces of truth’ as well as forensic or factual truth, cover personal or narrative truth, social truth and healing or restorative truth (1999:408-11).

Factual truth is closest to the legal practice notion in that it describes truth as ‘a version of events verifiable by forensic techniques’. Personal or narrative truth refers more broadly to the opportunity given for persons affected by wrongdoing to tell their story and have that story heard, even though it may not be possible to ‘argue that just because a story is told it is [necessarily] a true story’ (Markel 1999:409). Social or ‘dialogue truth’ refers to the more communal notion of truth being shared ‘experience that is established through interaction, discussion and debate’ (1999:409). The concept of ‘healing’ or ‘restorative’ truth is broader still and expresses more an aspiration than an actuality in most responses to wrongdoing. ‘Healing truth’ potentially occurs in a broad political setting where ‘facts and what they mean [are placed] within the context of human relationships – both among citizens and between the state and its citizens’ so as to effect communal healing (see Truth and Reconciliation Commission 1998:114). Allowing for different interpretations about the relative priority of these ‘faces’ of truth, truth telling is seen as having wide potential as a justice generating mechanism.

This complexity of truth and its telling presents definitional difficulties, but an essentially descriptive definition was used:
Truth telling refers to the practice of providing persons affected with opportunities to find or tell the truth of the wrongdoing and its consequences to the extent necessary.

In legal practice

Modes of ‘fact-finding’ or methods of ‘truth-telling’ are seen as fundamental to justice generation in legal practice. How truth is arrived at is basic to its practices since its form of response is predicated upon the identification of an offender who has been held or found to be responsible for some wrongdoing. The rationale of criminal practice is to establish with sufficient certainty whether behaviour which constitutes the violation of a legal norm has occurred. Legal practice relies primarily on a system of factual truth finding to arrive at this accepted version of events which can be verifiable by forensic techniques. This forensic inquiry is normally confined to investigating those elements of events relevant to establishing responsibility and to arrive at a ‘version of events’ against which culpability can be determined. It is in this sense that the truth finding process is crucial in legal practice.

In restorative practice

The need to establish forensically verifiable ‘truth telling’ is less crucial in restorative practice since the offender has invariably pleaded guilty or acknowledged responsibility beforehand. The focus shifts instead to providing persons affected by the wrongdoing with the opportunity to hear the offender’s ‘truth’, or ‘to tell the story they want to tell, and for their storytelling to be effective’ (Hudson 2003:182). This form of truth telling is more in the nature of Markel’s ‘narrative truth’ with the disclosures allowing a

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53 Pleading guilty is the standard requirement, though in New Zealand young offenders have the benefit of a lower threshold of ‘declining to deny’ culpability and in the Australian Capital Territory ‘acceptance of responsibility in order to participate in restorative justice’ is sufficient and is explicitly understood to fall short of a plea of guilty.
potentially fuller picture to emerge from participants who have direct interest in making and obtaining that disclosure. It is this understanding of truth as something arrived at by discourse which has potential healing force that is its crucial justice generating role.

The focus in restorative practice is more on the ‘truth of the harm caused’ rather than the factual truth of what occurred (Strang 2009). There is thus less need for disputes as to facts and instead more scope for concentration on participants’ ‘own evaluation of what happened’ in terms of the harm done (Hudson 2003:182). In accepting responsibility, wrongdoers may not necessarily depart from their own version of the facts but they will be capable of disputing the truth of the ill effects caused (Hudson 2003:184).

What is also claimed for truth telling in restorative practice is that its processes provide discursive capacity for all persons present to arrive at a shared truth. The victim’s account of the ill effects caused is normally privileged by the process because it is heard directly. The process also provides the offender with a direct voice about his or her culpability, which is largely undiluted by professional intervention. It is this process of ‘truth-finding through undominated dialogue’ (Braithwaite 2002a:87) with its echoes of Habermas’ (1996) discursive rules for ‘ideal speech’ that characterises the process of restorative truth telling. This discursiveness can give such truth telling its justice generating capacity.

In summary, opportunities for truth telling even by adopting different approaches and to serve different purposes were seen as crucial to justice generation in both forms of practice.
Reparation, Apology & Forgiveness

Reparation is a mechanism identified as common to both forms of practice. Apology and forgiveness as indicated were given little recognition in legal practice, but have significant prominence in the restorative practice literature.

Reparation is a broad term which covers the means by which harm resulting from wrongdoing can be ‘made good’. It can extend to restitution or compensation made by the offender (or provided by the state) including monetary payment, replacement of property or performance of services. But a reparative sanction is wider than simply restitution, since it can also be either material or symbolic in form. Material reparation typically involves the wrongdoer giving undertakings to compensate the victim financially or serve the community in some way directly or indirectly by community service. In its symbolic form, reparation is a product of the social rituals of the response and is generative of a sense of justice since it ‘responds in a tangible or symbolic way to the harm done to victims’ (Van Ness and Strong 1997:91). In doing so it directly addresses that sense of being harmed.

The definition of reparation captures both the material and symbolic aspects:

Reparation is the act of making amends, offering expiation, or giving satisfaction for a wrong or injury.

Apology was described by Goffman (1971:113) as ‘a gesture through which an individual splits himself into two parts, the part that is guilty of an offence and a part
that dissociates itself from the delict and affirms a belief in the offended rule’. The justice generating claims made for apology are similarly twofold. A meaningful apology provides a tangible confirmation of an offender’s willingness to take responsibility and to thereby leave excuses for the offending behind. Secondly, apology more directly acknowledges the harm done and affirms the wrongness of the harm.

There is some empirical support that receiving an apology contributes to the generation of just outcomes, particularly where it is seen as genuine and not self-serving. In the Australian Capital Territory RISE (Reintegrative Shaming Experiment) program where pathways of response were randomly assigned between legal and restorative practice responses, more than three-quarters of apologies made in the restorative pathway were perceived as ‘sincere’ or ‘somewhat sincere’ by victims and their supporters (Strang 2002:115). This contributed to victims’ sense that justice was being done in the process.

The definition of apology captures this:

**Apology** means the wrongdoer expressing sorrow about the effect their offence has had on the victim and other persons affected.

**Forgiveness** stands out amongst the generative mechanisms as behaviour which is essentially moral rather than social. Forgiveness on one view is ‘a power held by the victimized, not a right to be claimed’ (Minow 1998). In Minow’s view, this power of

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54 Daly (2000) reported similar findings in conference observations in the SAJ project with almost two-thirds of young persons apologising. As to the effect produced by such apologies while a majority of young persons (61 percent) said the main reasons they apologised was because ‘they were really sorry’, this was not the message received by victims with ‘just 27 per cent of victims believe[ing] that the main reason the [young person] apologised was because s/he really was sorry’ (Daly 2003:224-5).
forgiveness comes from its ‘ennobling capacity, [as] part of the dignity to be reclaimed by those who survive the wrongdoing’ (1998:17).\textsuperscript{55} If an offender is forgiven, the effect is not to provide him or her with a release from the consequences of the wrong but simply to communicate that a readjustment of social relationships has now occurred which has been bestowed by the harmed on the harmer (Augsburger 1996). As such forgiveness provides opportunities for moral learning but not necessarily justice generation.

The definition of forgiveness captures these aspects:

\textit{Forgiveness} means people wronged willfully abandoning resentment and endeavoring to respond with compassion. Forgiveness is a response that the wrongdoer has no right to ask.

\textbf{In legal practice}

The literature suggests that legal practice uses these generative mechanisms only in a limited way. Legal practice does have regard to material \textit{reparation}, primarily as a means of confirming that ‘the offender has shown remorse for the offence by making reparation for any injury, loss or damage’.\textsuperscript{56} But reparation is not recognised in legal practice as a primary means of sanction.

\textbf{Apology} also has relatively little role in legal practice either as a means to generate censure or as a form of sanction. Apology is accepted as a means of demonstrating contrition, as well as tangible evidence of the offender’s remorse. It is a legally

\textsuperscript{55} In some religious traditions (notably Judaism) where a wrongdoer has apologised to those he or she has harmed the wronged are seen as religiously required to grant forgiveness.

\textsuperscript{56} NSW \textit{Crimes (Sentencing Procedure) Act} 1999 s.21A(3)(i).
recognised mitigating factor capable of reducing the objective culpability of the offender (Edney and Bagaric 2007:161).57

Forgiveness is seen as a discretionary moral practice with ‘no place in a system governed by law, where the rules must apply equally to all’ (Edney and Bagaric 2007:177). Courts accept that in some instances forgiveness does affect the severity of sanctions imposed, since it ‘may reduce the possibility of re-offending, [and] may reduce the danger of public outrage’ both of which are positive outcomes (Edney and Bagaric 2007:177).

In restorative practice

Restorative practice claims to explicitly facilitate both material and symbolic reparation in its responses. In restorative practice, the communicative and symbolic meanings of reparation are more important than any exchange of material detriment for material advantage. The attraction of restorative processes is that they can ‘facilitate the negotiation of much more flexible forms of reparation that should, in principle, be capable of responding more appropriately to more of the particular harms that victims have experienced’ (Dignan 2003:144).

Apology is also identified as a primary generative mechanism in restorative practice. It is seen to ‘help to transcend breaches of the normative order within a given group or community’ (Bottoms 2003:96). The restorative process provides the opportunity for the disassociation between the wrongdoer and the wrong that Goffman (1971) noted needed to occur. Such apology can be verbal, and accompanied by physical acts (such

57 The New South Wales Law Reform Commission suggested that ‘genuine’ remorse may be evidenced by (i) a plea of guilty (ii) by co-operation with police (iii) by making reparation (iv) by apologising; and (v) by self-inflicted injuries or attempted suicide (New South Wales Law Reform Commission 1996:192).
as a handshake or hugging) or can be more formally delivered in writing, prepared
before or after a restorative encounter. Such apology is directed not at society’s
normative damage but at the victim’s own personal harm. This is so even where it may
have been society’s ‘moral imperative’ which first compelled the offender to take steps
towards apology (Tavuchis 1991).

**Forgiveness** is identified as a core value of restorative practice. Empirical research
suggests that when offenders received ‘perceived forgiveness’ their experience of that
feeling has a positive effect on their level of reoffending (Ahmed and Braithwaite
2006:351). But expressions of forgiveness were given less direct justice generating
power and seen rather as an expression of mercy or compassion sitting adjacent to the
realm of justice.

**Conclusion**

This chapter has developed a set of generative mechanisms by which to further
interrogate justice practice. It has considered how those who participate in an
institutional justice process in response to wrongdoing can come to experience a sense
of justice from the social interactions that occur there and how just outcomes can be
fashioned.

It has developed a method to examine these social interactions by isolating a set of
‘behaviours, approaches and principles’ seen as causal triggers which generate
experiences of justice. It has distilled twelve mechanisms seen to have this particular
generative force. The importance placed on each mechanism in the respective practices
has been compared and contrasted. Some mechanisms were valued by both, others by only one form.

There is a clear suggestion of both a paradigmatic unity in the mechanisms used to open the gateway to accountability and responsibility and a paradigmatic shift in the means used by restorative practice to generate censure. Legal practice favours more the use of punishment, restorative practice favours instead apology and reparation.

This chapter completes Part One of this thesis. Part One has developed a conceptual framework which can be used to examine justice responses to wrongdoing. The first analytical tool identified the essential aims of responses to wrongdoing as the requirement to meet retributive, restorative and consequentialist goals through the distribution of a set of harm-related benefits and burdens. The two further analytical tools provide a means to assess the ‘justness’ of these distributions and to determine how they have been generated through justice processes. We are now ready to use these analytical tools to inquire further into the practice of justice, using a variety of methodological techniques.

In Part 2 we first apply the evaluative criteria to ‘measure’ the justness of responses to wrongdoing through a focus on both forms of practice. The results of this analysis are reported in Chapters 5 and 6. We will find worrying deficiencies in both practices in realising these principles. Deficiencies are found in both the legal and restorative responses which suggests neither can alone form a sufficient ‘justice discourse’ for responses to wrongdoing (Dignan 2003). But in spite of this there remains an encouraging symmetry between the two practices in their respective adherence and non-
adherence. This raises the suggestion that some form of integration between the two practices may provide the fuller experience of justice needed. Later, in Part Three we will use another of the analytical tools to explore such potential further. First we assess these two practices against the normative measures developed.
PART TWO

MODELS OF JUSTICE PRACTICE ASSESSED AGAINST NORMATIVE THEORY
Chapter 5

Applying the evaluative criteria of justice to legal practice

Introduction

Part Two turns to the application of the analytical tools developed in the earlier chapters. The evaluative criteria developed are first used to compare two forms of justice practice – legal and restorative – and to ‘measure’ the justness of their respective responses to wrongdoing. The results of these analyses are reported in this and the following chapter.

This chapter applies the criteria to the practice of law in the context of responses to wrongdoing. In order to negate any assumption that law and justice necessarily correlate the term ‘legal practice’ has been substituted for the more familiar ‘legal justice’ term throughout the thesis to describe this form of institutional response.

As discussed in Chapter 2, wrongdoing which has been criminalised constitutes a breach of the normative system of law. The legal practice’s response to that breach is to use its coercive powers to respond to the breach. At issue is whether that response is

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58 The ‘legal practice’ referred to here is that which operates in modern Western legal systems. It fits best into Weber’s ‘formal-rational’ category of systems of law. Weber’s four-cell scheme differentiates systems of law as combinations of ‘formal’ or ‘substantive’ and ‘rational’ or ‘irrational’ (1947). In the formal-rational ‘ideal-type’ category, a legal system is based on courts making formal decisions according to laid-down rules, which are both general in application and case specific (see discussion in Hudson 2003:176).
just. The evaluative criteria of justice provide the means to assess this. We firstly examine the extent to which legal practice’s compliance with the four justice standards is mediated by law’s own internal commitments to the rule of law, to formal equality and to rights protection. On the face of it, these commitments should heighten adherence to the evaluative criteria, particularly as regards the rights and equality standards. However, when critically explored the effect of these commitments is seen to have a number of deficiencies overall. While legal practice is found to have good potential to meet the desert and rights standards, it has considerably less potential to meet the equality and harmonious social relationships standards.

Legal practice’s strong emphasis on retribution means it should deliver well on the need for negative desert. But its weak emphasis on restoration allows considerably less capacity to distribute positive desert and interferes with the promotion of harmonious social relationships. The strict formalisation that the law brings to notions of equality and rights protection mean that these standards are better addressed. But this formality means that the entrenched nature of these commitments result in a closer adherence to the form of equality rather than its substance.

The normative system of law

The claims made for law as a justice delivery mechanism are based primarily on its capacity to conceptualise normative principles of approved or proscribed conduct into rule-like form and to maintain adherence to these forms. In this way law can make determinate those relatively unformed ‘principles’ which social or political processes propose (Murphy 2005:18). In the case of responses to wrongdoing, the practice of law has the capacity to coerce compliance with normative prescriptions by providing a
means to determine culpability and to impose sanctions while affirming rights and
duties (Fiss 1984:19). It is in this sense that the claim is made that ‘law is not any set of
norms; [but] a system which [also] provides a method of settling disputes
authoritatively’ (Finnis 1980: 59, emphasis added). For these reasons, law is often
referred to as ‘the law’, with the definite article ‘reflecting a sense of law looming large
over society’ and claiming some normative supremacy (Laster 2001:1). The suggestion
implicit in these statements is that in spite of the fact that law is only something ‘made
and remade by human beings in practices and traditions’ (Sypnowich 1994:77), once it
is made it transcends its more simple origins and becomes ‘higher and distinct’ from
other normative expressions (Davies 1999:120).

Alongside this coercive and normative role, law is also seen to have a broader role in
setting ‘the tone or background noise for private exchanges’ (Tuebner 1998), though
attempts to ‘rarely intrude into everyday conduct’ in any overt sense (Campbell
1996:255). Law shapes conduct instead by providing a source of stable expectations and
by ‘constitut[ing] forms of thinking’ (Zipursky 2005:135). In affecting conduct in this
way, law is seen to sit alongside other means of social control, such as adverse social
opinion, economic influences, and moral pressures, but with the advantage of its own
coercive power. The consequence of this is that a legal practice response to wrongdoing
will see wrongdoing first and foremost as a breach of its normative scheme and will
focus fundamentally on that in its response. The question is whether this focus also
extends to influencing its capacity to deliver just outcomes.

What is claimed in the relationship between law and justice is an interrelationship that
delivers justice. In its role as ‘a device for ordering society’ (Fuller 1964), law has
broader functions to control human behaviour, resolve conflict, aid economic and social efficiency and ensure social and personal predictability. But even when carrying out these broader functions, legal practice is said to have the capacity to deliver justice by protecting individuals against exploitation. This is a reminder that to ‘de-emphasise law may mean taking away the only resource the powerless have for achieving justice’ (Parker 1999:56). This is the strong basis for law’s broader capacity to promote justice precisely because it can ‘explicate and give force to values…crystallised into legal doctrine’ (Fiss 1984:1085).  

But simply because the practice of law is often referred to as ‘legal justice’ is an insufficient basis on which to say that justice ‘simply exist as [a consequence of the application of] law’ (Davies 1999:126). Certainly there is an ‘institutional edifice’ that provides ‘a critically important method of justice in certain situations…[primarily] because it can coerce compliance’ (Parker 1999:49). But merely saying law delivers justice by enforcing ‘formal and universal principles that define a context in which each person can pursue her or his personal ends’ is not a sufficient basis on which to assert that law automatically ‘does’ justice (Young 1990:121).

As well, in spite of its ‘pretensions’ law does not operate as separate and distinct from other dimensions of existence, but is more an interconnected system of normative orderings, applying often shared sanctions and remedies to other regulatory situations.

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59 Yet law’s contribution to promoting justice by adapting society to social change seems sorely limited. Robenberg found that the effect of US appellate decisions was of very limited use in achieving broad social change (Rosenberg 1991). But there are some more positive suggestions about the effect of legal intervention in producing behavioural change in discrete areas, such as with family violence offenders (see Lewis, Dobash, Dobash and Cavanagh 2001).

60 A live question is whether the incorporation of alternative practices of justice (such as restorative justice) can add to both the quality and quantity of justice delivered in the legal justice system. A well established example of incorporating such ideas outside the criminal justice sphere is the use of ‘cooperative compliance’ strategies in the enforcement activities of the Australian Competition and Consumer Commission (ACCC) (see Yeung 2001; Parker 2004).
If this is true law does not ‘stand in a relationship of hierarchic control to other normative orderings in society’ and by doing so necessarily deliver justice (Galanter 1981:164). In many settings people do ‘bargain in the shadow of the law’ (Mnookin and Kornhauser 1979), but more often the ‘law [itself stands] in the shadow of indigenous ordering’ (Galanter 1981:168). This qualification is important for the purpose of our analysis because it highlights the need for a more accurate measure of the relationship between law and justice than merely its assumed presence. The evaluative criteria provide this alternative. To set the context, we first need to consider briefly the quality of the relationship between law and wrongdoing.

**Law and wrongdoing**

In the specific context of responses to wrongdoing, ‘criminal legal practice’ carries out its broad functions of preventing crime and addressing criminal behaviour within a strict framework of rights (Ashworth 1993:287). Such practice is primarily coercive with the ‘legal justice system’ exercising state power to compel citizens if methods of voluntary compliance have been ineffective (Braithwaite and Pettit 1990; Polk 1994). Where these quieter methods of ‘convincing’ or “motivating” citizens to accept the dominant norms or values’ proves insufficient, legal practice then ‘openly re[lies] on coercive power’ to achieve this (Althusser 1980 quoted in; Walgrave 2000a:170).

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61 Law is still invasive as ‘it can and often does figure in one’s deliberations about what one ought to do, and not merely as shorthand for predictions that are accessible to external observers’ (Coleman 2002:338).

62 There is a blurring in the literature of the distinction between the ‘criminal justice system’ (which includes the police, courts and corrections) as an overarching institution and its separate institutional parts such as the criminal courts. For clarity, where necessary, we draw a distinction between the ‘criminal justice system’ meaning that overarching institution with its wider policy goals and aims and the ‘criminal process’ meaning the criminal court component of that system exercising state power for the purposes of determining culpability, protecting rights and publicly censuring wrongdoing.
This coercive approach is most starkly evident in its responses to wrongdoing. Law’s primary focus when wrongdoing occurs is neither to address the wider harm done to victims and the community nor to consider the underlying causes of the wrongdoing. Instead law addresses the normative breaches constituted by the wrongdoing and may indeed inflict its own harm upon a wrongdoer. This leads to the contradictory result that its ‘just outcomes’ may serve to restore or reinforce pre-existing disequilibria ‘imposed on those already unfairly low on the scale of benefits and burdens’ in socio-economic terms (Goldman 1982:61).

The procedure of legal practice is necessarily based around the need to establish criminal responsibility so that any established normative breach can be justified as being dealt with in this coercive way. The allegation of such a breach in practice gives rise to a ‘charge’ in the first instance, usually laid by police. As a consequence of this charge the alleged offender appears before a court to have his or her criminal responsibility determined. Two distinct pathways then open. If criminal responsibility is accepted, a plea of guilty is usually entered and the offender is subject to a sentencing process which determines the form of response. Conversely, if criminal responsibility is denied (and for a large body of strict liability offences such denial may not be feasible), culpability is determined through an adversarial process, sometimes in the form of a jury trial but more often in the form of a hearing before a single judicial officer. If culpability is established via that process, the offender is then subject to the same sentencing procedure as for a plea of guilty. If culpability is not established, the offender is discharged or ‘otherwise dealt with’.63

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63 For instance, confinement for treatment if mental health issues were seen as the cause of the offending.
It is primarily within the sentencing part of this process that our focus on its justice responses lies.\textsuperscript{64} It is with this context that the evaluative criteria of justice can now be applied to assess the justness of its experiences and outcomes.

**Legal practice and the four standards of justice**

Legal practice’s adherence to its ‘ideological tripod’ of the rule of law, ‘formal equality’ and ‘rights protection’ is cited as a source of legal practice’s potential to deliver justice (West 2003:8).\textsuperscript{65} This ‘justice performance’ is testable more objectively however using the evaluative criteria.

**The desert standard**

The desert standard measures justice by the extent to which people are treated according to what they deserve, both in a negative and positive sense. Applying this measure to distributions made in response to wrongdoing assumes that treating people in accordance with their deserts will deliver just outcomes (see MacIntyre 1985:249). The definition used to apply this standard to responses to wrongdoing said -

\begin{quote}
The desert standard measures justice by the extent to which people are treated according to what they deserve, so as to address the wrong done to them (in a sense of positive desert) or by them (in a sense of negative desert).
\end{quote}

\textsuperscript{64}Certainly there are strong justice considerations in the culpability-determining phase, but these are not strictly responses to (established) wrongdoing in the sense used here.

\textsuperscript{65}The division into three separate commitments is artificial since all three are aspects of the one core legal practice commitment to the ‘rule of law’. It is clear that the ‘rule of law’ principle encapsulates both ‘the similar treatment of similar cases’ (Raz 1975) and the ‘protection of a regime of liberal individual rights’ (Hutchinson and Monahan 1987).
‘Desert’ provides the foundation of law’s response both for the offender (negatively) and to a lesser extent the victim and the community. There are however distinctions between the legal and the general concept of desert. The wrongdoing proscribed by the criminal law does not equate necessarily with moral wrong. Criminal law in many senses ‘de-moralises’ behaviour, so that what is right and wrong in legal terms is not necessarily the same as in moral terms (Norrie 2005:85). Conduct which the criminal law seeks to control may certainly be the product and result of moral injustice, but legal practice’s focus is not necessarily with these injustices. At the extreme the desert that is imposed in a legal response can equate at times to being ‘just deserts from one side, [and] social injustice from another’ (Norrie 2005:90).

Given these qualifications, desert is a measure which has clear resonance with criminal legal practice and is a standard which it has the potential to meet substantially. The legal response may often presume that such desert necessarily equates to ‘deserved punishment for the sake of justice’ and thereby may fail to also embrace positive desert needed to address the harm done (Sadurski 1985:233). Recognising its strong emphasis on negative desert, and allowing for its scant attention to positive desert, legal practice responses to wrongdoing are seen to have significant potential to meet the desert standard.

The equality standard

The equality standard measures justice by the extent to which treating people equally can provide them with a sense of justice. This standard says that in the case of responses to wrongdoing the harm-related benefits and burdens should be distributed in a way that
does this. Actual proportionate equality may need to be tempered to take account of ‘justifiable differences’ so that benefits and burdens are equalised (Stone 1980:16). The definition used to apply this standard to responses to wrongdoing said -

*The equality standard measures justice by the extent to which people are treated equally, with proportionate equality tempered so that actual treatment is equalised.*

Equality is a measure which also has clear resonance for legal practice. Ideally, when responding to harmful conduct, treating people equally in a legal sense will mean ‘treating [them]...appropriately, given their circumstances and their offending patterns’ such that justifiable differences in their background and offending behaviour are accommodated in the sanctions imposed (Hudson 2003:140). In the case of those harmed by wrongdoing (either directly or normatively), treating such people equally should mean acknowledging the harm done to them and allowing for differing impacts of that harm. Legal practice addresses the equality standard directly through its own internal commitment to the rule of law and to the requirements of formal equality.

Legal practice’s commitment to the ‘rule of law’ (which in its simplest sense refers to fidelity by the judiciary and the executive to existing ‘rules’ of law) implicitly suggests everyone will be treated equally. Waldron’s (2000:1) comprehensive list of the principles and ideals ‘referred to collectively as the rule of law’ explains the principle more fully as including a set of principles, such as ‘the subjection of government and state to law’, the importance of ‘legal predictably’, the requirements of ‘due process’, the idea of ‘one law for all’ and the ascendancy of law over ‘controversial ideologies’.
The overriding purpose of these principles is to ensure that law maintains predictability, consistency and independence. It is a key element in law’s claimed ascendancy over particular moral and political ideals, even as such ideals constitute ‘the cloth from which future law is cut’ (Waldron 2000:2). The rule of law provides a settled means to identify such agreed principles so that they may then be applied independently of any particular ideological loyalty.66

The literature speaks of ‘thin’ or ‘thick’ versions of the rule of law. In its ‘thin’ version, the rule of law represents the minimum adherence required to avoid the tyranny of the sovereign or of the majority. This can simply be measured against regular compliance with clear, general and validly enacted rules. If the content of those rules is morally sound so much the better, but this is not essential (Dyzenhaus 2003). By comparison, a ‘thick’ version of the rule imposes further, more detailed obligations of deeper pervasiveness and particularity.

Regardless of which version of the rule is adopted, the internal principle of ‘one law for all’ suggests a strong resonance with the equality standard. Even reading the rule narrowly to mean a ‘judicial fidelity to law’ still imposes obligations of consistency and predictability which should aid equal treatment.

There are persistent critiques nonetheless that legal processes are not equality enhancing. Critical legal scholars for instance have long argued that the rule of law

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66 The law is often seen as a ‘fragile body of principles and ideals’ (Waldron 2000:4), but with such fragility tempered by the development of principles to explicitly support the ideal of law in particular distinct circumstances. In the case of the criminal law for instance, the rule of law is supported by principles of the presumption of innocence, the privilege against self-incrimination, the requirement of proof beyond reasonable doubt and trial by an impartial and open tribunal according to fair procedures (Cowdery 2006).
imposes obligations of fidelity that are simply unworkable. Both Unger and Singer agree that the very indeterminacy of legal rules makes it impossible to fulfil the obligation to be judicially faithful to the exclusion of all other reasons for decisions (Unger 1975; Singer 1984). They argue that what judges actually do as a consequence is ‘some admixture of will and reason, of passion and disinterest, of discrimination and discernment, and of judgment and deduction’ but rarely simply strict rule fidelity (West 2003:23). Posner (1990:73) arguing from an economic perspective of law makes the same point when he describes legal reasoning as:

> a grab bag that includes anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker’s authority, metaphor, analogy, precedent, custom, memory, ‘experience’, intuition, and induction.

If it is accepted that it is simply not possible to ‘carve out a pristine space for the law to operate’ in (West 2003:24), then this raises serious questions about whether the rule of law itself really does work to promote equal treatment. If legal rules at best ‘under-determine the decision’ (Leiter 2001:295) leaving the final determination to non-legal influences, then there is doubt that fidelity to legal rules produces outcomes that necessarily treat people equally.

The other aspect of the rule of law which is important for our purposes is its focus on checking the excesses of private power (Hobbes 1996; West 2003:34-43). Hobbes saw law as ‘the positive edicts of a sovereign authority’ designed more to protect citizens from a state of ‘no law’, where otherwise the violent propensities of other individuals would hold sway (Hobbes 1996 Ch XVII). Law in this sense does constrain the
consequences of private lawlessness which would otherwise lead to violence, assault and forceful subordination (West 2003:38). In Rawls’s view, the Hobbesian thesis is feasible because ‘although men know that they share a common sense of justice and that each wants to adhere to the existing arrangements, they may nevertheless lack full confidence in one another’s compliance’ (Rawls 1971:240). Law provides this surer footing by securing from private domination certain entitlements to non-interference (West 2003:41). The ‘value’ of law in these terms is that it can ensure private interactions are not the product of force or influence. Tom Paine in his American Revolution pamphlet Common Sense (1995 reprinting) expressed the value of law in this fashion in his famous dictum that ‘In America, the Law is King’. He praised law’s capacity to restrain excesses by other individuals, including most notably the King (West 2003:43-54). If a legal response to wrongdoing can act to protect people from private vengeance in this way by subjecting offenders to rules of restraint then this provides additional grounds for asserting legal practice does have strong potential to meet the equality standard.

Law’s own notion of equality expressly makes a commitment to ‘like treatment of like cases’. Rawls suggests that ‘this precept that similar cases be treated similarly [alone]…does not take us very far’, unless ‘the criteria of similarity are given by the legal rules themselves and the principles used to interpret them’ (1971:237-8). But arming people with the certainty of this like treatment does have the potential to allow them ‘to establish for themselves [their own] greatest equal liberty’ potential (Rawls 1971:240). But how far such ‘like treatment’ aids genuine equality is itself subject to critique.
The basis on which ‘treating like cases alike’ is said to be justice promoting is because of the certainty it provides (Posner 1990). In Posner’s view, this capacity to benefit from certainty of treatment is universal, unrelated to gender, race or class (although initial opportunity to make choices is clearly influenced by such factors). Formal equality reinforces this certainty so that any bargains entered should be enforced and protected within existing law. Rawls argues that by minimising the threat of uncertainty, law does maximise the risk people are prepared to take in exercising their capacity for choice and that this treats them equally (Rawls 1971:237). This assumption rests on the shaky premise that it is possible to treat like case alike. Assuming that a process of reasoning by analogy will assign any seemingly novel ‘case’ so that it is ‘subsumed within yesterday’s settled practice’ is fraught (West 2003:119). Firstly there are strongly divided views about the usefulness of analogical reasoning itself. Sunstein (1992) argues that analogical reasoning does have distinctive properties that aid principled consistency, but Posner dismisses it as being at best part of ‘an unstable class of desperate reasoning methods’ (1990:86).67

More importantly, the core difficulty with the ‘like treatment of like cases’ approach is, as Holmes (1918) argued, that it is simply not logically possible to reason by analogy. Any ‘novel’ case does not in fact ‘lie’ in a pre-determined legal category, but needs to be first ‘placed’ there based on some means. Any such means of legal categorisation is necessarily based on a preference for one point of comparison above another, and this preferment can never be neutral but must be the product of commitments, values or prejudices that are ‘political, cultural or moral but decidedly non-legal’ (West

67 Farrar provides a critical review of this literature in his article Reasoning by Analogy in the Law (1997) and his more recent presentation of the same name (2009).
The result is that the method of preferment in fact treats people differently rather than equally, solidifying the perceived ‘normalecy’ of a particular worldview. People may be treated the same from the perspective of that worldview, but the preferment based upon any narrow criterion will of necessity produce a very limited form of equality (Littleton 1987). ‘Treating like cases alike’ therefore does not have an acceptable basis on which ‘likeness’ can be expanded. In this sense the formal equality of ‘treating like cases alike’ offers no necessary moral gain over *ad hoc* decision making.

This is a circuitous way to reach a view about whether legal practice’s internal commitment to formal equality does give it any special advantage in meeting the equality standard. The law does seek to ensure that the values or principles embodied in its legal rules are enforced equally by adherence to these commitments. But its potential to meet the equality standard is nonetheless significantly diminished because there is a considerable distance between the artificiality of its notions and the substantive equality called for by justice.

**The rights standard**

The rights standard measures the justness of a distribution by the extent to which it has ‘regard for the rights of all it affects substantially’ (Vlastos 1970:60). ‘Rights’ in this sense are ‘normatively protected interests’ which give the holder the capacity to compel or constrain somebody or some action because they ‘would be wronged if denied that something’ (Finnis 1980:205). The definition used to apply this standard to responses to wrongdoing said -

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68 But for a recent strong defence of the process of analogical reasoning see Weinreb (2005).
The rights standard measures the justness of a distribution in terms of the extent to which the distribution renews and protects the rights of all affected by wrongdoing.

Legal practice appears to measure well against this standard because the law gives primacy to a set of rights designed to preserve and protect individual freedoms. It does so by providing a formal enforcement structure so that reliance on normal social pressures or ‘ties of affection’ are not necessary (Waldron 1992).

The conception of rights that legal practice supports assumes there is a need to secure individual freedoms and restrict encroachments on aspects of those freedoms. The institutionalising in law of specific positive rights (to free speech, to the exercise of religion, to privacy and to property) provides the means to protect and guarantee individual autonomy from public and private interference. When there is interference with rights, the law is there to provide its remedy to address that interference (West 2003:72).

Waldron in his consideration of Bentham’s (1824) famous dismissal of rights as ‘nonsense on stilts’ traces a shift in the basis of legal rights from one based purely on ‘natural rights’ to one that moves beyond mere ‘truths’ about human nature (Waldron 1987:163). Waldron suggests the firmer foundation for rights that justifies ‘these irksome requirements’ is now recognised as being because rights themselves are explicitly justice enhancing (Waldron 1987:163). Rights seen in these terms do not arise purely from the fact of being human, but are articulated because humans deserve to be
treated justly and that treating them in a manner consistent with their rights achieves this. This is a view Rawls shared when he argued ‘each person possesses an inviolability founded on justice’ rather than on their humanness (1971:3-4). It is accepted there are certain ‘rights secured by justice’ which need to be upheld. This formulation of rights makes it more likely that the centrality of rights protection given by legal practice should therefore be justice enhancing.

The question however is how effective legal practice is in providing this protection. Tushnet (1984) argues that giving rights ‘legal’ form is not necessarily an effective means of their protection since personal rights encapsulated in legal form have the counter effect of limiting the state’s authority. This may mean the state cannot do what is required at times to secure the necessary preconditions for justice. Tushnet’s argument is that in order to secure the minimal preconditions of the good society for all, the state may need to violate the equal application of rights in some instances. Providing legal protection for rights may therefore simply ensure that the state is robbed of its capacity for the positive action necessary to promote just distributions.69

Additionally, by curtailing state intervention legally enforced rights may act to entrench private inequalities and provide ‘in effect, a privilege to exploit others’ (West 2003:77). If this is the case there is real potential that the negativity of legal rights will disguise or give scope to private abuses which become sites of injustice (Glendon 1992:520-3). Kennedy (2002:110) also argues that ‘the legal formulization of rights and the establishment of legal machinery for their implementation makes the achievement of

69 The constraints that a strict rights adherence focus could place on certain forms of ‘positive discrimination’, such as equal opportunity employment schemes is an obvious example.
these forms an end in itself’ which then leaves the actuality of rights (and justice) unmet.

There is, of course, no logical reason why legal rights cannot be positive as well as negative in effect. In West’s view, rights given positive legal form (such as welfare rights, education rights, environmental rights or ‘relational rights’\(^{70}\)) do have the potential to ‘goad the state, in the name of justice, to govern toward the end of creating the good society’ (2003:89). Legal practice can provide the institutional means of legitimising, protecting and enforcing such positive rights. If it does this it lends its coercive support to the ‘background guarantee’ role of ensuring justice.

Legal rights seen in these terms do constitute an effective coercive mechanism to support claims of right in situations where communal attachments have been breached or are not yet established. If legal practice can fill this role properly then rights enforcement ‘can be relied on to survive as a basis for action no matter what happens to [communal] attachments’ (Waldron 1992:379).

In summary the protection of rights by their legal enforcement means that legal practice has a high potential (perhaps its highest potential with respect to all the evaluative criteria) to meet this measure of justice delivery. The only qualification is that the legal enforcement of rights may substitute the achievement of their form for their substance.

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\(^{70}\) ‘Civil and political’ rights are those most often protected in legislation. See, for instance, the *Canadian Charter of Rights and Freedoms* 1982, the *Human Rights Act* 2004 ACT and the Victorian *Charter of Human Rights and Responsibilities Act* 2006. But pressure exists to extend the range of rights protected legislatively in some jurisdictions to include economic, social, cultural and environmental rights (as is the case in Chapter 2 ‘Bill of Rights’ of *the Constitution of the Republic of South Africa* 1996 and the United Kingdom *Human Rights Act* 1998).
The relationships standard

The relationships standard of justice measures the performance of justice by the extent to which harmonious relationships are maintained or restored. The definition used to apply this standard to responses to wrongdoing said -

The relationship standard measures justice by the extent to which distributions promote relationships of social equality characterised by equal dignity, respect and concern.

Measuring the justness of a distribution by this standard is consistent with law’s emphasis on ‘each person [realising his or her] sovereign interest to the greatest extent possible’, provided this liberty is within a context of relationships characterised by these indicia (Reiman 1990:82). However the question is whether legal practice is active in maintaining or restoring social relationships of this kind in its responses to wrongdoing.

Some elements of the form of retributivism favoured in legal responses do embrace the idea that paying the penalty for wrongdoing can lead the wrongdoer to ‘restoration’ in a way that does favour social harmony. Punishment in proportion to desert is also seen as a way of treating morally responsible persons with dignity and respect and leaving open their full return to society. Additionally, law’s persuasive normative influence does extend beyond those directly affected by wrongdoing to a more general audience. In doing so, law’s decisions can act as a kind of self-regulatory device capable of maintaining general harmonious social relationships. By carrying its ‘familiar moral judgments and principles into…practice’ (Dworkin 2000:4), legal practice can act to
'quell [the] controversies’ caused by wrongdoing through ‘the application of the law’. 71 But even given these indirect possibilities, law’s primary focus is not with ‘harmonisation’. Nor is it primarily concerned to re-establish individual social relationships. On one (perhaps extreme) view, ‘law is not [in fact about] pacification …for beneath the law, war continues to rage in all the mechanism of power’ (Foucault 2003:51). But even if legal practice has some focus on re-establishing harmony, its attention is more tuned to reducing the social dissonance caused by breaches of normative harmony.

Legal practice has little other than this indirect focus on the restoration of harmonious social relationships. Given that its core attention is normative breaches and their rectification, it has at best limited potential to meet the harmonious social relationship standard.

**Conclusion**

A primary focus of legal responses to wrongdoing is on repairing ‘the tear in the normative fabric’ brought about by wrongdoing. But this is a different focus from repairing personal or individual harm. That difference is seen to have a direct impact on legal practice’s potential to promote justice in terms of each of the evaluative criteria. Legal practice does favour distributions of deserved benefits and burdens, though tending to largely negative deserts imposed on the wrongdoer. Legal practice also favours treatment which deals with people equally though in a formal way that may arrest substantive equality. Legal practice also favours treatment that respects people’s rights in a way that has a strong potential to promote just outcomes.

71 ‘Quelling controversies’ was the High Court of Australia’s view of the purpose of law in *D’Orta-Ekenaike v Victoria Legal Aid* (2005:para 43). In a dissenting voice Kirby J. reminded the court that ‘controversies must nonetheless be “quelled” justly’ (para. 225).
From the review in this chapter it is clear that legal practice’s strongest potential to deliver justice is in its adherence to the desert and rights measures, and to a lesser extent its commitment to notions of formal equality. It has poorer potential to move its focus from normative harmony to promoting harmonious social relationships.

If the assessment of these deficiencies is accepted, then there are clear normative gaps. In its favour law has traditionally been seen to behave largely as a ‘semi-autonomous institution’ (Moore 1978) with a capacity to enlarge its own justice capability through interactions with ‘other forms of justice that abut, complement or negate [its] legal forms’ (Norrie 2005:81). One such ‘abutting justice form’ highlighted here is restorative practice. The next chapter repeats the exercise of applying the same evaluative criteria to its practice’s responses to wrongdoing. We will find in many ways the converse of legal practice – good potential in terms of the equality and harmonious social relationship standards, poor capacity to meet the rights and desert standards. This apparent complementarity will be used later to suggest how the strengths of one practice can be integrated with the strengths of the other so as to enhance justice delivery in response to wrongdoing.
Chapter 6

Applying the evaluative criteria of justice to restorative practice

Introduction

This chapter applies the evaluative criteria tool to restorative practice to compare and consider its potential for compliance with the justice standards. As with legal justice, the term ‘restorative practice’ is substituted for the more familiar ‘restorative justice’ to negate any assumption that ‘restoration’ and ‘justice’ are necessarily connected.

Restorative practice is not ‘just another version of existing juridical approaches’ (Walgrave 2000a:166), but rather follows a ‘fundamentally different path’ in creating a justice space where explicit ‘moral learning takes place’ (Schweigert 1997:23; Van Ness 1999:263). Participants in its processes are encouraged to take on new roles and new competencies as a means to activate the process of moral development which ideally begins with a relatively brief personal encounter. The structure and form of that encounter is guided by its own set of process and standard prescriptions (Walgrave 2000a:167; Braithwaite 2002d). Underlying each of these prescriptions is an overarching assumption that the best justice response to wrongdoing is restoration.

A key assumption of the restorative approach is that participants bring with them unresolved (and perhaps undiscovered or unacknowledged) emotional consequences of the wrongdoing and by addressing these consequences the catalyst for repair of harm can be found. For the offender, the emotional consequences may include anger (at one’s
self or others), fear, hostility, embarrassment, shame or guilt. For the victim affected by the offending, very similar emotional consequences may be unresolved. Restorative practice’s focus is on addressing these emotional consequences directly.

Applying the evaluative criteria to restorative practice will suggest (as it did with legal practice) that the relationship between its practice and the justice standards is mediated by its own internal commitments. In the case of restorative practice these include a commitment to managing shame, anger and guilt in an integrative way, to allowing space for the communication of emotion and to engendering a collective censure. Once again such commitments appear to heighten adherence to certain of the evaluative criteria, particularly the standards of positive desert and that of harmonious social relationships. However, when critically explored the effect of these commitments on compliance with the standards also leaves deficiencies. While restorative practice has good potential to meet the harmonious social relationship and the equality standards, there is poor potential to meet those of rights and desert.

As an initial step in this analysis, this chapter describes the restorative process itself in more detail and highlights some distinctive aspects of its form, functions and values as compared with legal practice.

**The differences in a restorative practice response**

The factors that make a restorative response to wrongdoing different from legal practice can be grouped roughly into three categories – form, function and values. These differences are considered singly and then summarised using Roche’s (2003) set of shortform ‘restorative value prescriptions’ as participation, personalism, reparation and reintegration. Firstly, we examine differences of form.
Differences in form

The unique form of its response is clear from the most commonly cited definition of ‘restorative justice’:

*Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future (Marshall 1996:37; Marshall 1999).*

The formulation of ‘restorative process’ endorsed in United Nations instruments is slightly different but highlights similar commitments: 72

*‘Restorative process’ means any process in which the victim and the offender, and where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator (United Nations Office on Drugs and Crime 2006).*

These two definitions can be reworded slightly to emphasise the differences in form for the purposes of a closer examination:

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Restorative justice is a process that brings together all persons affected by wrongdoing to consider such wrongdoing and the harm caused, and to decide collectively on a consensual basis how to deal with its aftermath.

Each of the highlighted elements describes a different aspect which contributes to this distinct form of response to wrongdoing. The significance of each can be considered briefly in turn.

‘brings together’

The ‘bringing together’ of the parties expresses a commitment to creating a forum that involves all affected persons. A fundamental part of a complete restorative process is an ‘encounter’ between all persons affected by the wrongdoing. This encounter can involve both direct face-to-face engagement and variations of indirect engagement. The level of the encounter can be categorised in terms of the degree of ‘restorativeness’. McCold and Wachtel (2003) illustrate this simply in their ‘restorative practices typology’:

73 This element may be better expressed as providing an ‘opportunity’ for all persons affected to attend if they wish. In the case of some victims (such as victims of large scale fraudsters for instance), the number of persons adversely affected may be huge and individual attendance may need to be replaced by representative appointment.

Where all three groups are actively involved (as they are in the peace circles, family group conferencing and community conferencing options which appear in the ‘restorative justice’ sector of the model), a process is rated as ‘fully restorative’ in participation terms. Other categories are classified as ‘mostly restorative’ and ‘partly restorative’ and remain part of restorative practice but involve potentially less ‘bringing together’.

‘persons affected’

The ‘persons affected’ notionally consist of the victim(s), the offender(s), and their ‘communities’. ‘Victim’ and ‘offender’ are not simple ‘uncomplicated and homogenous categories of self’ (Cunneen 2003:192). Each apparent ‘victim’ and ‘offender’ experiences these categories in different ways and as well the categories may not be mutually exclusive. Additionally, ‘victims come to conferences with different

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75 Bazemore & Schiff (2005:29, emphasis in original) rightly make the point that the application of this ‘three-dimensional focus’ excludes informal encounters outside the context of formal programs but which may fully engage all three ‘stakeholders’.

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orientations and expectations’ because of personal factors and because of differences consequential on the restorative program itself (Hayes 2005:96). Notions of an ‘ideal victim’ who is ‘vulnerable, respectable, not contributing to their own victimisation’, and a typical ‘offender’ who is ‘powerful, bad [and] a stranger to the victim’ are arguably not the norm (Cretney and Davis 1995:160).

The identification of a ‘community affected’ is also a troubling term, particularly as regards a community that can yield meaningful standards’ against which wrongdoing can be judged (Brown 1994:1292). Even if such a community can be ‘found’ for each offender, there are still issues of conflict, power, difference and inequality inherent in the community relationships that may need to be accommodated. There is also potentially a ‘dark side to the quest for community’ given the ‘potential danger that attends to the ways a spontaneously shared community often involves images of exclusion’ (Pavlich 2001:58). Finding this ‘ideal community’ is also confronted by the empirical reality that communities are often ‘marked (and sustained) by social exclusion, forms of coercion, and the differential distribution of power’ (Crawford 2000:290-1). It is clear that communities may not be ‘the havens of reciprocity and mutuality, nor…the utopias of egalitarianism’ that the notion of ‘community affected’ often connotes (Crawford 2002:110).

As such, restorative practice needs to have in place protections to prevent its encounters from becoming processes which ‘close, limit and exclude individuals, rather than reintegrating them’ (Cunneen 2003:186). The ‘ideal’ of community may be better seen as a ‘collective solidarity’ where attempts are made to guard against potentially parochial factors by artificially ‘creating’ communities (Pavlich 2001:59).
Restorative practice advocates recognise this need to ‘reshape’ existing communities to ensure that those who are actually ‘brought together’ emphasise inclusion over exclusion and open up the potential of ‘a virtue of care hospitable to the non-member’ being activated (Braithwaite and Strang 2001:8). In pragmatic terms, this may mean convenors ‘build[ing] a community’ around each single offender (or victim) by drawing widely from any conceivable base of support (Bottoms 2003:109). But adding artificial extensions, such as ‘community representatives’ may run the risk of the group adopting purely external standards and losing its own discrete community focus (Ashworth 2002:582). On the other hand, this risk needs to be balanced against the danger that the internal standards which do prevail at a conference are ‘the norms of a micro-community’ where majoritarian opposition to the offending may be weak or compromised. In such cases, the involvement of support groups to provide the absent normative voice may well be the only way to provide the necessary denunciation of the wrong (Coker 2002:129; Stubbs 2004:7).

‘wrongdoing’

As discussed in Chapter 2, the prescription of ‘wrongdoing’ suggests conduct which offends accepted normative standards in some serious way. Restorative practice’s initial

76 In some circumstances it would be necessary to relax this limitation to allow structuring of restorative processes to minimise power imbalances by giving a supporting voice to organised advocacy groups. A standard ‘community’ description used in the Australian Capital Territory’s Restorative Justice Unit (where restorative justice is currently confined to juveniles) which describes ‘the people most affected by an offence’ as ‘the victim, their family and friends and the young person who committed the offence and their family and friends’ is commonplace.

77 See Ali Wardak’s work on integrating local institutions of informal justice (jirga) within a post-war justice system in Afghanistan. Jirga is an example of a local institution of decision making and dispute resolution that ‘incorporates the prevalent local customary law, institutional rituals, and a body of village elders whose collective decision about the resolution of a dispute (or local problem) is binding’ (Wardak 2004:326). But fitting this process into a restorative-style model may prove difficult where the traditional community does not reflect equality for women and others.
focus is on wrongdoing in its ‘determination of “what happened” in the process of deliberation’ (Hudson 1998a:251). There is the risk that conceptualising wrongdoing as ‘incidents’ may exclude persistent patterns of conduct of which the offending behaviour is but a single manifestation. The ‘limits of an incident-based definition of domestic violence’, for instance, are all too well documented and any restorative process responding to such wrongdoing needs to expand its sense of wrongdoing to see it instead as ‘part of a pattern of repeated violence or other abuse’ (Stubbs 2004:14). Additionally, any emphasis on moral ‘wrong’ should not exclude the fact that the wrong is also ‘criminal’. As such, there needs to be an explicit emphasis on public censure in addition to the need to address the harm caused to individuals (Duff 2003:47).

‘harm caused’

Restorative practice resets the core criminal relationship of offender and state so as to ‘make the relationship between victim and offender central’ with the harm caused instead becoming the focus (Hudson 1998a:247). Making ‘the victim’s perspective central to proceedings’ (rather than simply a source of evidence or a consideration on sentence) brings the relational aspect of the harm directly into play (Hudson 1998a:248). Offenders are confronted not so much ‘with the power of the state acting on behalf of (or in the place of) the victim’ but with real and direct exposure to the harm their wrongdoing has caused to individuals (Hudson 1998a:247).

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78 Pelikan describes this in empirical work she undertook in a pilot project in Austria on the use of victim-offender mediation (VOM) as a diversionary response to domestic violence. She found that in VOM ‘the victim is at the centre. It is about her we are talking; it is her suffering, her fears, her apprehensions, her anger, and her reactions’ (2000). More traditional forms of response have been used to give victims an independent voice in the form of a subsidiary prosecutor in Germany, Austria, Norway, the former Yugoslavia and Sweden (Joutsen 1987:114).
‘collectively’

‘Collectively’ implies the reaching of a mutual decision in which all ‘persons affected’ have a say in ‘how to deal with the aftermath’ of offending. Victims and their supporters are part of this collective decision-making, as are offenders and their supporters. This raises the risk their obvious partiality may curtail or interfere with the right to ‘a fair hearing’ in an ‘independent and impartial tribunal’ which the law promises.79 Such a right is seen as expressing a ‘fundamental principle of justice’ and applies equally to any ‘sentencing stage’ of proceedings, which would include restorative processes (Ashworth 2002:586). One means of protecting this right may be to simply withdraw from the restorative process a full determinative role as regards sanction, so that any sanction to be imposed is subject to external and final judicial determination (Roche 2003:42-6).

‘how to deal with the aftermath’

Law’s focus is primarily on an ‘act’ (which may include harm, both actual and normative) and a ‘mental element’ (such as intention or wilful indifference). By contrast, restorative practice’s focus highlights the ‘aftermath’ or consequences of that offending. Such consequences are addressed as part of the process through mechanisms such as apology or reparation. There is an explicit recognition that harm releases relational, material and emotional needs in victims, offenders and affected community members and that meeting these needs is core to any restorative response (Pavlich 2005:40).

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79 As, for example, in Article 6.1 of the European Convention on Human Rights.
In summary, these are the main differences in form that set restorative practices apart from legal responses to wrongdoing. There are also further differences in functions and values which require review.

Differences in function

The range of processes described as ‘restorative’ is clearly wide as McCold and Wachtel’s (2003) typology suggests. It is useful to categorise such processes in terms of their function so as to highlight their degree of restorativeness. This can be done by categorising the process in terms of whether the response deals with criminalised or non-criminalised wrongdoing, whether its processes are diversionary or supplementary and whether direct or indirect deliberations take place between persons affected.

Responding to criminalised or non-criminalised wrongdoing

The use of restorative practice extends well beyond responses to incidents defined as criminal. Restorative responses for instance are widely used in the resolution of non-criminalised legal disputes and in areas such as schools and workplaces for incidents in which law has seldom direct involvement (Morrison 2007). Restorative responses are also used in larger ‘transgressions by the state through truth and reconciliation commissions’ concerning ‘large scale historical, social and political [mal]practices’ as well as in peace operations (Sherman and Strang 2007:32).80 In these other guises restorative practice is functioning as both a response to wrongdoing and as part of a process of societal reconciliation after mass wrongdoing. The focus of this study excludes these categories and instead concentrates on wrongdoing defined as criminal, where an identifiable and affected offender and victim are involved.

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Responses which are diversionary or supplementary

Restorative practice when functioning as part of a response to criminal wrongdoing can include both diversionary and adjunctive forms. If the form is diversionary, restorative practice usually sits outside the formal legal process as a substitute response and utilised where the wrongdoer is diverted by police, prosecutors or courts. When ancillary, the process instead supplements the criminal response with the offender participating in a restorative process but still returning to the formal criminal system for final disposition. Additionally, some restorative processes are post-sentence or pre-release and so operate well after disposition of penalty. The focus of this study is principally with those restorative practices which act in an ancillary role and to a lesser extent those that are diversionary.

Responses which involve direct or indirect deliberation

Restorative practice which is ‘face-to-face’ involves direct and personal deliberation among the ‘parties affected’. In most instances, a convenor with primary responsibility to manage the process also facilitates these deliberations. In some instances of direct deliberations, such as circle sentencing, a judicial officer and/or tribal elder(s) may be present and play a more interventionist role. The direct deliberation approach is preferred by many proponents because ‘the emotional power generated in this way is [seen as] crucial to the process’ (Sherman and Strang 2007:33). Additional restorative processes such as ‘shuttle diplomacy’ style mediation and victim-absent or offender-absent conferencing may be used as preparatory steps to face-to-face deliberations. The

81 Circle sentencing now operates widely including in Canada, the Carcross Circle Program, Yukon Territory and in Australia, Circle Sentencing in New South Wales, Victoria’s Koori Courts, South Australia’s Nunga Courts, Queensland’s Murri Courts and the ACT’s Ngambra Circle Sentencing Court. In New Zealand, there is a Maori Land Court but this does not deal with criminal wrongdoing; though its proceedings dealt with issues in a traditional and appropriate manner, including being conducted in the Maori language. But many mainstream restorative processes are conducted on the marae (traditional meeting place) by indigenous conference providers.
focus of this study is principally on those practices that reflect this direct personal deliberative model and involve some form of restorative ‘encounter’.

In summary, the focus of this study is those practices which involve criminal wrongdoing, which form a supplementary role to the criminal justice system and which involve a restorative encounter with direct deliberation. As well as these variations in form and function, there are also distinctive values that inform restorative processes which warrant closer attention.

**Differences in values**

Processes seen as restorative encounters are informed by a distinctly ‘alternative value base’ (Bazemore 1996:37). Early formulations of these values were quite loose and left the response to the core question ‘what is to be restored?’ essentially in the hands of the persons participating to determine the dimensions of restoration that mattered to them. What ‘mattered’ was found to include restoring property loss, injury, a sense of security, dignity, a sense of empowerment and a need to feel that justice had been done (Braithwaite 1996). Braithwaite later refined and expanded these formulations into a more comprehensive set of values (2002b; 2002d). Braithwaite grouped such values into three sets giving each differing priorities.

The first group were ‘constraining standards’ which specify procedural guidelines and emphasise rights and limits. The second group were ‘maximising standards’ which when adhered to were seen to provide the process with its restorative quality. The third set were ‘emergent standards’ seen sometimes to emerge of their own accord in the
course of encounters and which practitioners could not plan to achieve or push. While each of these value sets was aspirational, the threshold commitment was to ‘honour the constraining standards’ (Braithwaite 2002d:569). The restorative encounter at best was seen as ‘a space that tries to maximize the possibility of staying close to those values in our behavior’ when responding to wrongdoing (Pranis as quoted in Braithwaite 2002d:573). Of these three value sets, the two of most interest to this study are the ‘maximising values’ (which have already been used as one source in inform the conceptualisation of the harm-related benefits developed in Chapter 2) and the constraining values. The maximising values are ‘the values against which the success of restorative processes must be evaluated’ since these processes are seen as fundamental to delivering justice through restoration (Braithwaite 2002b:250).

So too there are constraining values which include those that ‘must be honored and enforced as constraints’ since they set specific standards ‘that are so fundamental to justice that they must always be guaranteed’ (Braithwaite 2002b:253). These constraining values include:

- non-domination of the proceedings by any party;
- empowerment of participants to tell their story;
- the honouring of legally defined upper limits on sanctions;  
- respectful listening;
- equal concern for all stakeholders;

82 The emergent standards are those values that may emerge in restorative practice but which it is not morally appropriate to expect or demand. The presence of these values are seen as providing strong evidence that the process is both restorative and justice enhancing (Braithwaite 2002b). These emergent values include remorse, apology, censure of the act, forgiveness and mercy.

83 New Zealand data especially supports the fact that courts rarely invoke proportionality to reduce restorative justice sanctions but much more frequently do so to increase the level of sanction (Maxwell and Hayes 2006). This empirical data supports the general view that the public is more tolerant and less punitive than politicians would have us believe (Roberts, Hough and Hough 2002).
• accountability of the proceedings;
• the opportunity for appeal; and
• respect for basic human rights.\textsuperscript{84}

In summary, the value systems that make restorative practices distinctive are those that constrain the process so that it adheres to certain process requirements and so that it seeks to maximise certain outcomes. It is convenient to have a shortform summary of these distinctive form, function and value differences sketched and this is conveniently provided in Roche’s (2003) prescriptions.

\textbf{The differences in summary form}

This review of the differences in restorative practice in terms of form, function and values help to provide a clear picture of the distinctiveness of such processes. This distinctiveness can also be captured more simply for ease of reference using Roche’s (2003) four ‘value prescriptions’ of restorative practice – participation, personalism, reparation and reintegration.\textsuperscript{85}

\textit{Participation}

‘Participation’ refers to the encouragement of the persons most affected by the wrongdoing to involve themselves directly in resolving the harm caused. Participation

\begin{flushright}
\textsuperscript{84} The final value of ‘respect for basic human rights’ is intended to encompass respect for the fundamental human rights specified in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Second Optional Protocol, the United Nations Declaration on the Elimination of Violence Against Women and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Braithwaite 2002d). The recently adopted 2006 UN Disabilities Convention and the 2007 UN Declaration on the Rights of Indigenous Peoples should also be added to this list of instruments so as to incorporate additional principles, such as self-determination that have ‘a direct impact on how restorative justice programmes that are respectful of indigenous rights might develop’ (Cunneen 2003:188). Interestingly, three of the four nations which voted against the adoption of this Declaration in the General Assembly in September 2007 were Canada, New Zealand and Australia.
\textsuperscript{85} Roche drew on Van Ness’ (1993:259) statement of ‘the foundational principles of restorative justice’ in drafting these value prescriptions.
\end{flushright}
encapsulates much of what has been said about the centrality given to ‘restorative deliberation’. This participation should ideally extend involvement to allowing those affected to contribute to deciding how to deal with the aftermath of the offending (Roche 2003:30). Restorative practice ideally promotes such full participation above indirect involvement.

**Personalism**

‘Personalism’ refers to the perception that wrongdoing is first and foremost a violation of people and their relationships. The emphasis is that the response focus of any justice response should be the *impact of that offending* on the victim, the offender, their families and the wider community. This emphasis should contrast with a legal practice focus where ‘the physical and emotional damage crime does [may be] suppressed, if not completely ignored’ (Roche 2003:27). Restorative practice promotes such 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 focus is therefore on the identification and repair of harm be it be material, physical or emotional (including such harm as ‘loss of dignity, happiness, confidence, security, personal power, and sense of self-worth’) (Roche 2003:27). This contrasts with the legal practice’s focus on sanctions designed to provide normative repair. Restorative practice promotes such reparation above sanctions as its means to express censure.

**Reintegration**

‘Reintegration’ refers to the focus in restorative practice of assisting offenders to rebuild ties with their community following wrongdoing (Roche 2003:29). Restorative
processes emphasise ‘the responsibility of the wider community to ensure offenders are accepted and included’ in order to promote community harmony and ‘with an eye to prevent future offending’ (Roche 2003:29). This contrasts with legal practice’s sharper focus on punishment and rehabilitation. Restorative practice promotes such opportunities for reintegration above a focus on punishment or purely rehabilitative measures.

These four descriptors will be used as a short form way to highlight the distinctive qualities of restorative practice. Programs which display all four characteristics are seen to promote a particular view as to how wrongdoing and the response to it should be reconceptualised. It is to these processes that the evaluative criteria are now applied.

**Restorative practice and the evaluative criteria of justice**

This section considers the potential of restorative practice to meet the different aspects of the evaluative criteria set in Chapter 3. The evaluative standards test the assumption that justice can be done through restoration by examining its perceived potential to satisfy each measure.

**The desert standard**

The desert standard measures justice by the extent to which people are treated according to what they deserve, in both a negative and positive sense. The definition used to apply this standard to responses to wrongdoing said -
The desert standard measures justice by the extent to which people are treated according to what they deserve, so as to address the wrong done to them (in a sense of positive desert) or by them (in a sense of negative desert).

In a negative sense, offenders are given what they ‘deserve’ in restorative processes because they suffer the burden of their emotions being exposed before others prior to and during the encounter. Offenders who acknowledge their wrongdoing (even if only to themselves) bring to the process a wide range of painful emotions (founded on feelings of indignation with themselves) (Moore 1993:13). Harris (2001) finds the mix of negative emotions created by this indignation to be ‘shame-guilt’ and sees these emotions as characterised ‘by feelings of having done wrong, concern that others had been hurt, feeling ashamed of oneself and one’s act, feeling anger at oneself and [feeling a] loss of honor among family and friends’ (this list comes from Braithwaite and Braithwaite 2001:7). This composite emotional burden can be overt or latent in offenders and arise as a combined consequence of the ‘internalized values, normative expectations and social context’ of the process taking hold. The activation of a desire to confront this burden is seen as a key to generating justice. Rather than simply allowing these emotional deserts, the restorative process facilitates their deserved distribution in a way that is painful but accepted (Harris 2001:184; Braithwaite 2002b).

As a consequence, offenders may also experience the benefit of positive desert if the process relieves them of some of the burden of this emotional composite through ‘the removal or transformation of [their pre-existing] shame’(Zehr 2004:310). It is the effect of this potential ‘redemption ritual’ that Maruna identified (2001; 2004) that gives offenders this positive desert due to them as a consequence of their own recognition of
the harm they have done. By shouldering their deserved emotional burden of shame-guilt they obtain a deserved relief from some of that burden through integration (Braithwaite and Braithwaite 2001:9-10; Harris 2001:77).86

The emotionally latent nature of the encounter also provides a means for the burdens suffered by victims to be similarly aired. Bringing together persons affected by the wrongdoing to discuss its consequences can have a similar effect of restructuring the shame, anger and outrage which victims bring to the process (Braithwaite 2002a:74). The ‘intentionally emotional’ meeting can explore these emotional responses, firstly through looking back to find the fullest possible truth of what wrong occurred and by then looking forward to ways in which to repair the physical, emotional and social harm caused by the wrong (Braithwaite 2002a:251).

Retzinger and Scheff (1996) suggested there is a crucial sequence of emotional expressions which activates this flow of deserved benefits to victims (Retzinger and Scheff 1996:316). They saw a need to provoke the offender’s own expression of shame and remorse so as to elicit a move to positive rather than negative reactions from the victim (1996:316-7). The offender must be brought to the point of sharing and communicating his or her ‘visible expression of shame’ to the victim (1996:321). This display is best provoked through ‘refram[ing] displays of moral indignation against the offender’ by the victim and others and in their place eliciting ‘vivid expression of painful emotions’ (1996:321). Structuring the encounter in a way that gives victims first

86 Reintegrative shaming provides one explanation of how this is done. The premise of reintegrative shaming is that social disapproval which is respectful and healing can prove most effective in harm reduction and restoration than stigmatising shame (Braithwaite 1989).
opportunity for the ‘expression of painful emotions’ provides this trigger for emotional repair to begin.\textsuperscript{87}

It is through a sequence such as Retzinger and Scheff suggested that restorative practice can release the burdens of negative emotions and the benefits of emotional repair. The process thereby gives persons affected by wrongdoing their ‘positive desert’ through relieving some of the harm caused. The restorative encounter provides the forum in which to elicit expressions of feelings of shame/guilt and remorse which the offender deserves to suffer. This acts as the catalyst for the relief of some of the undeserved emotional burdens imposed on victims and so provides them with their positive deserts.

It is clear from Retzinger and Scheff’s analysis that desert does have a part to play in restorative practice. As Ashworth (1998:305) also notes, desert measure is an aspect restorative practice adopts when the question of ‘decid[ing] how much damage has been done to the community and how it needs to be restored’ is at issue. Ashworth says some restorative justice writers (in his view ‘notably Van Ness’) in fact ‘come close to embracing a desert-scale’ by the use of use of ‘degree measures’, such as degrees of harm or degrees of culpability as their ‘metric’ for determining the level of restoration required (1998:305).\textsuperscript{88}

\textsuperscript{87} There have been reservations expressed about shame being the assumed pathway to reintegration, particularly in relation to certain offences and offenders. These concerns have been most persistently expressed in relation to family violence offences and in relation to young women offenders (Alder 2000; Strang and Braithwaite 2002). In the case of family violence offending, there are concerns about how the power imperative that underlies such offending can be neutralised. In the case of young female offenders a specific critique is that to assume a generic, rather than a gendered population may fail to take account of the particular dimensions of acknowledging shame (even in a shaming process focused on reintegration) (Alder 2000:109).

\textsuperscript{88} Interestingly, in the rewrite of the introductory section on ‘restorative justice’ by Roberts in the third edition of the von Hirsch, Ashworth & Roberts (2009) \textit{Principled Sentencing} collection, more common ground with restorative practice is recognised than previously. The potential of restorative programs ‘to express some normative censure of culpable conduct’ (2009:166) and the advocacy by some of ‘a middle
But there are key differences as to how desert is managed in restorative practice. Unlike the ‘authoritative model of deserved punishment’ that more characterises a legal practice approach, a restorative response has at its core a ‘negotiated process between offender and victim [and others]’ (von Hirsch, Ashworth and Shearing 2003:26). This negotiated process is a discourse that is ‘closer in certain respects to informal moral discourses in everyday life’ (von Hirsch, Ashworth et al. 2003:26). Its crucial effect is that the response is more often reparative in focus and so less directed to delivering an authoritative expression of blame. The affected persons ‘brought together’ are deliberately not armed with authority to express blame by means of sanctions or punishments. The focus is therefore not to satisfy the desert standard through penalty. As such, the process deliberately excludes any ‘right of victim allocution on the appropriate retributive sentence’ with such determinations specifically left to be made elsewhere (Cavadino and Dignan 1997:352 emphasis in original). The effect is that there is less overt focus on punishment. 89

As a consequence while restorative practice does have the potential to partly meet the desert standard of justice (most notably in terms of providing all persons affected with their positive deserts), desert is not its means to do justice. The restorative process deliberately steps aside from a role in the imposition of negative burdens. The process therefore has limited scope to give offenders their full negative deserts, when that is seen to be necessary in response to wrongdoing.

89 Victim allocutions in the form of victim impact statements are now common in a number of jurisdictions and though these statements do not call for a particular sentencing outcome they do attempt to affect sentencing outcomes (Kennard 1989; Booth 2005).
The equality standard

The equality standard measures justice by the extent to which people are treated equally. In the context of wrongdoing this standard asserts that benefits and burdens should be distributed in a way that provides for the ‘equal treatment’ of people. The definition used to apply this standard to responses to wrongdoing said -

*The equality standard measures justice by the extent to which people are treated equally, with proportionate equality tempered so that actual treatment is equalised.*

Restorative practice has regard to this standard in a more significant way. One summation of the intended focus of these practices is their concern ‘with establishing or restoring actual equality and respect between particular persons in a given context following a particular set of actions or events’ (Law Commission of Canada 2003:120). Importantly, within this response there are more overt attempts to address difference in terms of gender, race or class as regards just treatment (see Hudson 1998; 1998a; 2000).

An issue which arises with this more overt approach to equality is the degree to which restorative responses depart from considerations of proportionate treatment of offenders. Proportionality as we have seen anchors the ‘equal’ treatment of offenders to their degree of culpability. By releasing this tight nexus with the degree of seriousness restorative practice makes a significant realignment with the equality standard. Similarly victims and others affected are treated with ‘equal concern and respect’, with their ‘entitlement to reparation [not] governed by the [relative] seriousness of the offence’ (Cavadino and Dignan 1997:352). This uncoupling acknowledges that the
impact of crime can extend well ‘beyond the person formally noted in police records as the victim’ (Zedner 1994:243).

In the case of offenders restorative practice openly acknowledges ‘the social context of structural disadvantage in which many offenders act’ and attempts to bring this background to bear in its response (Zedner 1994:230). However this ‘crafting’ can give rise to claims of inconsistent treatment which are asserted to be equality damaging (see Van Ness 1999:274-7). Proportionate responses do have the guide of matching the degree and form of sanctions to the gravity of the offence and the offender’s culpability. As we have seen attempts to substitute other bases such as ‘restorative proportionality’ (where the linkage was made with the degree of restorative effort required) or ‘consequentialist anchors’ (where the coupling was with the likely consequences of the sanction itself) do run the risk of being generally unworkable in practice (Braithwaite 2005). As a consequence when restorative practice becomes involved in questions of sanction, there are clear departures from the equality standard.

Nonetheless restorative practice does attempt to adhere to the equality standard though it may be more aligned to parsimony than to equality (Braithwaite and Pettit 1990). Its response to ‘equality of treatment’ is to treat offenders of ‘equal culpability given knowledge of [their] circumstances’ the same, rather than simply impose ‘a simplified sameness’ (Hudson 1998a). This is likely to mean wide departures from strict proportionality (see, for example, Tonry’s (1994) suggestion of giving offenders who are severely socially disadvantaged credit for their past restraint from crime).90

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90 A restorative approach might agree that parsimony is better served by abandoning discounting for guilty pleas as Tonry (2004) suggests. He says such discounts unfairly disadvantage black youth in the UK and USA who will not plea because the criminal justice system lacks legitimacy for them and as a consequence receive more severe penalties when convicted.
This ‘individualised equality’ which restorative practice seeks to deliver would be better off rejecting the notion that it is ‘a requirement of justice’ to adhere to strict proportionality of treatment (von Hirsch 1993:6). The concern is that such a departure would mean sanctions will instead be based on ‘attitudes’ or other ‘non-offence’ factors, clearly potentially equality defeating (Warner 1994). Restorative approaches address this concern by deliberately moving away from a sanctioning role and focusing instead upon providing a reparative response (Braithwaite 1999a).

In other ways however restorative processes do accommodate equal treatment more directly. Its processes provide a voice for people who might otherwise have virtually none, particularly women’s voices. Daly’s (1996) observational work on restorative conferences in Adelaide, Port Augusta and Canberra provides vivid evidence that conferences became highly gendered events, in which female voices predominated. She noted a significant female presence in the conferences with the majority of attendees (victims, victim supporters and offender supporters) being women (Daly 1996; see too Daly and Stubbs 2006:15). The experience of researchers in the Canberra RISE program showed similar patterns indicating that ‘women’s voices in restorative conferences are often extremely influential’ (Braithwaite 2002c:154). The same findings were seen in youth conferences in New Zealand with Maxwell and Morris (1993:292) concluding they were ‘places where women’s voices are heard’. Alder (2000) was concerned about whether conferences reinforced cultural restraints on the ‘dissent’ voices of young female offenders. But Daly’s findings also suggest that ‘female offenders were as self-assured as their male counterparts’, and were not cowered or stereotyped in their participation (2008:113).
Restorative practices can similarly accommodate equality promoting scope for indigenous voices. Sentencing circles in particular help to address ‘important social justice aspirations of Indigenous peoples searching empowerment’ (Braithwaite 2002c:151). These aspirations can be better addressed by tailored restorative processes, with ‘circles’ managed and facilitated by indigenous providers. Two examples of such programs (the Mi’Kmaq Customary Law program in urban Nova Scotia and the Koori Court network in New South Wales) will be reviewed later in Chapter 7.

It is clear from this discussion that restorative practice does have the potential to meet the equality standard in a way that is different, though substantial. Restorative processes deliberately focus on addressing individually needed benefits and burdens rather than in meeting strict proportionality requirements. While this is seen as a beneficial development, critics retain nagging doubts that discarding proportionality can mean other sources of inequality will creep in. The internal protections that restorative approaches employ can provide the best way of ensuring that determinations of ‘equal well-being’ are ‘created or achieved’ by those who are direct participants in the encounter (Sullivan and Tifft 1998:40).

The rights standard

The rights standard measures the justness of a situation by the extent to which distributions of benefits and burdens in response to wrongdoing have regard for, and promote the rights of all affected. Converseley a distribution which invades or denies such rights is unjust. The definition used to apply this standard to responses to wrongdoing said -
The rights standard measures the justness of a distribution in terms of the extent to which the distribution renews and protects the rights of all affected by wrongdoing.

There are two main issues which arise with respect to the adherence of restorative processes to this standard. The first deals with the broader overriding issue of its processes adopting a rights-based approach to justice delivery. The second is more concerned with how well restorative practice deals with discrete aspects of procedural rights which should be afforded to offenders and victims in its processes.

With respect to the question of a ‘rights-centred approach’, restorative practices do involve a departure from such a strict approach in the way in which they determine distributions of benefits and burdens. The restorative focus on individualising justice can run contrary to giving people their deserved entitlement in a strict rights sense. Restorative practice does not accept the assumption for instance that ‘differences and imbalances can [necessarily] be addressed by guarantees of sameness in treatment and procedural requirements’ (Law Commission of Canada 2003:127). Restorative practice looks instead to outcomes that repair the harm done by wrongdoing and where possible addresses the underlying causes of the wrong. One concern is that this alternative conception is in itself rights defeating. The adherence to a right-based approach gives legal practice for instance the capacity not only to protect rights in its responses, but to give expression and recognition to rights more broadly.91 Restorative responses do not

91 Legal practice can do this either under the general law or by legislative recognition given to specific social and economic rights in human rights instruments. See the ACT Human Rights Act (2004) which has provision to add such rights and the Victorian Charter of Human Rights and Responsibilities Act
have this rights creation capacity. Zedner (1994:249) expressed the fear that a combination of ‘reparation’ with ‘retribution’ (which he saw as representative of some forms of restorative practice) could act to ‘recreate [and]…accentuate social inequality’ unless rights were clearly protected. But restorative practice’s notions of ‘reparation’ are clearly much wider than this. The alternative solutions negotiated in restorative practices are not tied to constraints of ‘retribution’. They are much more likely to accentuate and renew social rights, than deliberately seek to curtail them.

The second issue was restorative practice’s capacity to protect specific procedural rights accepted as necessary to ensure fair treatment in responses to wrongdoing. This concern has two aspects. The first is whether offenders are inadequately rights protected when they are referred to or dealt with in restorative processes. The second concerns the protection of victims’ rights. Braithwaite recognised the impact of the first concern in his consideration of the ‘Worries about Restorative Justice’, citing a concern that restorative practices ‘can trample rights because of improvised articulation of procedural safeguards’ as one of those worries (2002a Chapter 5 ). Braithwaite acknowledged this concern as potentially well founded but said it could be adequately addressed by ‘a creative interplay between restorative forums and traditional Western courts’ (2002a:166). We need to examine the potential for this ‘interplay’ more closely.

The ‘constraining values’ discussed earlier can bring into effect a range of protective mechanisms through the key ‘respect for basic human rights’ value. Adherence to internationally accepted standards is seen as essential in providing the overriding ‘moral framework through which we can assess and evaluate the behaviour’ of all participants which includes some provisions (2006). More comprehensively, the South African Constitutional Court has developed a significant socio-economic rights jurisprudence (Mokgoro 2009).
involved in restorative processes (Braithwaite 2002b:253). If the standards are strictly adhered to, the externally prescribed moral framework can place ‘content into fundamental notions of [justice and] injustice’ and ensures that values of voluntariness, non-domination, accountability and appeal rights are therefore properly recognised and respected (Cunneen 2003:97).

There are strong concerns expressed as to the adequacy of the protection this ‘interplay’ can provide. The argument is that fairness requirements make it essential to protect rights since restorative processes do involve a form of ‘imposition’ on the offender (even if the ‘imposition’ is agreed or voluntary). ‘Calling for an acknowledgement of fault in itself involves adverse judgements about the offender and his behaviour’ and this in itself constitutes an ‘imposition’. It is obvious that such judgments result in ‘dispositions that may deprive the offender of important interests’ to property or to his or her freedom to act and so are patently rights invasive (von Hirsch, Ashworth et al. 2003:27). There must therefore be clear limits ‘to prevent violations of rights behind a mask of benevolence’ (Ashworth 2002:592).

Van Ness sees such limits as in fact operating in restorative processes. In a series of analyses, Van Ness (1996; 1999; 2003) examined the particular procedural rights which require protection and considered the ramifications of their non-adherence. Using a set of ‘fundamental rights of persons accused or convicted of criminal offences’ which he gleaned from both ‘international accepted’ and national instruments Van Ness (1999:266-9) identified the rights most at risk of non-adherence in restorative processes:

1. the right to equal protection under the law
2. the right to freedom from degrading treatment or punishment

3. the presumption of innocence

4. the right to a fair trial, and

5. the right to counsel.

Van Ness’ conclusion was that in ‘programs observing good practices’ there is ‘no reason to conclude that [these programs] will inherently result in due process violations’ (1999:270). He (2003 170-1) suggested that abiding by a standard set of ‘basic principles on the use of restorative justice’ (such as Braithwaite’s (2002d) constraining values) would ensure these essential procedural rights identified as most at risk were protected.

The second aspect of the rights critique issue for restorative practice is the nature of the protection it offers to victims’ rights. Claims are made that victims are in fact promised too much in terms of rights assertions in restorative practice. Ashworth (2002) argues the protection and promotion of rights for victims in responses to wrongdoing have long been properly limited and that restorative practice makes unsafe departures from this constraint. In particular, Ashworth is concerned that giving ‘substantive and procedural rights [to] victims at the stage of disposal (sentence)’ is in itself justice defeating. Ashworth (1993:281-2) says that in not adhering to these constraints, restorative practices blur the line between victims’ legitimate ‘rights to services’ (support, assistance, state compensation etc) and their illegitimate rights to participate in and influence ‘the appropriate retributive sentence’ (Cavadino and Dignan 1997:352). The extension of rights to victims to be consulted on decisions to prosecute, on bail determinations, on acceptance of a plea, on submissions on sentence and the like,
concerns Ashworth the most. He says the ‘determination of what procedural rights (if any) victims should have’ is never a matter solely related to victims’ needs and wants as restorative practice implies (Ashworth 1993:282). Instead these determinative decisions should be calibrated against the rationale of the criminal process which of necessity will diminish the relevance of these personal wants against community needs (von Hirsch, Ashworth et al. 2009). Ashworth’s concern is that if restorative practice does not accept that the deliberative priority should lie with society not with victims, justice will not be served. One response that some restorative justice processes make to this critique is to remove any unmediated determinative function from victims. The processes also put in place systems of accountability in the form of legal checks (the presence or availability of advocates during conferences for instance) or judicial oversights (the requirement that restorative outcome agreement provisions be reviewed) that provide necessary checks and balances. These measures are seen to properly constrain the scope of the role given to victims, one which Roche sees as being effective in accountability terms (2003).

Restorative practice does adhere to the rights standard in that its dealing with people involved in its processes are consistent with their rights entitlements. Provided its practices adhere to the best practice protocols there is a balanced articulation of procedural safeguards between offenders, victims and the affected community. Restorative practice does not assert a broader capacity to give expression and recognition to rights more generally in the way that legal practice clearly does. But it does use its commitment to individualising just outcomes in a way that will reinforce rather than diminish rights.
**The relationships standard**

The relationship standard of justice measures distributions of benefits and burdens by the extent to which they maintain or restore harmonious social relationships. The definition used to apply this standard to responses to wrongdoing said -

*The relationship standard measures justice by the extent to which distributions promote relationships of social equality characterised by dignity, respect and concern.*

Measuring the justness of a response to wrongdoing in terms of whether it has the potential to contribute to harmonious social relationships is a standard with explicit restorative content. Restorative responses are seen to place direct emphasis on the effect of harmful behaviour on social and normative relationships (Llewellyn and Howse 1998). Such practices recognise that individuals form social relationships of some kind with those they come into contact with even where this arises from wrongdoing. As such, a justice response is concerned with repairing damage done to those relationships as far as is feasible (Luna 2003). This obligation to repair is usefully conceptualised as a requirement to make ‘atonement’ for wrongdoing so as to re-establish pre-existing ‘relational harmony’ (Garvey 1999).

This does not mean restorative processes themselves are necessarily ‘harmonious’ or without tension and distress since the process aims to explore all aspects of necessarily unpleasant events and to also explore negative emotions suffered as a result of the harm (Braithwaite 2002a:251). Nonetheless, the focus of its processes is the collective
censure that can begin the work of repair. It is through this catalyst that harmonious social relationships can begin to be re-established.

There are difficulties with this approach in that apparent ‘harmony’ may at times be mistaken for unvoiced opposition or dispute. Ashworth (1998:305) argues that giving prominence to the notion of ‘reassurance’ as a feature of the responses to offending overlooks the wider aspects of societal harmony which should be considered important in a response to wrongdoing. The ‘reassurance’ of a restorative perspective may be as specific and contextual as providing places of safety for victims, and the concern is that this may mean broader concerns such as restraints (through separation) on offender’s behaviour necessary to protect the broader community are ignored. Ashworth (1998) argues that prioritising narrowly conceived views of what ‘harmonious social relationships’ means can run the risk that the more pressing concerns of societal harmony (such as overall ‘public safety’) are dangerously downplayed. There is also criticism that the assumption that ‘having crimes dealt with through interaction between victim and offender’ will by definition be more likely to produce personal or societal harmony is an essentially unexamined assertion (von Hirsch, Ashworth et al. 2003:24).

Effective measures can be put in place that address these limitations. This will be illustrated in a number of programs reviewed in Chapter 7. An analysis of the checks and balances at play in these programs shows that their attempts to ensure ‘harmony’ can create outcomes which are both individually and socially beneficial.

Restorative practice has a high potential to meet the harmonious relationships standard as a direct consequence of its focus on repair. Its restorative encounters do provide
forums where movements towards such harmony can develop out of the collective response.

**Conclusion**

This chapter has examined the distribution of benefits and burdens restorative practices make so as to reach just outcomes. We found the justice potential of these practices is substantially different from legal practice when assessed against the evaluative criteria. Its strongest claim to justice delivery is in its potential to satisfy the harmonious social relationship criterion and to meet the equality standard in ways that more fully accommodate difference. It has lesser potential to satisfy the rights standard and poor potential to meet the desert criterion.

Each of the conceptions of justice formulated in Chapter 3 was seen to have a different focus. As indicated, none of the measures provide ‘an overarching standard to which the others [must] reduce’ (Schmidtz 2006:17). Different responses will privilege one or other of these standards which in themselves are aspirational rather than precise measurements. But the standards do provide an indication of the potential of each practice to deliver just outcomes. What has been found is that neither practice does this fully.

This chapter completes Part Two of the thesis. Its core findings are that while both forms of practice meet some of the evaluative criteria well, neither practice has the potential to meet all four requirements fully. However, there was clear evidence of complementarity in how each practice addressed the standards. This has raised the
possibility that some form of integration of the two approaches may deliver better potential to meet all criteria. This possibility is to be addressed further in Part Four.

Before we do so one remaining question is left to be explored. This is to ask why the compliances we have unearthed are so different. What is it about the restorative means of justice generation that accounts for its wide disparity in addressing the evaluative criteria as compared with legal practice? Exploring the source of these differences is the focus of the next part of this thesis. Part 3 turns to the generative mechanism tool to examine restorative practices more closely to address this question. It looks to see if there is some causal link between the generative mechanisms they use and the nature of justice they deliver. We first select a series of sites of restorative practice in Canada, New Zealand and Australia for this purpose. Chapter 7 details and describes the particular sites of practice selected. Chapter 8 then reports and analyses the data gathered from interviews with practitioners in these practices about the role they see a particular mix of generative mechanisms plays in their practice in order to generate just experiences and outcomes.
PART THREE

MODELS OF JUSTICE: PRACTICE ASSESSED AGAINST EXPLANATORY THEORY
Chapter 7

Selecting sites of restorative practice

Introduction

Part Three turns the focus to applying the generative mechanisms to analyse the practice of justice. This is done through an empirical study based in restorative practice. The study provides the opportunity to investigate whether the paradigmatic departure from the methods used to generate justice in legal responses identified in Chapter 4 is borne out in practice.

Part Three contains two chapters. This first chapter set the scene for the inquiry by detailing the selection of programs to be studied. It is not until Chapter 8 that substantial use is made of the interview data itself. The focus of this chapter is to describe the methods of selection and detailing the particular practice sites chosen. From this sample of sites we will attempt to explain the wide differences shown in the restorative form of practice in meeting the evaluative criteria as compared with legal practice. This inquiry also sets the scene for Part Four where the feasibility of the integration of the two forms of practice is considered.

The focus in this Part is solely upon the distinctiveness of restorative practice. It has been speculated that this distinctiveness provides one means to address some of the current deficiencies in responses to wrongdoing. While there are a significant number of
studies examining the legal practice, there is a dearth of similar data on the justice aspects of restorative practice (Cashman 1985; Canadian Sentencing Commission 1988; Mack and Roach Anleu 2008). This work seeks to fill this gap to some degree.

Each of the selected sites of practice is described using information from primary sources, site visits and evaluative and reporting data. Potential programs for selection were assessed in terms of their ‘restorativeness’ using Roche’s (2003) value prescriptions and in terms of their ‘responsiveness’ using the essential aims of responses to wrongdoing identified in Chapter 2. On the basis of these assessments, nine practices were chosen as the sites for the empirical study. The interview data drawn from facilitators and others involved in these programs is reported in Chapter 8 and describes the role each generative mechanisms is seen to play in restorative practice.

**Selection criteria – restorativeness and responsiveness**

Potential programs for study were drawn from modern Western (common law) legal systems where restorative practice has an established place in institutional responses. The pool of potential sites was culled firstly based on practical considerations such as ease of accessibility to the program (a number were in remote communities or based in correctional facilities), breadth of application in terms of offence level and variety of operation in terms of the range of offenders targeted.

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92 Most of such studies are based in US data. As Mack and Roach Anleu (2008:6) point out, US empirical legal research into judicial attitudes is aided by substantial empirical databases (see for, example, those accessible from the Empirical Legal Studies blog at [http://www.elsblog.org/the_empirical_legal_stud/courts_judges/index.html](http://www.elsblog.org/the_empirical_legal_stud/courts_judges/index.html) accessed 14 April 2009. There are emerging studies relating to legal practice in our three jurisdictions. In Canada, there are studies from 1986 (Canadian Sentencing Commission 1988; Roberts, Doob and Marinos 1999), in Australia from 1982 (Cashman 1985) and Mack and Roach Anleu’s own work in 2007 but nothing similar was found for New Zealand. Carter (1974) and Johnson (2002) have also researched legal justice attitudes from the perspective of prosecutors (respectively American and Japanese) and Landau (2004) on the perspective of legal professionals in Canada (Toronto) about attitudes to restorative forms of response (which they report in summary as ‘generally positive’(143).
The pool of potential programs was drawn from three jurisdictions, New Zealand, Canada and Australia. Few, if any, countries have been more influential than these three in the development of restorative practice. New Zealand was chosen because it is seen as the Southern Hemisphere ‘birthplace’ of restorative practice and because of its significant use of community-managed programs. New Zealand also has probably the most mainstreamed restorative practice in the juvenile jurisdiction of any place in the world. Canada was chosen because it is seen as the Northern Hemisphere ‘birthplace’ of restorative practice and because of the strong influence of indigenous forms of response on its restorative practices. Some experts believe Canada has greater diversity of restorative practice innovation than any nation in the world. Australia was chosen because of its long history with a broad variety of restorative practices due in large measure to its federated political structure. Australian researchers have also made a disproportionate contribution to research on restorative practice and theory. As far as was possible, a preference was shown for programs which deal with both juvenile and adult offenders. This combination was seen as more likely to be responsive to a wider range of criminal wrongdoing, particularly more serious offending.

The first preliminary analysis used primary source data including print and web-based materials for each program, descriptive and promotional material, and practice and procedure guidelines and manuals. Statistical, evaluative and descriptive reports were also reviewed. This content was collected from websites, government sources, independent evaluators and during site visits. Enabling legislation, particularly

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93 Most programs now have comprehensive practice handbooks; such as in New Zealand (Hayden 2001); in Canada (e.g. in the Nova Scotia program) (Nova Scotia Department of Justice 2005b) and in Australia (e.g. in the Victorian program) (Condliffe 2006).
provisions allowing or restricting referrals based on offence type, seriousness of offending or likely penalty was also reviewed.

Two criteria of ‘restorativeness’ and ‘responsiveness’ were then applied to each potential site of practice by which to make a final selection of those to investigate further.

‘Restorativeness’

This first criterion categorises programs by the degree of ‘restorativeness’ they display. ‘Restorativeness’ is intended as an assessment of the extent to which programs facilitate fully restorative encounters between all persons affected. Following the discussion of restorative practice in Chapter 6, the measure of ‘restorativeness’ can conveniently be determined using the indicia of participation, personalism, reparation and reintegration (Roche 2003:27-30):

1. ‘participation’ assesses interventions on a restorative continuum based on their capacity and intent to engage three broad affected groups – victims, offenders and communities – in communication, either face-to-face or indirectly. Where all three groups are involved a process can be identified as ‘fully restorative’ or ‘mostly restorative’ depending on their level of participation (McCold and Wachtel 2003);

2. ‘personalism’ assesses interventions on the basis that wrongdoing is first and foremost seen as a violation of people and their relationships. Programs are seen to be more restorative if they value relational repair above a focus on violations of the law;
3. ‘reparation’ assesses interventions on the basis that the practice emphasises repair of harm caused by wrongdoing above an emphasis on sanction or penalty;
4. ‘reintegration’ assesses interventions on the basis that a practice focuses on assisting offenders to rebuild ties with their community rather than emphasising penalty.

These indicia were applied to each potential program favouring those assessed as ‘fully restorative’ or ‘mostly restorative’. 94

‘Responsiveness’

The second criterion used to categorise programs was their degree of ‘responsiveness’. ‘Responsiveness’ as used here is intended as an assessment of programs in terms of the breadth of their response to criminal wrongdoing’. The essential aims of responses to wrongdoing developed in Chapter 2 were used as a means of assessing the program’s degree of responsiveness:

1. the aim of retribution which requires interventions to address violations of the moral standard implicit in the rule of (criminal) law by giving people what they deserve;
2. the aim of restoration which requires interventions to seek to restore personal and normative damage caused by wrongdoing;
3. consequentialist aims which require interventions to seek to protect the community by deterrence and rehabilitative measures.

94 A number of potential programs were excluded after applying this criterion. For example, the Restorative Resolutions Project in Winnipeg, Manitoba (visited on 4 June 2004) was identified more as a process of restorative probation which routinely did not involve any persons affected other than the offender being involved (Richardson and Galaway 1995; Bonta and Gray 1996; Bonta, Wallace-Capretta et al. 1998).
In some instances there was an absence of data on which to make assessments of these response features. In these cases the degree of seriousness of offences covered in the program was used as a proxy for responsiveness. This criterion was applied to each potential program favouring those assessed highly in terms of their responsiveness to a broad range of offending, particularly serious offending.95

**Program Selection**

Using these two criteria a group of nine programs spread across the three jurisdictions was settled upon for further study. The programs were seen as broadly representative of the breadth of restorative practice and as such suitable as sites from which to gather interview data on the generative mechanisms at play in such practice. We now review the practice in each of the three jurisdictions and the sites selected in each.

**Programs in New Zealand**

**Context – juvenile family group conferences**

Restorative practice in New Zealand has ‘an ancient history through its connections with traditional Maori forms of conflict resolution’ (NZ Ministry of Justice 2005a 1.3.1). In its more modern formulations the New Zealand justice system has had engagement with restorative practice beginning with juvenile offenders in the late 1980s. The Youth Justice provisions of the *Children, Young Persons and their Families Act 1989* (NZ) provided a framework for responsibilising the care and protection of

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95 A number of programs were also excluded after applying this criterion. For example a considerable number of potential programs only responded to juvenile offenders (this was particular the case in Australia). However, programs were not excluded solely on the basis of this criterion if there was evidence of a broad scope of responses in terms of offence level and type.
young people. The core of this approach was to require young persons who had come to
the notice of police to attend a compulsory family group conference (FGC) prior to
arrest and any court proceeding. Attendance could be by way of police diversion or by
means of a ‘court ordered FGC’ where police charging had in fact occurred.\footnote{The use of FGCs should be viewed against the background that ‘far more young offenders are dealt with by the police\textit{ without} using the conference procedure at all’ in any event. Some 76\% are dealt with by warnings, written cautions or police-organised informal diversion outside that FGC system (McElrea 2005:14). At the other extreme, about 12\% of all youth offending is dealt with by actual arrest and charging through the courts (Becroft 2003:14).} In most
cases, the outcome of the FGC provided for a voluntary plan for the young person to
undertake and if this was agreed, no charge or further court sanction resulted (Becroft

The effect of these diversionary measures saw a fundamental shift from the use of
courts as the default form of response, to one which engaged young offenders through
FGCs. This shift began a systemic change in the New Zealand response to young
offending which has developed over the succeeding twenty years (Carruthers 2005:10).
The change in the youth justice response was also to have a significant impact on
responses to adult offenders.

\textbf{Adult community-managed programs}

Restorative forms of response were gradually and informally expanded to cover adult
offenders from the mid-1990s onwards. The sentencing provisions in the then extant
\textit{Criminal Justice Act 1985} (NZ) mandated only one requirement (to ‘take into account
offers to make amends’ and their ‘acceptance by victims’ as evidence of mitigation
(s.12) that could conceivably have a clear restorative focus. This small legislative
licensure was exploited to introduce and develop restorative responses for adult offenders in increasingly broad forms.

Adult conferences were first facilitated by the Te Oritenga Restorative Justice Group in Auckland, a large city on the North Island (the first facilitated by Revd Douglas Mansill of Auckland’s St Giles Church) with cases referred from courts or police (Bowen and Boyack 2003; Carruthers 2005:11). In 1995, the New Zealand Government began to provide formal funding support to develop additional community-based programs. Three of these programs dealt specifically with adult offenders – Project Turnaround, Te Whanau Awhina and the Community Accountability Programme and each of these programs was funded as a pilot by the Crime Prevention Unit.\(^97\) By 2000, this funding support had grown to cover some 20 diverse programs, either administered directly by the Department of Justice or through private providers, such as the Auckland-based Restorative Justice Trust (Morris and Maxwell 2003). By 2004, these programs were delivering in the order of 900 adult conferences annually (Maxwell and Hayes 2006). The programs were also beginning to be seen as ‘an established service in many district courts and communities throughout New Zealand’ as a commonplace way to respond to criminal wrongdoing (Paulin and Kingi 2005; Paulin, Kingi and Huirama 2005; NZ Ministry of Justice 2005a). This acceptance had been accelerated in 1998 when the New Zealand Court of Appeal gave its approval to the use of restorative practices in adult matters in the Clotworthy decision (NZ Court of Appeal 1998).

A number of these programs operated more as ‘community panels’ than restorative responses with only small degrees of victim involvement (Maxwell and Hayes

\(^{97}\) Project Turnaround operated in Timaru in the South Island; Te Whanau Awhina in West Auckland and the Community Accountability Programme the Second Chance Restorative Justice Programme in Rotorua in the North Island.
2006:134). However each of the original pilot programs had strong though differently focused restorative elements. The Te Whanau Awhina program operating in Waitakere City in suburban Auckland ensured a strong direct community presence with meetings held on a *marae* (a communal Maori meeting place) before a panel consisting of local *marae* members and with the offender accompanied by their *whanau* (extended family) and friends (Smith and Cram 1998; Webster 2000). Similarly, the Community Accountability Programme (subsequently the Second Chance Restorative Justice Programme) operating in the large rural community of Rotorua in the North Island used a more strict victim-offender model but with provision for a strong ‘communities of care’ presence in the form of family and community based victim or offender supporters (Maxwell and Hayes 2006:131 n10).

There were several evaluations of these pilot programs in terms of their effect on reducing reoffending. Maxwell et al (1999) compared the reconvictions of 200 participants in the Project Turnaround and Te Whanau Awhina programs with control samples of offenders from the same District Courts charged with the same offences. Results showed reconvictions for those participating in the restorative schemes were ‘significantly less’ than the matched control groups. Results from these and similar evaluations gave impetus to moves to place adult restorative programs on a more formal footing within the criminal justice system itself.

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98 Project Turnaround showed reconvictions of 16 per cent as compared with 30 per cent for the matched control sample and Te Whanau Awhina showed 33 per cent of participants being reconvicted as compared with 47 per cent of the controls. Morris and Maxwell’s analysis of the data (2003:267 n23) suggested that for the greater proportion of the Te Whanau Awhina participants (and their matched controls’) reoffending was ‘most likely due to the fact that they were more serious and persistent offenders’. In comparison a separate evaluation of the Rotorua Second Chance Restorative Justice Programme (Paulin, Kingi et al. 2005) showed the one year reconviction rate for a sample of conference participants was very similar for a matched comparison group of offenders (42 per cent as compared with 43 per cent).
Adult court-annexed referral program

The idea of formalising the process by means of a court-referred adult program was first mooted in April 1994 by Judge McElrea in a presentation ‘The New Zealand Youth Court: A Model for Development in Other Courts?’ (1994) to the National District Court Judges Conference. McElrea’s proposal was referred to the Ministry of Justice and a pilot court-annexed program was recommended, though funding was not made available for it to commence until 2001 (Hayden 2001:9). The conferencing model used in the pilot was specifically designed to address some of the perceived deficiencies in the juvenile FGC scheme. Criticisms of FGCs had included concerns that conferences were too offender-focused99, that they were mandatory100 and that there was a failure to locate and invite the widest possible ‘community’ group to attend.101 By the time the adult pilot commenced in 2001, there had also been lengthy experience with ‘community panel’ responses to adult offenders and these had raised high expectations that the victim and ‘community’ component of encounters could be strengthened and expanded.102

The court-referred adult model began as a pilot in September 2001 (it now remains as a permanent form of response) in a number of District Courts (two in central Auckland and Waitakere in the City of Auckland, one in regional Hamilton and one in Dunedin in the South Island).

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99 From a low participation base, 51% of victims were reported to be participating in FGCs by 2003 (Becroft 2003:34).
100 ‘The striking feature about the earlier [youth] legislation is that there are no gate keepers. The FGC process was made mandatory in virtually all cases in where an offence is admitted’ (McElrea 2005:8).
101 ‘In some cases, FGCs are being held with only the police, YJC, young person and one parent (usually the mother) attending. This is not seen as a ‘true’ FGC by those connected with the program (Becroft 2003:39).
102 A 2005 ‘stocktake’ of community-managed programs showed that of 19 providers, only six were using solely a community panel model (NZ Ministry of Justice 2005a:4).
The integration of restorative practice for adult offenders was given added impetus by legislative changes introduced in 2002 (the Sentencing Act 2002 (NZ), Victims’ Rights Act 2002 (NZ) and Parole Act 2002 (NZ)). For the first time legislation obliged courts on sentencing to take into account restorative process outcomes.

Section 8 (j) of the Sentencing Act, in particular provides:

In sentencing or otherwise dealing with an offender the court...must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case.

Evaluation of the court-referred adult program in its pilot stage (2001-4) confirmed earlier findings of small, but significantly reduced reconviction rates for conferenced cases (32% re-offending in the subsequent two years) as compared to matched comparison groups of court-processed offenders (36% re-offending) (Triggs 2005). Importantly, when conferenced offenders did reoffend the offences for which they were reconvicted in the two-year follow-up period were reported as less serious than for non-conferenced offenders (NZ Ministry of Justice 2005a:8). Given these positive results in terms of recidivism, the adult scheme was continued past the pilot period in the four initial courts. It has however not been expanded to cover all of New Zealand’s thirty District Courts (District Courts deal with the vast bulk of criminal offending in New Zealand). This has resulted in small intake numbers being the norm. Providers report completing in the order of 175-200 conferences across the four locations annually (NZ Ministry of Justice: Crime Prevention Unit 2008). In addition, the existing network of

103 McElrea disputes suggestions that these reductions are not statistically significant. On a recalculation of the raw data, he suggests a ‘9% reduction in reoffending measured after 2 years, together with a 50% reduction in the seriousness of offences where participants did reoffend’ (2007:102).
‘community-managed’ programs continues to operate and now covers the remaining twenty-seven District Court locations in New Zealand. These programs complete in the order of an additional 1245 conferences per year (NZ Ministry of Justice 2005a).

Combined, these two programs facilitate some 1500 adult offender conferences annually across a network of the thirty District Courts in New Zealand (NZ Ministry of Justice: Crime Prevention Unit 2008). This breadth of exposure suggests that conference convenors and other persons involved in these various programs will provide a useful source of data about the generative mechanisms at work in restorative practice.

From the broad pool of community-managed programs and the court-annexed program, the following specific sites were chosen from which to collect interview data with facilitators and others involved in the programs:
  • the Restorative Justice Trust, a community-managed program operating in Auckland, and
  • the court-annexed referral programs at the Auckland, Waitakere and Hamilton District Courts.

The analysis of these programs in terms of their restorativeness and responsiveness is reported below.

**NZ adult programs - restorativeness and responsiveness**

The Restorative Justice Trust program and the court referral programs both prioritise strong community involvement. Each has a strong community presence through its provider groups, with trained facilitators and convenors being drawn from the local
As to more specific community participation for those directly affected, the court-referred program evaluation reports that over half of conferences had up to five participants (with 14 per cent having ten or more participants) including the offender and victim. In the 91 conferences observed for the pilot, the vast majority of conferences had at least one victim present (with more than a quarter having from two-four victims present). Of the conferences observed, only five had no victim present and in those cases a victim’s representative was substituted (NZ Ministry of Justice 2005a:n137).

In both the community-managed and court-annexed programs there was also close attention given to developing practice standards that can be seen to meet many of the indicia of restorativeness. A training program on Restorative Justice Skills traversed New Zealand in late 2000 with a view to promoting consistency in practice and procedure. A practice guide for conferencing practitioners which emphasised principles similar to participation, personalism, reparation and reintegration was developed from this program (Hayden 2001). Consistency in adhering to these standards is maintained by ongoing training, some of which is provided by Restorative Justice Trust personnel (Bowen and Boyack 2003:3). A consultative process has also produced a set of ‘Principles of Best Practice for Restorative Process in Criminal Cases’ and a ‘Statement of Restorative Justice Values and Processes’, both of which are now operational. These statements specifically endorse and require participation, reintegration and reparation as important values in the practice in these programs (NZ Ministry of Justice 2004). These Best Practice Principles were seen by participants as central in developing the form of practice now in place in the court referred programs.

104 During the pilot evaluation period six community providers conducted conferences in Auckland and Waitakere, four in Hamilton and two in Dunedin (NZ Ministry of Justice 2005:n20).
In terms of offence responsiveness, the type and seriousness of offences dealt with in the Restorative Justice Trust program is controlled in large measure by the range of cases referred by courts or police. These referrals are seen to involve a high degree of offence seriousness, though there is a mandatory exclusion of cases involving family and sexual violence (It is noteworthy that some other community-managed providers do include family violence offences in their intakes, reporting that ‘a significant proportion of its intake involves such cases’ (Maxwell and Hayes 2006:134)).

The offence range is similarly wide for the court-annexed program. In its programs, offenders must first plead guilty to an ‘eligible’ offence. ‘Eligible offences’ include all property matters with maximum penalties of two years or more, ‘almost all’ other Crimes Act offences where the maximum penalty is between two and seven years’, serious driving offences causing death, and ‘more serious’ firearm offences. Drug offences and domestic violence offences are also currently excluded in these programs (NZ Ministry of Justice 2005a:1.5.3).

The Adult Programs as representative of New Zealand restorative practice

Both the community-managed and court-annexed programs were seen to rate well against the selection criteria of restorativeness and responsiveness. The primary source data material specific to the Restorative Justice Trust in Auckland and the data applicable to the court-annexed programs in the Auckland, Waitakere and Hamilton courts each show a close commitment to the indicia of restorativeness (participation, personalism, reparation and reintegration). This was confirmed from observations made
at site visits and during court attendances. There is also evidence of considerable degree of offence responsiveness. Participants in programs face a broad range of criminal offending, up to degrees of seriousness as permitted by the legislation. This would suggest that each of the essential aims of retribution, restoration and meeting consequential objectives are engaged in these responses. Based on these findings it was concluded that the programs were representative of a broad range of ‘fully restorative practice’ in the New Zealand context (McCold and Wachtel 2003).

Data from interviews with conference convenors and others involved in both these programs can provide reliable sources of data about the kind of justice generating mechanisms at work in these practices. The New Zealand programs are seen as particularly suitable because they represent an approach to restorative practice which is mainstreamed within its criminal justice system in a way that is unique in the three countries studied. More than in any other jurisdiction ‘restorative justice is a central consideration in sentencing’ as a consequence of the Sentencing Act 2002 (NZ) reforms and the influence of the Clotworthy decision (Carruthers 2005:5). From the data it will be possible to build a picture of how the distinctiveness of restorative approaches act to create just responses to wrongdoing.

105 The Auckland District Court was observed on 7 July 2005. During the court session observed a number of referrals for Family Group Conferences were made under s 246 of the Children, Young Persons, and their Families Act 1989 (NZ) which is the trigger for the ‘decline to deny’ referrals which allows FGCs to be held without an explicit acceptance of responsibility.
Programs in Canada

Context – national legislative framework

Unlike New Zealand, Canada does not have a nation-wide system of restorative practice. Though Canada’s constitutional structure gives the federal government exclusive legislative authority in criminal law, this has not resulted in a nationwide consistency of response to criminal wrongdoing (Archibald 2008). This is partly because the Constitution Act 1982 allows for the sharing of legislative and administrative regulation of policing, courts and corrections between federal and provincial governments which has lead to a wide variety of local and regional forms of response. Tensions had also long existed as to the proper division of this authority. More recently, the introduction of the Canadian Charter of Rights and Freedoms 1982 was used as an opportunity to push for greater provincial autonomy in forms of responses and this has resulted in further proliferation of different approaches (Archibald 2008).

Against this background, a series of inquiries also highlighted disproportionate incarceration of Canada’s Aboriginal peoples, both in terms of relative numbers and more pointedly across different provinces. The regime of responses to the youth offending provisions in the then extant national Young Offenders Act 1985 was also seen as unnecessarily punitive with a similarly ‘very high use of custody as a sentence,

106 The provinces are Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan. The territories of Northwest Territories, Nunavut and Yukon were added to the federation but only exercise legislative powers delegated to them by the federal government.
107 Schedule B to the Canada Act 1982 (U.K.) c 11.
109 A large number of commissions and inquiries had investigated the excessive incarceration of Aboriginal peoples in Canada, in particular the 1990s with the Public Inquiry into the Administration of Justice and Aboriginal People (1991) and the Royal Commission on Aboriginal Peoples (1996).
particularly for less serious and non-violent offences’ (Department of Justice Canada 2002:8). In response to these findings provincial governments began to develop their own ‘alternative measures’ in order to address the high degree of incarceration. An important component of such alternative approaches was the influence indigenous conceptions of justice which emphasised the use of reintegrative approaches were to have. Roberts and Roach (2003:240) caution that ‘the forms of Aboriginal justice are as diverse as Aboriginal peoples themselves, and should not be reduced to, or assimilated within the restorative justice paradigm’. Nonetheless, Aboriginal justice responses did provide an important inspiration for many alternative responses. This has particularly been the case with the initiatives of circle sentencing, which have now developed as an established alternative sentencing process drawn from traditional indigenous peacemaking circles (Stuart 1997).

As a result of these and other pressures, most provinces established a variety of restorative type programs. These are very broad in scope and are also highly varied in terms of their accessibility, variety and breadth of application. Applying the selection criteria to this broad range of practice, the following programs were selected as being

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111 Examples of circle sentencing programs in Canada include the Carcross Circle Program in Yukon Territory and in a different form the Four Circles of Hollow Water (Aboriginal Corrections Policy Unit 1997).

112 Quebec retains its strong emphasis on rehabilitation programs instead.

113 Programs reviewed using these initial scoping criteria included the Victim-Offender Mediation Project Langley (Roberts 1995) and the Fraser Valley Community Restorative Justice Programs Network (Beebe, Williams, Chapman and Plecas 2003), both in British Columbia; the Restorative Resolutions Project in Winnipeg, Manitoba (Richardson and Galaway 1995; Bonta and Gray 1996; Bonta, Wallace-Capretta et al. 1998) which provided a form of restorative probation; the adult victim-offender mediation program in Saskatoon, Saskatchewan (Nuffield 1997); the Toronto based Community Council Project (Aboriginal Legal Services of Toronto 2007) and the Ottawa based Collaborative Justice Project (Rugge and Cormier 2003; Rugge, Bonta and Wallace-Capretta 2005), both in Ontario and both dealing with serious level offences and, lastly, the Nova Scotia Restorative Justice Program (2005; 2005a) dealing with juvenile offenders.
suitable from which to gather interview data from facilitators and others involved about the use of generative mechanism in their practice:

- The Toronto-based Community Council Project which operates as a diversionary response for indigenous offenders through the Gladue Court
- The Ottawa-based Collaborative Justice Project which operates a program for serious offenders in that city
- The Nova Scotia Restorative Justice Program for juvenile offenders which operates a province-wide program for juvenile offenders through a network of community justice agencies.

The analysis of these programs in terms of their restorativeness and responsiveness is reported below.

**Toronto Community Council Program**

Since 1992, the Aboriginal Legal Services of Toronto (ALST) has administered a Community Council Program (CCP) dealing with referrals from city based courts in that city. The role of ALST is not primarily to provide legal representation but to strengthen the capacity of the Aboriginal community to deal with justice issues and to ‘provide Aboriginal controlled and culturally based justice alternatives’ (Aboriginal Legal Services of Toronto 2007). Its representational role is essentially confined to intervening in major Supreme Court of Canada cases, and assisting in deaths in custody inquests and appearances in test case sentence appeals, such as *Proulx* (2000).
form the core target group for the program. Those charged with domestic violence or sexual assaults are currently excluded from the program. A CCP ‘hearing’ takes place with the offender, two or three elders (drawn from a panel of some thirty to forty traditional elders) and a caseworker. The offender and his or her support group attend and ‘where an offence involves a victim, every effort is made to [also] encourage victim participation’ (Aboriginal Legal Services of Toronto 2007). The number of community panel meetings held for each client varies between two and three sessions and this is usually followed by regular caseworker contact over varying periods. The successful completion of the program is marked with a ‘graduation’ ceremony conducted before community groups, judges and other court officials.

While the CCP operates solely as a diversionary program, the court from which the majority of its referrals flow also uses restorative forms of response on sentencing. The decision of the Supreme Court of Canada in *R v Gladue* (1999) mandated a departure from traditional sentencing jurisprudence in the case of Aboriginal offenders. This decision was the catalyst for the creation of an Aboriginal-specific Gladue (Aboriginal Persons) Court by the judges in the downtown Toronto District Court in 2001 (Knazan 2003). The development of the Gladue Court was seen as a clear move to a practice of ‘sentencing within a restorative justice paradigm’ as prescribed by the *Gladue* decision (Turpel-Lafond 1999). The designated Aboriginal persons court has since expanded in terms of court time (up from two half days to two full days per week) and in terms of its influence on the use of restorative sentencing principles in courts more broadly in Toronto and across Canada through presentations by its judges and advocates (see Knazan 2003; 2005).
The guiding principles of the Gladue Court are to make the court Aboriginal-specific as far as possible. This is done by ‘identification’ (accepting self-identification as Indian, Metis, or Inuit from offenders), through ‘resources’ (identifying and drawing upon Aboriginal social services agencies for sentencing options), by creating ‘atmosphere’ (providing a respect for Aboriginality in behaviour such as the exercise of care in the use and pronunciation of Aboriginal names and place names) and by ensuring ‘presence’ (providing a clear Aboriginal presence in terms of court personnel, and providing time for the offender to be heard and have his or her personal presence acknowledged) (Knazan 2003:5-15). Ongoing evaluations of the court over a rolling three-year cycle have indicated an increasing caseload (assessed against the number of reports prepared by caseworkers) rising from approximately 50 matters in 2005 to 75 in 2006 and continuing to increase annually, with most referrals (80 per cent) coming from defence counsel. Recommendations in Community Conference reports for restorative type outcomes are reported as being accepted ‘completely’ or ‘mostly’ by courts as a substitute for punitively based sentences (Campbell Research Associates 2006a; 2006b).

**Toronto CCP - restorativeness and responsiveness**

The CCP’s strongest focus is on establishing or re-establishing indigenous community ties through drawing upon Aboriginal social services agencies which ‘provide offenders with realistic and meaningful dispositions’ and through supporting the achievement of outcome obligations offenders agree to undertake (Aboriginal Legal Services of Toronto 2007). While the process ‘encourages’ victim attendance, it is seen as ‘giving little [real] scope for victims’ interests’ or participation, with its major focus being on integrating offenders into their Aboriginal community (Roach 2007). Roche (2003:269) confirmed that while victims are invited to attend, they rarely do, and if they do attend they often prefer to participate in separate meetings with the community panel.
There is, however, a strong emphasis on personalism, particularly in terms of seeing offenders use the opportunity to strengthen their Aboriginal community values. This is part of the stated aim of the program which allows ‘the Aboriginal community of Toronto to take a measure of control over the manner that the criminal justice system deals with Aboriginal offenders’ so as to begin ‘the healing process necessary to reintegrate the individual into the community’ (Aboriginal Legal Services of Toronto 2007). In deciding how best to accomplish healing, ‘the Council make[s] a decision requiring the individual to do certain things’ which then form part of an outcome agreement (Aboriginal Legal Services of Toronto 2007). ‘Requirements’ may include reparation, attendance at counselling, community service or treatment programs. The performance of agreed outcomes is monitored by Indigenous caseworkers and their monitoring indicates ‘successful completion figures are extremely high, even for individuals with long-term interactions with the criminal justice system’ (Drumgold 2004:37). Data reported by Proulx (2003) from CCP records confirmed full completion rates in 65 per cent of cases and partial completion rates in an additional 13 per cent of matters.

This strong emphasis on community participation (though without substantial victim participation), on addressing personal elements of offending and on integration into the community suggests a high level of restorativeness in the program.

As regards the indicia of responsiveness, there is more emphasis on restoration than retribution in the CCP’s responses. There is also a clear emphasis on addressing
consequentialist goals, such as reducing offending through treatment and on using rehabilitation without resort to separation or punishment.

There is currently no statutory basis for the CCP and as such no schedule of ‘eligible offences’ to which the scheme applies. Referrals are instead based upon a practice protocol between ALST and the Crown Attorney’s Office. The types of offences which are diverted under this protocol cover a wide range and these can be extended further by agreement (Aboriginal Legal Services of Toronto 2007). Reported success in reducing re-offending with prior participants has seen ‘increasingly complex matters being diverted’ (Drumgold 2004:36). This has extended diversion to now include serious offences of robbery and violent assaults and this has ‘resulted in gradual erosion of the pool of excluded charges’ (Drumgold 2004:36). The program’s degree of responsiveness to increasingly serious offending is considerable giving it scope to respond in terms of the essential aims more broadly.

The Toronto CCP as representative of Canadian restorative practice

From this review of primary material and from a site visit and courtroom observations when matters were being diverted\(^\text{115}\), the Toronto CCP was assessed well in terms of the indicia of restorativeness, particularly participation and a strong sense of personalism. A very high level of responsiveness was also evident, increasingly in relation to serious offending. The program was assessed as a good example of the Canadian diversity of practice with a markedly different approach as to what a response to wrongdoing should entail, seeing offending as an opportunity to re-engage Aboriginal persons with their

\(^{115}\) The Gladue (Aboriginal Persons) Court at the downtown Toronto District Court was observed while in session on 28 September 2007.
Indigenous communities. Including a program with this distinctive perspective in our source of interview data adds a dimension not available in other restorative approaches.

**Ottawa Collaborative Justice Project**

The Collaborative Justice Project (CJP) also has a long history of applying restorative approaches to objectively ‘serious offending’. The CJP has completed in excess of 300 cases in its ‘serious offending’ mode since 1998. While the program excludes sexual assaults and domestic violence, it does include most other serious offence categories, such as robbery, aggravated assaults, break and enter, impaired driving causing death and various frauds. Case referral is by the Ottawa Provincial Court and is subject to consent of the prosecution and defence following a guilty plea. Charges are then adjourned for a number of months to allow the intervention to take place and the offender returns to the court for reporting and final sentencing.

The outcome of the program is to reach a ‘Resolution Agreement’ (which may or may not be the result of a face-to-face encounter) which contains provisions with respect to apology, attendances at various treatment programs (violence, anger management, drug or alcohol counseling), restitution, agreed future behaviour and certain forms of reconciliation gestures (apologies, reparation, community service) (Collaborative Justice Project 1999). Resolution Agreements are made available to the court and the agreement provisions often form the core terms of probation orders. A typical court outcome is a conditional sentence with the agreed outcome provisions providing the court imposed conditions.

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116 Current government funding (since 2007) is now earmarked for post-sentence youth cases and diversionary program for young adult offenders. Private funding is all that is available to maintain a now limited serious offender program.
Bringing the offender, the victim and affected community members together in a face-to-face encounter is viewed by the CJP as only one way to address its aims of ‘support, accompaniment and empowerment’ for those affected by wrongdoing (Collaborative Justice Project 1999). As such a restorative process proceeds even if the victim does not wish to participate, provided consent is given for the process to take place in their absence. An additional option of indirect interchanges provides a form of communication between the victim and offender using a caseworker as an intermediary. About half (47.3 per cent) of all victims contacted by the program chose to participate in some direct or indirect form. The most common reason for non-participation was that victims already feel a sense of closure or lacked the desire to communicate further with the offender (Rugge, Bonta et al. 2005:37). Conversely, the most common reason for participation was to obtain information about the offence, to ‘hear’ the offender’s explanation and to communicate the impact of the offence to them. As a stated aim of the CJP is to empower victims, ‘allowing them to decide the nature and degree of contact with the offender’ was seen as crucial in this regard (2005:40). However, overall participation remains a core value for the CJP process. In the absence of the victim, the process continues with the offender, their social supports and ‘engaged community members (such as community volunteers, a police and a probation officer)’ as participants (Rugge, Bonta et al. 2005:5).

An important purpose of the CJP is ‘to demonstrate how an approach that promotes healing and repair in cases of serious crime can deliver more satisfying justice to victims, the accused and the community’ than a traditional form of response
(Collaborative Justice Project 1999). This is clearly reflective of an emphasis on personalism and shows a departure from a focus purely on breaches of the criminal law.

Resolution agreements reached provide evidence of the importance placed on reparation, both symbolic and material. Symbolic reparation in the form of apology was reported in more than eighty-seven percent of matters, either in face-to-face meetings or by letter (Rugge, Bonta et al. 2005:22). Resolution plans also typically include provisions such as monetary restitution. There is a strong emphasis on reintegration through rehabilitative measures, including the performance of community services, attendance or continuance of treatment programs and maintaining or finding regular employment (2005:22). Data on completion of resolution agreements suggested successful reintegration occurred more often when a face-to-face meeting had taken place (2005:22). Some victim reintegation was also suggested by reports of slightly lower levels of fear of further offending following face-to-face meetings (2005:26). Victims also reported reduced heightened suspicion of strangers and unease when out as compared with a control group of victims whose offenders were dealt with in the traditional justice system (2005:27).

As regards responsiveness, the focus of offending in the CJP is ‘serious criminal matters’ of a kind that would normally be dealt with by a court and result in imprisonment. Offenders who participate in the program were assessed as ‘appropriately targeted’ having committed ‘fairly serious crime, with 70.8% of offenders committing crime against the person’ (Rugge, Bonta et al. 2005:38). This finding was moderated to some extent by the fact that ‘although crimes against the

117When the case returns to court for sentencing the Crown is reported as supporting the vast majority of plans (85.4%) and the court itself generally endorses those plans (in 79% of cases) (Rugge and Cormier 2003).
person are certainly serious, results indicated that over half of offenders were [in fact] first time offenders and less than one third of victims reported physical injury resulting from the crime, ([though] seven cases involved a death)’ (2005:38-9). Program offenders are therefore likely to be persons who had committed serious crimes rather than being serious offenders. This was confirmed when offenders were assessed against the risk of reoffending, with the CJP participants ‘scoring as low to medium risk’. At the time of referral, many offenders however did face a period of imprisonment for their offending, though less than twenty per cent eventually did receive a full time custodial sentence (2005:39).  

118 Offenders reported their own objective from the program in restorative terms as ‘needing’ to apologise, to provide an explanation for their actions and to have the opportunity to repair the harm they had caused (Rugge and Cormier 2003:9). Given the range of offences responded to there was a clear capacity to respond to each of the essential aim requirements of retribution, restoration and in meeting consequential objectives.

The Ottawa CJP as representative of Canadian Restorative Practice

From the analysis of the program’s primary data and from a site visit and courtroom observations when matters were referred119, the Ottawa CJP was assessed highly as against the indicia of restorativeness. There was a particularly strong emphasis on participation (though focused primarily on offenders) and on personalism. The program’s website notes this view on offending:

118 A common penalty is a conditional sentence (served in the community) where the offender is subject to a range of liberty-reducing conditions imposed under Section 741.1 of the Criminal Code. Conditional sentences have been interpreted by some (see Roberts and Roach 2003:246) as ‘restorative sentences’, but this was not a view shared by the CJP staff itself (Mann 2007).

119 The Ottawa Provincial Court was observed while in session on 1 October 2007.
The application of a restorative approach in cases of serious adult or youth crime, [provides] for a more satisfying experience of justice for all parties involved, for the victim(s), offender(s) and the community. We recognize that serious crime usually involves a greater degree of impact and therefore contributes to a greater need for a restorative approach.¹²⁰

This approach to wrongdoing and the practice’s strong basis in serious offending lends an important and valuable point of comparison with other forms of practice. The program provides a further example of the Canadian diversity of practice with its emphasis on addressing high level serious offending restoratively.

**Nova Scotia Restorative Justice**

The Nova Scotia Restorative Justice (NSRJ) program commenced as a provincial government ‘alternative measure’ initiative in 1997. The program itself developed from a lengthy consultative process involving all ‘the criminal justice services [seen as making] vital discretionary decisions in relation to offenders and victims’ (Archibald 2008).¹²¹ The province’s justice system was particularly amenable to innovative approaches given ‘alternative measures other than judicial proceedings’ had been used to divert adult and youth offenders from as early as 1986.¹²² The Royal Canadian Mounted Police (RCMP) had conducted a diversionary program for adult and youth

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¹²⁰ [http://www.collaborativejustice.ca/about_e.html](http://www.collaborativejustice.ca/about_e.html) accessed 4 August 2009.

¹²¹ Archibald relates a story of just how serendipitous this was in his and Llewellyn’s (2008:301) review of the history of the program. He says ‘a critical turning point for restorative justice in Nova Scotia was an airplane conversation in early 1997 between the then provincial Minister of Justice and a prominent criminal defence counsel who were both returning from Vancouver after attendance at one of the first large restorative justice congresses ever held in Canada’.

¹²² Section 717 of the *Criminal Code* (1985) provides for the program authorisation of alternative measures for adults and the now repealed *Young Offenders Act* (1985) under section 4 provided similar authorisation for young persons.
offenders in that province called Community Justice Forums (CJF) \(^{123}\) since that time. Additionally, Community Corrections had operated a parallel adult diversionary program for ‘low end offences’ since the mid-1980s. \(^{124}\) However these programs were largely criticised as stigmatising and narrow in their reach and purpose (see Montgomery 1997; Archibald 2008:301).

Guidelines to adopt the NSRJ initiative province-wide were negotiated in the form of a protocol under the then current *Young Offenders Act 1985* in 1999. \(^{125}\) The Nova Scotia Restorative Justice Program commenced for young offenders initially as a pilot in November 1999 in four communities, and in November 2001 was extended province-wide on a permanent basis (Archibald 2008:298). \(^{126}\) It remains today as an established program, focussed on juveniles.

The NSRJ program involves restorative responses delivered through a network of regional non-profit agencies. These agencies have significant pre-existing experience through their involvement in the earlier youth ‘alternative measures’ programs. The NSRJ program is also closely aligned with two existing and continuing province-wide restorative programs – the indigenous Mi’kmaq Customary Law Program \(^{127}\) and the

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\(^{123}\) These had operated since the mid 1990s and were based on the Wagga Wagga restorative justice model (Archibald 2008).

\(^{124}\) A post-charge Adult Diversion Program is in place pursuant to section 717 of the *Criminal Code* (Nova Scotia Department of Justice 1998:10). Clairmont estimates this program which in some instances involves victim-offender mediation, diverts up to 1500 offenders per annum (2007).

\(^{125}\) See *Restorative Justice: A Program for Nova Scotia* (Nova Scotia Department of Justice 1998). The *Program* (1998:19) provides that ‘implementation of the Initiative will be multi-phased’ and at this stage has not extended past ‘Phase 1 targeting youth between the ages of 12 and 17’, firstly in the pilot areas and subsequently province-wide. The Attorney-General of Nova Scotia’s authorisation for the youth focussed phases was reissued from April 2003 under the new *Youth Criminal Justice Act SC 2002* c 1 as ‘extra-judicial sanctions’ and extra-judicial measures’ pursuant to s 10.

\(^{126}\) The original four communities were the Cape Breton Regional Municipality and the Halifax Regional Municipality (both urban), and the Cumberland County and the Kings/Annapolis/West Hants Region (both rural).

\(^{127}\) The Mi’kmaq Customary Law Program is part of the Aboriginal community development activities of the Mi’kmaq Legal Support Network which has recognised government status for the conduct of treaty
RCMP run Community Justice Forums, both of which are seen as ‘dovetail[ing] closely with the NSRJ in protocol and administration’ (Clairmont 2005:4).

The NSRJ program was designed to provide for a ‘continuum of options’, only some of which would qualify as ‘fully’ or ‘mostly’ restorative responses in the McCold and Wachtel typology (Nova Scotia Department of Justice 2005:11-13). The pre-existing individual or group ‘accountability sessions’ and ‘adult diversions’ (which did not involve victim participation) were incorporated into the new scheme and classified as ‘alternative measures’ and not seen as strictly restorative (Archibald 2008:318). 128 More specific ‘restorative justice processes’ which do emphasise restorative encounters and include ‘victim-offender conferences, restorative conferences and sentencing circles’ were seen as more akin to ‘fully’ restorative options. The scheme’s operational protocol mandates that ‘an agency shall not conduct a ‘restorative justice process’ [without] the victim or a representative from the community of harm’ being present (Nova Scotia Department of Justice 2005:12).

Two examples of the program’s operation can illustrate how the process itself is managed.129 The Valley Restorative Justice (VRJ) agency delivers the program in three primarily rural-based communities (Annapolis, West Hants and Kings Counties). VRJ deals with up to ten per cent of the total province referrals (Nova Scotia Department of Justice 2005a:6, Chart 2). The vast majority of offences handled (more than 70%)

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128 As well, Archibald and Llewellyn (2008:320, fn98) report that ‘victims were present at a significant number of accountability sessions’, which is borne out to some extent by data which indicates that of the 391 accountability sessions conducted in 2003-2004 ‘victims or victim representatives’ participated in 86 or 22% of the sessions (Nova Scotia Department of Justice 2005a:12, Chart 8).

129 The agencies cover both urban (Halifax Community and Island Community) and a range of rural areas (including The Valley, Southwest Community and Cumberland County).
involve ‘property offences’, with a small proportion of ‘violent offences’ (approximately 5%) making up the largest part of the balance (Valley Restorative Justice 2007:Appendix 4). The most common form of response to this offending is a ‘community group conference’, and in almost two-thirds of these sessions victims (or victim or community representatives) are present. A further community presence is built into the program as all convenors who co-facilitate restorative encounters and supervise the completion of outcome agreement commitments are local community members undertaking the work on a voluntary basis.

The second example is the Halifax Community Restorative Justice (HCRJ) which operates in predominantly urban area of the city of Halifax. The HCRJ deals with up to forty five per cent of province-wide referrals, including two-thirds of all post-charge referrals in the province. The effect of this weight of referral is that HCRJ undertakes a large volume of what were referred to as ‘high harm files’ in many of its referrals. This has meant the scheme has become ‘a very major option for dealing with young offenders’, used by both police and prosecutors as an alternative to court process (Clairmont 2006:14). The program’s most common restorative processes are ‘accountability sessions’ which are usually conducted in the absence a victim, but again with the trained community volunteer present.

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130 In 2006, HCRJ staff report that they accepted 692 referrals and of these 57% were post-charge (interview comments of HCRJ staff 3 October 2007). In Nova Scotia, as distinct from the practice in other provinces, police lay charges rather than the Crown. Where the Crown refers a matter to restorative justice the charge already laid by police is either dismissed outright or stayed until outcome agreement commitments are completed.

131 HCRJ staff report that they would ‘do’ victim-offender sessions in about 20% of matters, (interview comments of HCRJ staff 3 October 2007). ‘Accountability Sessions’ are described as ‘an accountability meeting where the youth, accompanied by parents/guardian, is required to explore the offence and its impact with trained facilitators and develops and commits to a reparation plan which forms the Restorative Justice Agreement’ (Nova Scotia Department of Justice 2005a:11).
Nova Scotia RJ - restorativeness and responsiveness

Particularly in those forms of responses categorised as ‘restorative justice’, which include victim-offender conferences and sentencing circles, active participation is an important value of the program and this is enhanced by the use of community volunteers who conduct conferences and manage agreement commitments.

The NSRJ program is driven by an explicit ‘relational conception of justice’ which has strong resonance with the value of personalism. ‘Criminal wrongdoing’ is seen as behaviour which disrupts social equilibrium. Such behaviour requires ‘social dialogue that includes victims and perpetrators and involves concrete consideration of the needs of each for restoration’ in order to address the disequilibrium caused (Llewellyn and Howse 1999:375). The program rejects a purely criminal violation focus in favour of ‘a restorative approach [that] invites the participation of communities in achieving reconciliation between offenders and those harmed through the commission of an offence’ (Nova Scotia Department of Justice 2005:6).  

This emphasis on ‘community’ participation has a number of practical dimensions. The delivery mode of the program is through not-for-profit agencies which combine paid staff with ‘high calibre volunteers [who operate] at the facilitator and board levels’ to conduct conferences and manage outcomes (Clairmont 2005:5). In these distinctive ways, its programs are ‘clearly rooted in the communities which they serve’ (Archibald 2008:311).

132 The NSRJ Coordinator in interview on 4 October 2007 expressed the view that ‘one stated goal of the program is “building stronger communities”, but we need language for, and evidence of, what this means in practice. If we just use anecdotes of successful encounters, this looks like our concepts are underdeveloped or uncertain’.
The NSRJ program also reflects an explicit emphasis on reparation and reintegration. Reparation is emphasised as one means of bringing together ‘the victim, offender and community members [to] actively participate in a process which identifies how the offender may begin to repair the harm’. More specifically, the process is designed to put in place ‘reparation plans to respond to the harm done’ (Nova Scotia Department of Justice 2005:2-3).

There is also some evidence of a reduction in reoffending. In the HCRJ scheme, for instance, self-reported reoffending by young persons (in the six month period after their first restorative session) showed lower levels of reoffending (self-reported at only nine per cent) (Clairmont 2005:175-6). Data from a wider ‘window of opportunity’ (the period two years post-session) confirmed a similar pattern of reduced offending. The commitment to a restorative form of response seems to remain even when reoffending does occur as more than twenty per cent of those who have had a previous ‘restorative justice experience’ were again referred to ‘another RJ experience’ by police or prosecutions in relation to fresh reoffending behaviour (Clairmont 2005:185-6).

Further indirect evidence of reintegration is evident from the apparent effect of the program on reductions in the use of imprisonment for young offenders in Nova Scotia. A review of the federal Youth Criminal Justice Act 2002 changes in 2005 showed significantly decreased use of custodial sentences for young persons following years of depressingly high youth incarceration rates in the province (Department of Justice Canada 2005). In the case of Nova Scotia, a marked reduction in rates of youths ‘jailed’

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133 Clairmont (2005:176) expresses caution about this sample of 359 youths saying the follow-up sample may not be representative, since only 53% of the original young offenders consented to reinterview.

134 This sample of 854 young offenders came from the four ‘founding’ restorative justice agencies (Halifax, Sydney, Amherst and Kentville) involved in the initial pilot project which commenced in November 1999 and thus were drawn from both urban and rural communities.
was evident as beginning in 1999 when the pilot was introduced and again seen to decrease significantly from 2001 when the scheme became province-wide (Clairmont 2005a).

There was other confirming evidence that young offenders were being diverted from court based responses. The rate of ‘youth not charged (but otherwise dealt with) per 10,000 of population rose from 164 to 641’ in the period 1999 to 2003 which suggests a substantial uptake of diversionary alternatives amongst police and youth courts instead of traditional ‘charging’ and court attendance (Clairmont 2005:27). This diversionary trend was not viewed so much as net-widening but as a semi-formal alternative intervention which was ‘beneficial for both the youth and the larger community’(Clairmont 2005:13). The net effect was that ‘judges were seeing fewer young people aged 12 to 17 in their courtrooms’ and fewer of those whom they do see were being jailed (Statistics Canada 2000). The ‘requisite attention to the needs of victims, offenders and communities’ in order to effect reintegration was also seen as significantly increased through restorative responses (Archibald 2008:329).

Referrals to the NSRJ program are also subject to an ‘offence level’ restriction which regulates the stages at which offences of various levels of seriousness can be referred to the program. Moratoria are also in place for certain offence types, including serious sexual assault and family violence (Nova Scotia Department of Justice 2005:Appendix B ; Archibald and Llewellyn 2006:315). 135 There is a categorisation of offence types

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135 The Protocol notes ‘there is currently a moratorium in place restricting the referral’ of 3 classes of offences: sexual offences (summary), spousal/partner violence offences (both Level 3) and sexual offences (indictable) which is a Level 4 offence.(Nova Scotia Department of Justice 2005a). This moratorium was imposed in April 2000 and remains in place.
which determines the level and timing of restorative referrals.\textsuperscript{136} This schema of ‘offence level’ referral has the effect that most offences are potentially open to restorative intervention while judicial intervention is retained as the gateway for those charged with more serious offences.\textsuperscript{137}

\textit{The Nova Scotia RJP as representative of Canadian restorative practice}

The NSRJ program was selected based on the review of this primary source material, in particular from the details contained in its comprehensive protocol and procedural manuals, as well as from observations made at two sites of practice.\textsuperscript{138} From these assessments, it was evident that the program provided a range of restorative responses to criminal wrongdoing. As regards the program’s responsiveness, a wide exposure to a substantial level of youth offending was evident, especially in the case of the HCRJ agency. The program’s unique emphasis on a systemic approach to wrongdoing using a menu of different restorative alternatives makes it a particularly important source of interview data as to the generative mechanism at work in restorative processes.

Each of the three Canadian programs was rated highly against the selection criteria of restorativeness and responsiveness. The primary source material reviewed and the observations made both confirmed these programs as ‘mostly’ or ‘fully’ restorative. The

\textsuperscript{136} Only minor property and assault offences (‘level 1 offences’) are referable for pre-charge caution. ‘Level 2 offences’ (such as break and entering, some fraud and theft-related offences) are referable at all entry points of police, Crown, court and Corrections. ‘Level 3 offences’ (which include more serious fraud and theft-related offences, summary sexual offences, aggravated assaults, dangerous driving causing death, and manslaughter) are referable only at the court and Corrections entry points. ‘Level 4 offences’ which are the most serious category (currently only murder) can be referred only at post conviction.

\textsuperscript{137} This may explain why the allocation of offence levels was an exacting process involving ‘lots of stuff’ that had to be fought through involving the four levels of offences and the four entry points (Interview comments of the Crown Attorney, representative on the ‘Police’ and ‘Crown Entry Points’ subcommittees 4th October 2007).

\textsuperscript{138} The HCRJ was visited on 3 October and the VRJ on the 4 October 2007. No court observations were conducted in Nova Scotia.
Canadian programs were seen as especially suitable because of the systemic approach these programs took in their responses to wrongdoing, particularly in the case of the Nova Scotia program. Such approaches create responses which are ‘restorative’ and ‘responsive’ in the way these measures have been used, but which are also responsive in a much wider sense. Interviews with convenors and others involved in these programs are likely to add useful data to the understanding of the generative mechanisms at play in restorative practice.

**Programs in Australia**

**Context – early experimentation**

The Australian development and implementation of restorative responses was in large measure influenced by the New Zealand experience together with experiments involving reintegrative shaming theory. Australian programs have since expanded from this discrete focus on the dynamic of reintegrative shaming (as used in the now superseded Wagga Wagga and RISE experiments\(^{139}\)) to embrace a more diverse form of practice approaches, though still mainly focused on juvenile offenders (Braithwaite 1989; Sherman and Strang 1997).

Each Australian State or Territory now has a legislatively-based restorative program (see Maxwell and Hayes 2006).\(^{140}\) Programs from these states and territories were

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\(^{139}\) The RISE experiment continues as an experiment with longitudinal data currently being collected from participants in original referrals.

\(^{140}\) Statutory programs on a state or territory basis include the Queensland Youth Justice conferencing operating since 1997 (Hayes, Prenzler and Wortley 1998; Hayes and Daly 2004); the Tasmanian dual system of police (since 1994) and Department of Health (since 2000 with the proclamation of the *Youth Justice Act 1997* (Tas)) administered conferences (Pritchard 2002; Pritchard 2004); the West Australian Restorative Justice Conference program for young persons (since 1994) (Cant and Downie 1998); the Northern Territory police pre-court diversion program for young people (since 1999 under amendments to
initially examined based again on availability of access, variety of operation and breadth of application. Of particular interest were those programs which used varied models of family group conferencing and those with some (limited) application to young adult offenders. Four programs were selected from these for further study.

The selected sites of practice were:

- The New South Wales (NSW) Juvenile Conferencing Scheme which operates as an adjunct to that State’s juvenile justice system
- The Australian Capital Territory (ACT) Restorative Justice Scheme which operates as a Territory-wide program for young persons
- The South Australian Family Conference Scheme which operates as an adjunct to that State’s Youth Court
- The Victorian Youth Justice Group Conferencing Program which operates as an adjunct to that State’s Children’s Court.

The analysis of these programs in terms of their restorativeness and responsiveness is reported below.

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the *Juvenile Justice Act 1997* (NT) (Wilczynski, Wallace, Nicholson and Rintoul 2004); the New South Wales Juvenile Conferencing Scheme (since 1998) (Trimbo 2000); the Australian Capital Territory Restorative Justice Scheme (since 2005); the South Australian Family Conference Scheme (since 1994) (Daly, Venables, McKenna and Christie-Johnston 1998) and the Victorian Youth Justice Group Conferencing Program (since 1995) (Markiewicz, Lagay, Murray and Campbell 1997; Markiewicz, Lagay, Murray and Campbell 1997a). Victoria was the last to have a legislative backing when the *Children Youth and Families Act 2005* (Vic) conference provisions were extended to all Children’s Courts in 2007 following an initial Melbourne-based pilot.
The Youth Justice Conferencing scheme was established under the *Young Offenders Act 1997* (NSW) and commenced in 1998. Since then, some 1600 conferences have been conducted annually throughout NSW (Wengert 2008).\(^{141}\) The scheme was deliberately designed to provide ‘an alternative process to court proceedings for dealing with children who commit certain offences’ (Shaw 1997). The legislative framework provides for three different levels of intervention, beginning with police warnings and cautions and graduating to Youth Justice Conferences (YJCs). The use of these diversionary options is not mandatory but the regulated sequence of responses is designed to direct the exercise of police discretion away from court appearances for young people. This has been successful to a significant degree (Chan, Bargen, Luke and Clancey 2004). There are statutory limits on the type of offences that may be referred to each of the diversion options.

A Youth Justice Conferencing (YJC) operates as a ‘decision making body’ to the extent that it can make recommendations about the young person and determine an outcome plan regarding them (s.34(2)). In doing so, conference participants are specifically directed to make decisions in a way that will provide some form of response to the victim (s.34(3)(e)) so as to meet ‘the need to make reparation’ which also reintegrates the offender into their family and community in a way that ‘strengthens the family or family group’ (s.34(1)(a)(ii)). There is also an intention to provide developmental and support services which will ‘enable the young person to overcome the offending behaviour and become a fully autonomous individual’ in the future (Trimboli 2000:1).

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\(^{141}\) Maxwell and Hayes reported an average of 1373 conferences in the period 1999-2004 (2006:137).
In 2005, the YJC structure was used as a model to extend conferencing to young adult offenders (aged 18 to 24 years). The Community Conferencing Program for Young Adults (CCYA) program was established under the *Criminal Procedure Act 1986* (NSW) and designed to give courts additional sentencing options for offenders likely to be facing a sentence of imprisonment (People and Trimboli 2007:1). The program commenced in two Local Courts in Liverpool in suburban Sydney and on the north coast Tweed Heads circuit in September 2005. It continues to operate in these courts. Though the CCYA scheme gave the conference group some limited decision-making power, its primary function was to develop a ‘draft intervention plan’. It was through this plan that the young adult offender could show commitment to ‘undertake activities or attend programs which aim at promoting rehabilitation and reducing re-offending’ (NSW Attorney General’s Department 2005). The program accepted a wide range of serious offenders (statutory exclusions include sexual assaults and domestic violence offences). However, regrettably more than half of referrals in the initial pilot period were for traffic offences or drug related offences. This resulted in low victim participation rates (36 per cent) which were seen as likely to increase given a wider range of offence types following the pilot (People and Trimboli 2007:20). The CCYA has been recently ‘repositioned’ and now operates more as a ‘sentencing initiative’ (and renamed ‘Forum Sentencing’) with less of a restorative response. Though it was extended to seven other Local Courts, the young adult program has shifted significantly from a restorative form of response to operate now more as a sentencing input process.

142 NSW also has a post-sentence program operated since 1999 by the NSW Department of Corrective Services. Its Restorative Justice Unit (RJU) facilitates victim-offender family group conferences with offenders in custody where victims have requested or agreed to a mediated encounter (Booth 2002; NSW Restorative Justice Unit 2009).

143 The Press Release from the NSW Attorney General announcing this repositioning was titled ‘Victims of Crime to Assist in Sentencing’ and promised that under the program ‘offenders will be ‘ordered to sit
NSW YJC - restorativeness and responsiveness

YJC schemes fare moderately well when assessed against the restorativeness criterion. The YJC scheme (and the CCP scheme in its pilot mode) was ‘designed to open up participation in criminal justice processes to families, victims and “communities of care” in arguable restorative ways’ (Bargen 2003:2). The scheme provided an ‘entitlement’ to a young person and members of his or her family or extended family to attend a conference, and this was also the case with the victim (or victim representative) and their support persons (s.47(1)). Additionally, the convenor has the capacity to build a ‘community of care’ for the offender by inviting ‘a respected member of the community’, a representative of any school the young person attends, the young person’s care worker together with ‘any other person requested by the child’s family or extended family’ (s.47(2)). Trimboli found in her evaluation of almost 400 conferences that in ninety percent of matters at least one member of the young person’s immediate family did attend, and that in eighteen per cent of cases at least one member of the extended family (a grandparent, aunt or uncle etc) also attended (2000:61). In three-quarters of conferences, at least one victim was also present (2000:28).

The preparation for and conduct of conference is in the hands of conference convenors recruited from the local community. The hiring of convenors on a fee-for-service basis is seen as ‘a deliberate move to de-bureacratize the operations of the conference, to avoid burnouts as experienced in other jurisdictions, as well as to involve members of local communities’ (Chan, Bargen et al. 2004:80). Since the start of 2005, the number of active convenors has settled at approximately 370 who are based in their regional communities (2004:80).

down with their victims’ and ‘might be forced to make an apology, pay compensation or undertake drug and alcohol treatment” (Hatzistergos 2008).
The notion that crime is primarily a response to law breaking remains at the heart of the scheme. There is little evidence of a move to prioritise more personal effects of wrongdoing. In reaching decisions, participants are specifically directed to have regard to ‘the need to make reparation to any victim’ (s.34(3)). Evaluations suggest some dissatisfaction about how well this is met in practice. In response to an evaluation question - ‘what are the worst features of the outcome plan?’, the most frequent comments made by victims (23 per cent of victims) and their support persons (17 per cent of support persons) was that compensation was not seen as commensurate with the damage caused by the offending (Trimboli 2000:48-9).

Reintegration appears a strong principle of the YJC scheme in that young persons are seen as best ‘dealt with in their communities in order to assist their reintegration and to sustain family and community ties’ (s.7(e)). The impact of YJC attendance shows a positive effect on reduced levels of reoffending with a study comparing the experience of conference and court pathways indicating that conferencing resulted in up to a twenty per cent better reduction in the rate of re-offending as compared to court for certain categories of offences (Luke and Lind 2002).

There are statutory limitations on the type and seriousness of offences that may be diverted (s.8(2)). The intention is that conferencing is not to be used for minor offences, which are instead dealt with by ‘warnings’ or ‘cautions’. Warnings, for instance, can be used for many offences that do not involve violence (s.13), and cautions for a range of offences that can be dealt with by police response alone, subject to considerations of seriousness, degree of violence involved, and harm caused (s.20(3)). The range of
offences that can be conferenced include property and personal violence offences below a certain ceiling, with serious violence offences, serious sexual assaults, domestic violence offences and serious drug offences excluded (s.8(1a-b)).

The NSW YJC as representative of Australian restorative practice

From a review of its primary material and a site visit,\(^{144}\) the YJC was assessed as showing a commitment to the indicia of restorativeness, in particular strongly emphasising participation and reintegration. The statutory scheme’s provision for three levels of response (warnings, cautions and conferences) has meant that a wide range of more serious offending comes before conferences. The program provides an important example of an approach incorporating strong due process protections. These measures ‘facilitate the protection of children’s rights through weaving procedural and other safeguards into the fabric of the scheme’(Bargen 1996:235).\(^{145}\) This has meant that conference convenors and others involved in the program strive to operate within a rights focused environment. Interviews with its convenors can add an important perspective on the effect of these measures on justice generation.

ACT Restorative Justice Scheme

A scheme of restorative practice was introduced into the Australian Capital Territory (ACT) in 2005 underpinned by the *Crimes (Restorative Justice) Act 2004* (ACT). Prior to this, a pre-court diversionary conferencing scheme had been delivered by ACT Policing since 1994 for juvenile and adult offenders.\(^{146}\) For part of that period (from July 1995 to July 2000), the effectiveness of this diversionary form of conferencing was

\(^{144}\) The Queanbeyan regional YJC unit was visited on 3 January 2008.

\(^{145}\) Bargan (1996; 2001) had been strongly critical of the absence of these protections in police run conferences prior to the implementation of the *Young Offenders Act 1997* (NSW) scheme in 1998. She was then appointed to the new position of the Director of YJC in NSW and facilitated this interweaving of procedural protections to a significant degree.

\(^{146}\) By 2004 the number of diversionary conferences conducted by ACT Policing had fallen from 500 at its peak to fewer than 50 per year (Legislative Assembly for the Australian Capital Territory 2004:2)
subject to detailed evaluation as part of the Reintegrative Shaming Experiment (RISE) project.\textsuperscript{147} 

The current ACT statutory scheme has two phases. Phase One commenced in January 2005 and focuses specifically on young offenders aged 10 to 18 years of age, who have accepted responsibility for certain ‘less serious’ offences. Phase Two is yet to commence, but will expand the scheme to include adult offenders, and ‘more serious’ offences, for both juvenile and adult offenders (potentially covering family violence and sexual assault offences) (ACT Department of Justice and Community Safety 2006:7).

The operation of the Restorative Justice Scheme is closely regulated by its governing legislation the \textit{Crimes (Restorative Justice) Act 2004}. Section 6(a) of that Act specifies the object of the scheme as:

\textit{to enhance the rights of victims of offences by providing restorative justice as a way of empowering victims to make decisions about how to repair the harm done by offences.}

The scheme’s further stated purpose is to make a constructive impact upon the offender by enabling him or her ‘to express contrition or remorse in a meaningful way’

\textsuperscript{147} The RISE experiments gathered data about diversionary conferences including 900 adult drink driving offenders, 470 juvenile property offenders (some with a personal victim and others without a personal victim such as shoplifting offences) and 110 violence offenders under the age of 30. A central hypothesis of the experiments was that there would be less repeat offending after a conference than after court. This was borne out primarily in the case of the violence offenders; with no significant differences seen in the case of property offenders (except for a subgroup analysis involving 23 Aboriginal offenders where reoffending was exacerbated by conferencing) and a small increase for drink drive offenders that proved transitional (Sherman, Strang and Woods 2000; Sherman and Strang 2007).
The key means to achieve both these aims is through a facilitated conference.

The scheme is administered by the ACT Restorative Justice Unit (RJU), created under the Act and operating as part of the ACT Department of Justice and Community Safety. Referrals for participation in the program are made to the RJU by various criminal justice system actors and the unit makes assessments of suitability, based on considerations such as power balances and safety so as to determine whether participation is likely to be a constructive or a negative experience for victims. The scheme ‘requires’ that certain parties take part in a conference and this includes ‘a suitable victim or parent’ (s.42(1)(a)). The Phase One review (completed after the first year of operation in 2005) showed that the vast majority of referrals assessed as ‘unsuitable’ for conference were because either no suitable victim could be contacted or because the victim did not consent to participate (ACT Department of Justice and Community Safety 2006:14). A total of sixty-three per cent of victims did participate (2006:15). The most common reasons for non-agreement was ‘not feeling personally affected by the crime’, ‘not wanting to have contact with the offender’ or simply ‘wanting to move on and put the matter behind them’ (2006:16). A more extensive external evaluation has not yet been completed.

**ACT RJU- restorativeness and responsiveness**

As well as offender and victim attendance, the scheme provides that convenors can invite supporters of both the offender and victim to a conference as ‘community

148 ‘However, these other positive aspects of restorative justice are not outlined in the objects of the Act because the starting point of the scheme is victims’ (Legislative Assembly for the Australian Capital Territory 2004:5)
As well as these supporters, relevant police and ‘persons acting for participants in a professional capacity’ (including lawyers and ‘victim/offender intercessors’) are seen as part of the community that can be ‘constructed’ by the facilitator (s.44 (3)). The scheme is positioned so as to ‘augment’ rather than replace offence-based notions of criminal justice. This is reflected in the stated intention to address ‘victims’ needs…without distorting the prosecution of a crime’ (Legislative Assembly for the Australian Capital Territory 2004:5).

The primary aim of a conference is to reach agreement between participants. This outcome agreement includes measures ‘intended to repair the harm caused by the offence’. Such measures routinely include apology, plans to address the offending behaviour, work plans and provisions for material or symbolic reparation. The scheme specifically excludes measures which require the offender to be detained, humiliated or made to endure duress. The first phase review indicated that outcome agreements consistently showed a trend towards victims demonstrating that ‘they want young people to undertake some type of program that assists young people to address their offending behaviour’ (ACT Department of Justice and Community Safety 2006:46). The types of tasks identified as beneficial in this regard were seen as ‘attendance at residential rehabilitation programs’, ‘drug and alcohol counselling’, ‘anger management course attendance’ and ‘sport and recreation programs’. Any outcome agreement is made available to all parties and to the referring entity and the court. A very high compliance rate (98 per cent in the first year) with the terms of individual agreements was reported due in large measure to the strict monitoring by the RJU (ACT Department of Justice and Community Safety 2006:21).

Over 95% of both victim supporters and young person supporters were reported as finding the process ‘helpful’ and ‘fair’ and indicated they would ‘participate in a process again’ and ‘recommend it to someone else’ (ACT Department of Justice and Community Safety 2006:35-8).
The extent to which victims and offenders have been able to resume their normal lives after the effects of wrongdoing was viewed as a measure of their ‘reintegration’. Using self reporting assessments of level of anger, fear and anxiety before and after conferences, all participants expressed significantly reduced feelings of distress. Most victims reported a shift in negative attitudes towards the offender (falling from 66 per cent of victims reporting antipathy before the conference to 43 per cent after the process). In a similar vein, more than three-quarters of victims anticipated that they would have no difficulty in meeting the young person again (2006:40-1). Reintegration of offenders measured in terms of the pattern and type of any reoffending behaviour indicated ‘no particularly high rate of recidivism’ during the initial ‘window of opportunity’ of up to 18 months post-conference (2006:44).

Consistent with the intention to ‘augment the criminal justice process’ rather than replace it, two different ‘triggers’ operate for different levels of offences to be engaged by the Act (Legislative Assembly for the Australian Capital Territory 2004:5). For ‘less serious offences’, the trigger is ‘an acceptance of responsibility for the commission of an offence’ (s.20) which opens up the conferencing option as an ancillary form of response. For ‘serious’ offences (e.g. offences against the person which hold a penalty exceeding 10 years jail), the trigger remains a plea of guilty and there the availability of conferencing options is regulated by the stage in the criminal process from which the

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150 Victims’ level of anger with the person responsible for the harming was reported to have dropped from 44 per cent before the conference to 16 per cent after, and similarly with level of fear (dropping from 12 per cent to 2 per cent) and level of anxiety (dropping from 29 per cent of victims who were anxious to 13 per cent) (ACT Department of Justice and Community Safety 2006:38-40).
referral comes. Essentially, opportunities for referral diminish as the case proceeds upwards through the criminal process.\textsuperscript{151}

\textit{The ACT RJ scheme as representative of Australian restorative practice}

The ACT Restorative Justice scheme was assessed against the selection criteria based on a review of its primary source material and from conference observations and site visits.\textsuperscript{152} From these assessments it was evident that the program provided a significant response to criminal wrongdoing with a deliberate focus on addressing victims’ needs while not distorting the prosecution of offending. The program’s responsiveness is currently confined to juveniles who admit to ‘less serious offending’ though there is a continuing debate as to extending this reach. The RJU’s unique emphasis on facilitating a whole of justice system approach where diversion to the ‘parallel’ system of conferencing is available via gatekeepers (from police through to corrections) means interviews with facilitators and others involved in the program can provide useful additions to the data on the generative mechanisms at work in restorative responses.

\textbf{South Australian Family Conference Scheme}

The South Australian Family Conference scheme has operated as an adjunct to that State’s Youth Court since 1994 under the provisions of the \textit{Young Offenders Act 1993} (SA) The scheme operates state-wide with approximately seventy per cent of referrals coming from police, with most of the balance from the Youth Court. Some 1800 conferences are held each year, representing about eighteen percent of all youth

\textsuperscript{151} Less serious offences’ include a very wide class of matters where the penalty is below the statutory maxima (10 years imprisonment for offences against the person and 14 years for other offences). As the second phase has not yet commenced, all domestic violence and sexual offences remain excluded.\textsuperscript{152} The ACT RJU was visited on 6 and 13 September 2006 and a RJU-facilitated conference was observed on 12 April 2006.
Conferencing has also been trialled (in 2005) for pre-sentence young adult offenders but its extension to such offenders has not been continued past the pilot stage (Goldsmith, Halsey and Bamford 2005).

Young offenders referred to the scheme are required to attend family conferences accompanied by ‘such other persons [who are] invited to attend’ which is usually one parent, invariably their mother. About half of victims also attend (Doig, 2008). Wider participation than offenders and victims in conferences is reported as small, with the average number participants in more than two-thirds of conferences being three or fewer, excluding the facilitator and police youth officer (Daly, Venables et al. 1998:8). The scheme does not require a wider community attendance as its legislative basis specifically confines the referral to ‘family’ conferences. The Family Conference Team which facilitates all conferences is part of the SA Courts Administration Authority and is co-located with the Youth Court.

South Australian FGC - restorativeness and responsiveness

The SA program has been subject to substantial evaluation, predominantly as part of the South Australian Juvenile Justice Project (SAJJ) beginning in 1998. One of the research objectives of that project was to assess the degree to which participants involved in the process experience a sense of ‘restorativeness’ as a consequence of their involvement. SAJJ’s own measures of restorativeness sought to ‘tap the degree to which offenders and victims recognized the other and were affected by the other’ and it focused on signs

of ‘positive movement between the offender and victim and their supports during the conference’ as a measure of this (Daly 2002:207). As part of the evaluation, SAJJ researchers observed a number of conferences (a total of 89) in which more serious offending was being addressed and which were seen as having the type of ‘high emotional intensity for victims (and offenders)’ likely to provoke some ‘positive movement’ (Daly, Venables et al. 1998:16,26).

These conferences were examined by SAJJ researchers for evidence of such ‘movement’ suggestive of restorativeness (Daly, Venables et al. 1998:10). Results indicated high levels of perceived procedural justice but fewer participants reported feeling ‘restored’ in terms of the relational measure used (2002:206-7). These indicators included specific behaviours, such as displays of remorse and offers of apologies and less defined signals, such as ‘the degree and quality of interactions’ in terms of ‘positive movement (or mutual understanding) between the victim and the young person’ (Daly, Venables et al. 1998:App.1,4 & 5; Daly 2001; 2006:n4).154 Restorativeness’ measured in this way was seen as present ‘in 30 to 60 percent of conferences’ and solidly present ‘in about one-third of cases’ (2002:207; 2006:138).155 Daly suggested that ‘restorativeness’ was less easily achieved than procedural fairness because the relationship from which this renewal needed to emerge is necessarily more personal than professional. Since this is the relationship most likely to have been damaged by the wrongdoing, pathways to repair and renewal were likely to be weaker (2006:138).156

154 Facilitator responses were obtained from self-completed surveys while offenders and victims were separately interviewed face to face.
155 Interestingly, Daly speculates that it is in jurisdictions where conferences are routinely used (as in South Australia) that we should not expect to see ‘restorativeness’ emerging most of the time. By comparison, in other jurisdictions where conferences are used selectively (perhaps for matters seen as ripe for relational repair) restorativeness may be more likely to be evident (2002:210 n10).
156 By comparison, in the adult conferencing pilot ‘restorativeness’ was assessed in terms of ‘emotional well-being as well as tangible compensation’ coupled with the effect on participants of ‘a genuine display of remorse’ and this was seen as more easily achievable (Goldsmith, Halsey et al. 2005:25, 37).
However, there is still significant evidence of ‘restorativeness’ in the SAJJ sense and this has substantial parallels with the indicia of restorativeness used here.

The objective seriousness of the range of offences dealt with in this scheme is substantial. As Maxwell and Hayes (2006:136) point out, ‘[o]ne important jurisdictional feature of family conferencing in SA is that there is no schedule of offences that may be referred to conference’. The legislation provides on its face that a conference referral may be made ‘if a youth admits to the commission of a minor offence’ (s.7(i)). However, the standard of ‘minor’ as provided for in police operational protocols allows for a much wider scope than what might objectively be considered ‘minor’. Police practice has also been influenced by the decision in *R v Police* 157 where the South Australian Supreme Court considered the interpretation of provisions which restrict diversion by the court itself. The court held that while the referral power of police might itself be specifically limited to ‘minor offences’, ‘there is no reason in principle to limit the court’s [own] power to refer only minor matters’ (para.24). A broader capacity for courts to refer was accepted as necessary to allow diversion to a ‘family conference [where it] may be appropriately used as an alternative to traditional sentencing’ (para.25). The practical effect of the decision was that courts could refer if the police did not. As a consequence, police discretion itself has remained wide and covers a variety of objectively ‘serious offences’ (presumably on the basis that if police did not refer for this type of matters, the courts would). Types of offences routinely conferenced therefore include major indictable matters ranging from serious organised shoplifting to

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arson, and dangerous assaults to serious sexual offending, including rape where committed by juveniles. 158

The SA FGC as representative of Australian restorative practice

The South Australian FGC program was assessed as suitable for study from a review of its primary source material, a site visit and review of the SAJJ evaluative data. 159 The program performs strongly against the restorativeness and responsiveness criteria particular given that the experience of a sense of ‘restorativeness’ was already highlighted in the SAJJ data. Additionally, the program’s exposure to a broad range of objectively serious offending means its convenors can add new perspectives to the interview data on the generative mechanisms at work in restorative practice.

Victorian Group Conferencing Program

Restorative programs operated without legislative backing in Victoria from 1995. These operations began with group conferencing conducted by Anglicare Victoria as a private provider from a small number of juvenile referrals by Victorian Children’s Courts. This developed further into a Group Conferencing Program (GCP) dealing with offenders who face supervisory order (such as a probation, youth supervision or youth attendance order) in those courts (Maxwell and Hayes 2006:143). 160 The program was later expanded to other areas of Victoria and other providers. In 2006 the scheme was given

158 SAJJ data suggest serious matters were routinely conferenced with, for instance, more indecent assault offences by youths (carrying up to 10 years imprisonment) in fact being finalised by conferencing than in court in the period 1995-2001 (59 percent as compared with 35 per cent) (Daly, Curtis-Fawley and Bouhours 2003:Table 2a).
159 The SA FGC program at the Youth Court was visited on 18 August 2009.
160 There were about 500 young offenders potentially facing such an order each year.
statutory recognition under the *Children, Youth and Families Act 2005* (Vic) and in 2007 conferencing was expanded to cover all Children’s Courts in Victoria.\(^{161}\)

A wider role for restorative responses has also been proposed for young adult offenders and such a pilot commenced in 2008 (Bassett 2007).\(^{162}\) This pilot was sited at the Collingwood Neighbourhood Justice Centre (NJC) which is a novel court operating in the form of a ‘multi-door court’ since 2007 under the *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic). The NJC court has an explicit mandate to ‘apply therapeutic and restorative approaches in the administration of justice’ (s.1).\(^{163}\) The results of the young adult pilot are scheduled to be reported in late 2010.

The aim of conferencing in the juvenile program is seen as ‘improving decision making with young offenders, as well as reducing the rate of juvenile offending, and diverting young people away from state programs’ (Markiewicz, Lagay et al. 1997:vii). This has been addressed by ‘utilising the resources of the family and significant others, and empowering them in the decision making process’ within the criminal justice system (Markiewicz, Lagay et al. 1997:1). The scheme requires that conferences *must* be attended by the young person, by his or her lawyer and by the police informant (s.415(6)). A conference *may* also be attended by members of the young person’s family and ‘persons of significance’ to him or her and by the victim or a victims’ representative (s.415(7)). In practice, this has resulted in the young person being accompanied by his

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161 Group Conferencing provider organisations were expanded from Anglicare (whose area was moved to Gippsland) to include Jesuit Social Services (Metropolitan Melbourne) and the Salvation Army (Hume).

162 The Victorian Attorney-General Rob Hulls was reported as considering restorative justice to adult offenders more generally http://www.crikey.com.au/ accessed 8 May 2009.

163 The Collingwood NJC has been in operation since 2007 and is designed to house a wide range of services from which the court can draw. The services available on site include community corrections, aboriginal justice, alcohol and drug case officers, mediation, crime and violence prevention, legal aid, financial counselling, victim support, mental health, emergency relief, accommodation services and family violence support (Lim and Bassett 2008).
family and supporters, together with the arresting police and a youth lawyer, and in some instances the victim or a victim representative (Spencer and McIvor 2000:7). Victims are reported as participating directly in approximately half of conferences (Bassett and Walker 2008:31).

The young adult pilot similarly emphasises restorative encounters with victims where possible attending as this is seen to ‘strengthen the integrity of the conferencing process by requiring offenders to face their victim’ and therefore may ‘improve victim satisfaction with and participation in the justice process’ (Bassett and Walker 2008:30). Few conferences for young adults had taken place at the time of a site visit in October 2008 and the target number for the two year trial period has been set at a modest fifteen to twenty-five conferences per year (Bassett and Walker 2008:5). The pilot program envisaged that other forms of encounter, such as community peer panels and circle sentencing models, may also be trialled in addition to family conferencing (Salmon 2008).

**Victorian GCP - restorativeness and responsiveness**

The conferencing program extends the response to criminal wrongdoing from primarily a breach of the law to encompass its effects as a violation of people and their relationships. Participants in the process are asked to ‘provide suggestions about how [the young person] might repair the harm caused to the victim’. These suggestions ‘sets the expectations for the outcome plan’ (Victorian Department of Human Services 2007).

Informational material from provider agencies conducting conferences emphasise this

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164 The lawyer is present at each conference not to ‘represent’ the young person ‘but to advise with respect to the content of plans and ensure that due process is observed’ (Spencer and McIvor 2000:7). Bargen (1996) saw this legal representation aspect of the Victorian model as important in ensuring procedural safeguards absent in some other Australian models.
aspect of repair more explicitly. One provider’s promotional pamphlet asks: ‘Would you like the chance to say sorry and make amends?’ (Jesuit Social Services 2005). The young adult pilot similarly ‘aims at transformative outcomes’ that promote ‘the healing of the victim and the reintegration of the offender, not simply a focus on penalties that punish past wrongdoing’ (Young Adult Restorative Justice Group Conferencing Program 2008:5).

The Group Conferencing scheme identifies two explicit ‘strands’ in any conference outcome plan. The first is specifically directed at ‘making reparation to the victim for the offence’ and this may include apology, making financial reparation or carrying out unpaid community work (Spencer and McIvor 2000:7). The young adult pilot has a similar emphasis on increasing ‘offenders’ awareness of the consequences of their offence for victims and the community and encourag[ing] them to make reparation’ (Bassett and Walker 2008:3).

The second ‘strand’ identifies activities which the young person can undertake. These activities are designed to prevent further offending and assist in his or her rehabilitation (Spencer and McIvor 2000:7). One agency’s Factsheets describe these aims as ‘providing a community rehabilitation intervention’ that diverts the offender from more intensive supervisory court outcomes and ‘effectively integrate [him or her] into the community’ (Victorian Department of Human Services 2007). If the court accepts the proposals made in the outcome agreement, the convenor engages with the young person and an identified community representative to implement the plan and to provide follow up. In a formal evaluation prior to rollout of the statutory scheme in 2006, ninety per cent of conference plans were assessed as fully or partially implemented, with those
monitored by agencies more likely to be fulfilled than those monitored by family members (Markiewicz, Lagay et al. 1997). Young persons were seen to need external assistance in implementing outcome plans (Condliffe 2006:29). The evaluation also compared conference participants with a comparison group of young persons given court imposed probation in terms of reoffending rates. However results showed little appreciable difference as regards the offending between the two groups over the two year period post conference or court (Markiewicz, Lagay et al. 1997a).

Referrals to group conference for young offenders are reserved for those offences in which the court is ‘considering imposing a sentence of probation or a youth supervision order’ (s.415(1)). This equates to moderate to serious level of offending. There are standard exclusions such as wrongful death, sex offences or serious violence offences. Sentencing is deferred following referral and conference reports become a key factor in determining whether a supervision order with restrictive conditions will in fact be imposed (s.414). If the outcome plan is accepted, it may be substituted for the imposition of a strict supervisory order (s.576). The likelihood of a strict order (most generally a probation order) increases if the young person has appeared before the court on previous occasions. A recent evaluation indicated that a pool of approximately 500 young people per year fell into the category of potential recipients of a supervision order. From that pool, an increasing number now attend conferences (rising from an initial twenty per year prior to the legislation to about 200 each year since the program went state-wide) and there is a significant resultant decline in the number of supervisory orders being imposed in Children’s Courts (Griffiths 2008).

165 In the case of the young adult pilot, the program provides for multiple referral points (via police, courts and corrections) designed to capture offenders who might not normally be diverted to conferencing with the hope of capturing more serious forms of offending than is the case with the juvenile program. (Young Adult Restorative Justice Group Conferencing Program 2008).
The Victorian GCP as representative of Australian restorative practice

The Victorian GC program was selected following a review of its primary source material and from the observations made at site visits. The program structure specifically addresses many of the procedural critiques made of other juvenile programs (Bargen 1996). These protections (assured to a degree by the availability of legal advice at all stages in the process) are legislatively mandated. The process covers offenders facing a restrictive supervisory order as a consequence of moderately serious offending. This means convenors and others involved in these program can add a useful perspective on the generative mechanisms at play in restorative responses.

Each of these Australian programs rated as ‘mostly’ or ‘fully’ restorative. What makes the Australian programs distinctive is the substantial consistency of practice across different modes of delivery. For instance, the ACT scheme’s primary focus is victims’ needs as compared with the South Australian scheme’s focus on engaging with young persons who have committed serious offences. This diversity of focus suggests interviews with convenors and others involved in each of these programs are likely to provide different insights into what it means to achieve just outcomes restoratively.

Conclusion

The purpose of this chapter has been to provide the context for the empirical inquiry to be reported in Chapter 8. A small number of sites seen as representative of restorative practice have been selected for review from a wide pool of programs. The pool of potential sites was confined to three common law jurisdictions, New Zealand, Canada

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166 The Collingwood Neighbourhood Justice Centre where the Young Adult Restorative Justice Group Conferencing program was being piloted was visited on two occasions – 13 May and 1 October 2008.
and Australia. Potential sites were first reduced on the basis of difficulties with access, lack of variety in program operation and narrowness of application. Within these jurisdictions, a number of selected sites was assessed against two narrowly conceived criteria – their level of restorativeness (assessed in terms of participation, personalism, reparation and reintegration) and their level of responsiveness (assessed in terms of the need to address the retributive, restorative and consequentialist aims in response to serious offending). From these assessment nine individual sites of practice – two in New Zealand, three in Canada and four in Australia – were chosen as the sites for closer study.

Chapter 8 reports on the data obtained from interviews with those involved in each of these programs. The purpose of the inquiry is to explore the role played in their justice practice by the mechanisms identified in Chapter 4. We draw on data collected in interviews with conference convenors and others, such as police, lawyers and judges involved in each programs. From this data the views expressed about the role each generative mechanism plays in restorative practice are consolidated. This analysis provides an opportunity to test the hypothesis that restorative practice has its own distinctive method of justice generation. From these results, suggestions are made as to how restorative practice might complement and fill the deficiencies in legal practice’s poor capacity to meet all of the evaluative criteria fully.
Chapter 8

The restorative practice of justice

Introduction

This chapter reports on the findings from the empirical study conducted into restorative practice at the sites selected in Chapter 7. The reporting aggregates the views expressed by those interviewed about the place they saw each generative mechanisms played in their practice. The level of agreement expressed about this mix of ‘practices, behaviours, approaches and principles’ seen as effective in generating justice was considerable, though in some instances different weight and emphasis are noted.

To put the views expressed in context, it will be recalled that it was hypothesised in Chapter 2 that certain harm-related benefits and burdens need to be distributed in response to wrongdoing for a just outcome to occur. In particular, it was theorised that benefits needed to be distributed to address the harm done and burdens needed to be removed or imposed. A set of generative mechanisms were devised as a means to identify the social behaviours seen as having the power to generate those distributions. It was further hypothesised that restorative processes employ a distinctive mix of mechanisms which may explain why their method of justice practice fares so differently to legal practice in terms of the justness of its experiences and outcomes.

This chapter provides a narrative of what practitioners said about the importance given to each individual mechanism in their practices. Their responses are aggregated to provide a snapshot of justice practice.
Methodology

Interviews of up to an hour were conducted face to face with fifty individuals closely involved in the selected practices. The interview procedure was semi-structured, the conduct of the interviews based on a written schedule which focused specifically on each of the twelve generative mechanisms identified in Chapter 4. Potential interviewees were identified specifically because of their involvement in the selected practices detailed in Chapter 7. They were either restorative practitioners (convenors, facilitators, program managers) or others (lawyers, judges, magistrates etc) involved directly in the programs or in the use of these programs as part of legal responses to criminal wrongdoing. Interviews were conducted at the practice site mainly on a one-on-one basis, except for a small number of participants involved in the same program who preferred to be interviewed as a group. The interviews were conducted steadily from 2005 onwards, firstly in New Zealand in 2005; in one Australian jurisdiction (the Australian Capital Territory) in 2006; in Canada in 2007 and in the remaining Australian jurisdictions (Victoria, South Australia and New South Wales) in 2008.

Interviewees were first asked to provide a general description of the program in which they were involved and this information has formed part of the information about each program provided in Chapter 7. Interviewees were then asked to make comments about ‘a provisional list of elements that seem to me might be essential to doing justice restoratively’. These ‘elements’ were the twelve generative mechanisms identified in Chapter 4. The definition of each mechanism developed in Chapter 4 was shown to

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167 An interview protocol approved for ethical purposes was used to conduct interviews (ANU Human Research Ethics 2005/146) and is reproduced in Appendix A.
168 No one approached for interview refused, though three interviews were not conducted due to the subject’s unavailability at the time of the writer’s visit.
169 This statement was read in the early part of each interview and appears on page 1 of the interview schedule, see Appendix A.
interviewees on flash cards, or read aloud or was paraphrased to participants as each element was introduced. Comments were sought about each mechanism in response to two specific questions:

- Does [this mechanism] come into your program?
- Does your program have any particular views about the importance of [this mechanism] in achieving justice in your program?

A record of responses were made using a combination of contemporaneous note taking during the interview itself and subsequent note taking immediately following the interview. A typed version of the record of their interview was emailed to each interviewee soon after its completion, with the request that they check it for accuracy and make any corrections or additions they wished. Approximately a third of respondents made some corrections or additions, mostly of a minor nature but in a few cases giving more detailed responses than before.

Interview data obtained was consolidated into responses about the twelve factors and analysed using a variation of the constant comparative method where new comments obtained were consistently compared with all previous comments until no fresh perspectives were seen to emerge (Glaser and Strauss 1967; Parker 1999:231-2). This detailed aggregation was then drawn on for the report which appears in summary form here. Direct quotations are indicated by italicising the extract used. Words inserted within the quotations to retain sense and grammatical correctness are placed in square brackets. The method of reporting is designed to thread together extracts from various

\[170\] The interview and reporting methodology draw on similar methods adopted by Roche (2003) and Parker (1999) in reporting their empirical data.
responses seen as best capturing the consensus view about the importance of each of the mechanisms as justice generators in restorative practice.

Each respondent was allocated a code to record three identifying characteristics, while at the same time maintaining confidentiality. The first letter in the code indicates the interviewee’s jurisdiction - New Zealand (N), Canada (C) or Australia (A). The second letter indicates the interviewee’s gender (M or F). The third letter indicates whether the interviewee was a restorative ‘practitioner’ (P) or ‘other’ (O), such as a judicial officer, program director or policy advisor. Each interviewee was also given an individual identifying number.

**Describing restorative justice practice**

The following section presents the narrative thread of responses concerning each mechanism. The extracts used from the interview data are confined to what was said about justice generation. The mechanisms are presented in pairs or groups in the same way they were introduced in Chapter 4 based on perceived similarity or effect.

**Accountability and Responsibility**

Interviewees were provided with the definition of ‘accountability’ developed in Chapter 4:

> By *accountability* I mean the offender giving a public account of his/her responsibility for the wrongdoing which stakeholders in the injustice accept and for which the offender is held to account.
It was consistently reported that **accountability** in the formal sense of being ‘held’ accountable was not part of the restorative process. Rather the view was

*restorative justice enables someone (if they wish) to accept responsibility themselves...By deliberately staying in the ‘telling the story’ part of the process until the full story of the wrongdoing is out, a different sort of accountability is seen to arise.* (AMP45).

This form of accountability **comes out from hearing other persons’ stories about the effect on them of the offending** (AFP38). The conference process itself facilitates this by asking the offender to account for their wrongdoing explicitly, and once the offender actively takes responsibility in that form, then they are accountable. (AFP34).

It was reported that if this **baseline acceptance of responsibility occurs at the outset** (CFO11), then there is no need for a formal holding to account because the offender had in fact accounted for his or her own wrongdoing. This was seen as a different process from being **held accountable as an objective phenomenon** (CMO10) as in legal proceedings.

Because the restorative process raises a different expectation of accountability, it was seen as important that offenders were prepared before the conference – *an offender has [to be prepared] to make a [different] commitment to proceed with restorative justice and accept responsibility* (AMP33). If they do this, then once offenders were in the conference they cannot deny responsibility, it is [simply] counterproductive (NFO28). The effect is that they must own up and admit to what they have done ...rather than
saying that the victim is to blame ... or trying to rationalise or justify [their behaviour in some other way] (NMP25).

In a majority of programs, a ‘statement of facts’ (variously described) was read out at the start of the conference and certain ‘accountability’ questions were put to the offender. Typical formats adopted were

the offender is asked ‘Is that right?’ (NMP27), [or]

the offender has to acknowledge and agree with it [the statement of facts], then tell his version of events in a ten to fifteen minute rave (NMP25).

As well as this self-accounting, the offender is also expected to begin to meet the needs of the individual victim, [which is seen as another way of] demonstrating they are being held to account (NMO29).

It was explained by a number of respondents that what a victim needs from the process is some externally recognisable sign of the offender’s self-accountability. This can also be met later in the process by offers to make amends in an outcome plan that can demonstrate accountability in a very tangible way (NMO31).

The self-accountability described was seen as important to justice generation and tangible signs of this acknowledgement were given by accepting a version of the events of the wrongdoing or by offering to make amends that meet the victim’s needs. But accountability in the more overt sense of the offender being ‘held to account’ by external others is not part of the restorative process.
Interviewees were provided with the definition of ‘responsibility’ developed in Chapter 4 -

By responsibility I mean having the offender actively accept responsibility for their wrongdoing through confronting them with the consequences of their offending and taking responsibility for its consequences.

Having the offender actively accept responsibility for their wrongdoing was seen as being

accountability going a step further – [with] the offender accepting one hundred per cent that they were involved in the wrongdoing (AFP34).

Substantial preparation was needed for an offender to reach this state of full acknowledgement:

acceptance of responsibility is more than just ‘I’ll plead guilty’ [and] more than ‘I did the act’. Rather it is an acceptance of a moral wrong, [and a recognition of that such acceptance] is a larger concept than simply admitting guilt (CMO17).

To do this, an offender has to move from simply admitting as little as ‘yeah I done it, so what!’...[which indicates] that it may be necessary to work with the offender to find out why they are so ambivalent to a fuller acceptance of responsibility. This is teased out in the [preliminary] ‘suitability’ process...so that the offender is prepared to give a full account of what happened (AFP37). In some practices this was equated to accepting responsibility for ‘the undisputed harm’ to the victim (AMP33).
The importance of the process itself in facilitating this was emphasised by a number of respondents:

> It is the process that will bring this home to [the offender] or not...and they are prepared [beforehand] to engage with the process by giving details of their offending (AMP40).

The conference encounter itself was seen to provide the feeling that a young person takes [full] responsibility (AMP39), often because their significant others, such as parents and family are present. It is the discourse structure of the conference that lends itself to getting a full account of what happened (AFP37) as well as sorting out the meaning of what happened for those involved (CFO11).

It is this process that encourages offenders to

> show responsibility by telling their story and being truthful and honest and by telling the group ’This is what I was thinking at the time’ and ’This is what I have thought since’ (AMP35).

An acceptance of responsibility in this fuller sense was seen to have a number of positive benefits. It was extremely important for the substantial effect it has on the offender in terms of voicing responsibility (CMO10) and as the means of beginning their process of moral reform and the process of repair for the victim to see the offender taking blame for their part in what happened (AMP45).
The acknowledgement provoked by the restorative process was one step further than accountability. The restorative process itself acts as the catalyst for encouraging such an acknowledgement. The distinction drawn between accountability and responsibility was seen as artificial and was not used in practice. For most respondents, the two elements of accountability and acceptance of responsibility simply ran together as ‘acknowledgement’. When combined, these elements of behaviour which acknowledge wrongdoing were seen as critical to justice generation.

**Censure and Remorse**

Interviewees were provided with the definition of ‘censure’ developed in Chapter 4 -

*By censure I mean to publicly denounce harmful behaviour and declare it as wrong with a view to having the wrongdoer recognise his or her wrong.*

Deliberate overt censure was not reported as a core justice-promoting activity in restorative practice. Instead the process delivers censure by *adding the missing piece of impact on others* (CFP19)...not [by] telling offenders how wrong they are, [but by] getting them to reach this view themselves (AFP41).

The trigger for ‘taking on’ this role of self-censure is through *being made aware of the harm caused to the victim* (CFP8). This awareness can flow from the presence of victims, or in some instance even without their physical presence, *(even if a victim just sends an email which can be read out, that can have an effect too (AMP39))*.

When victims are present the awareness can come from victims saying such things as
‘I feel really angry because you have done this to me’ (NMP26) or from the presence of supporters, often the offender’s own supporters or families. This presence allows for censuring to occur (AMP33).

When this awareness is established, censuring for the wrongdoing flows from the process [itself], because someone has accepted responsibility for harm (NMP27) and because of the exchange of emotions that takes place around [such acceptance] (AMO49). 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 (CMO10).

Censure affects the offender because it gives him a sense of relief [and] is an answer to [his or her] debilitating feelings of guilt. Censure is not structured in as a preconceived outcome – its beginning can be where the topic is raised by the victim [first saying] ‘I want you to know that what you did was totally unacceptable and wrong’ (NMO29).

The timing of the censure was seen as crucial. In some cases, the perceived need for censure [may have] already disappeared once the poor social circumstances of the young person become evident (AFP41). In other cases, the shift from the anger of censure to the understanding of compassion occurs more slowly within the process itself (AMP40).

Feelings of self-censure do not require the expression of any particular sentiment as a catalyst. While a victim or others in a restorative justice meeting might express blame or moral disapproval, they should not need to do so (AMP45). Also, ineffective
denunciation by police [or others] as defacto for the community (NFO28) is more likely to be seen as outside,[and] imposed upon the offender, who does not have to buy into it (NMO31).

Overt censure was also rejected because it implies something being done to the offender as compared with the wrongdoer being involved as an active participant in a process (CFO11). Different conceptualisations other than ‘censure’ 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 (NMO31).

The encounter does this work itself because it enables the offender to demonstrate, from the outset, that they themselves disapprove of their offending behaviour. They do not need to be persuaded of this basic moral fact within the context of an encounter with the victim ... though their sense of remorse may deepen in the course of the process (AMP45).

Overt censuring in terms of ‘publicly denouncing harmful behaviour’ is not seen as a core justice generating mechanism. In restorative process the self-censure engendered by the reproach of ‘look what harm you have done!’ is seen as more effective.

Interviewees were provided with the definition of ‘remorse’ developed in Chapter 4 -

By remorse I mean the offender feeling sorry for what they had done, wishing that it had not occurred and expressing that they are sorry.
Remorse was seen as implicit in restorative practice because its processes are social rituals which allow the person responsible to say ‘I no longer stand by what I did’ (AMP45). While genuine expressions of remorse could not be manufactured (AMP33), identifying what remorse actually ‘looks’ like was seen as difficult (AFP34).

One implicit indicator of remorse is seen to come from the offender’s motivation to participate [in the process] ...and fully admit the wrongdoing ... [by] putting in place ways for this not to happen again (AFP34). More tangible indications come from saying such things as ‘I do not want to continue along this path’ (CFP4), or more simply by offering to shake hands in the conference or by going a bit further to do something to indicate their remorse (AFP34). A particular advantage of restorative processes was that such expressions of remorse can be more readily validated or established by the participants directly involved in the process themselves (NMO30).

Many practitioners reported an expectation in participants that the restorative process itself will ignite a remorse response (AMP33). When such expressions were made this acts as a catalyst for opening a dialogue (AMP33), and it was this dialogue that allows the victim to release emotions of defiance (such as anger and resentment)...and which can assist them in their process of healing and recovery (AMP45).

A different conceptualisation than ‘remorse’ to describe what was occurring in restorative processes was expressions of vulnerability, [so that] when people show this instead of being defensive, it opens up opportunities for discussion (CMO10). A number of comments recognised that many offenders do not have an enormous capacity to feel
a lot of remorse AFP3 and therefore it is important to assist them to build the capacity for empathy and understanding (CFO11).

The self-censure that the process itself engenders brings with it the beginnings of repair. Expressions of remorse act as a catalyst to drain negative emotions from victims and others. Restorative practice provides a forum to express remorse and the means to allow participants to gauge its genuineness. This genuine remorse was seen as generating a sense of justice.

**Punishment and Vindication**

Interviewees were provided with the definition of ‘punishment’ developed in Chapter 4 -

> By **punishment** I mean a sanction which involves a deprivation imposed with the intention of expressing censure for harm done and preventing or dissuading future offending.

**Punishment** is *not the goal of restorative justice; [instead] the goal is to restore relationships. Describing the difficult aspects of restorative justice processes as punishment does not produce any new version of justice (CFO11).*

Respondents did report that persons affected do 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 – we do not see that happening often (AMP33).* Victims may well have **punishment on their minds** at the outset of the process, but these feelings perceptibly shift in the preparatory stages as **accountability not punishment** is stressed (CFP19).
A common expressed view was that punishment by its nature is not merely a descriptor for something unpleasant, but of something imposed on someone with the intention of inflicting pain. [and such] imposition is antithetical to restorative justice (CFO11). Restorative processes were not structured around punishment. The reason for this is that restorative justice is not primarily about the punishment of the perpetrator, but rather about the vindication of the victim (NMO31). What follows from this is that the justice ‘business’ of a restorative process is not the inflicting of pain but rather attempting to give the moral lesson of respect (CFO11).

But ‘making up for what has happened’ can still include reintegrative programs that require an effort (AMP39). The resolution plan described in most programs is potentially onerous given that it holds the offender accountable and he or she may agree [to do certain things] to make amends. But these obligations are not seen as punishment (CMP22).

The crucial difference drawn between punishment and burdensome amends was how this outcome or consequence or whatever you may want to call it is arrived at (AFP38). The key distinction is that an offender accepting a sanction voluntarily is not the same as an imposed outcome (NMP27). But the fact that burdens agreed to in an outcome agreement …may be perceived as a burden by offenders ought to be recognised (CMO10).

It was recognised that to utilise punishment as a justice-promoting mechanism tool would mean that all the panoply of proportionality, rights protection, legal
representation etc etc would then need to be brought into play [with the effect of] damaging the restorative process itself (AMP45).

Punishment is on the minds of participants when they begin the restorative process but it is seen to fade from a central role as a justice-promoting mechanism. When offenders take on onerous burdens, their acceptance of them rather than their imposition means that much of the negative associations of punishment are absent.

Interviewees were provided with the definition of ‘vindication’ developed in Chapter 4 -

> By **vindication** I mean taking seriously the concerns of persons affected in a way that helps them to feel that it is they who have been wronged.

**Vindication** is behaviour that says a wrong has been done (AMP40), and importantly also says that this wrong is not the victim’s fault (AMP35).

Vindicating behaviour was seen to provide a way for the conference group to acknowledge that the victim has done nothing wrong. [Victims] get satisfaction from hearing this, and it assists with [the development of] their feelings of safety that these events will not reoccur (AMP35). In this regard, restorative conferences are forums designed for vindication; as the raison d’être for the conference because they offer an open acknowledgement that the victim’s experience is regrettable and morally wrong (NMP27).
The restorative emphasis on validation, vindication and voice [means that victims see] the focus is being shifted to them – to what they would like the offender to do [since] the spotlight is on the harm caused (NMP25). This gives victims a voice when they would not otherwise have one, in an environment where they are going to be cared for [and this] can help them heal and come out stronger (NFO28). The restorative process was seen to provide this relief as a consequence of the people in the conference having the chance to provide vindication for the victim (AMP36).

Such 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 (NFP24).

Punishment is not a core justice-generation tool for restorative practice.
Conversely, vindicating behaviour is a critical tool because vindication communicates to the victim that the wrongdoing was not of their making. This provides relief from feelings of responsibility which is central to beginning the process of justice through restoration for victims.

**Deterrence and Proportionality**

Interviewees were provided with the definition of ‘deterrence’ developed in Chapter 4 -

By *deterrence* I mean an intended effect of a response in reducing the tendency of the offender to re-offend, and an effect of a response in reducing the general tendency of other people to offend in this way.
**Deterrence** of further offending by the person involved in the wrongdoing was seen as a very important byproduct of what might happen [because] the victim wants a community where the sort of wrongdoing done to them does not happen (AFP34).

Having a deterrent effect is more an indirect rather than a conscious focus of the process since deterrence is not something we drive for, not something we routinely raise with victims and offenders (AMP33). Restorative practice achieves a deterrent effect because of its deliberate focus on making communities of accountability stronger and on strengthening clear community bonds (CFO11). The effect is that the acknowledgement of responsibility by being an acceptance of the reality of the harm caused [starts this] deterrent effect (NMP25).

It is the potential to gain a clear picture of the impact of what they have done (AFP37)... by personalising the offence which may have an effect in terms of specific deterrence that is higher than in the criminal justice system (CMO10). The hope is that such a focus will keep offenders from wanting to create that same harm again (CFO11).¹⁷¹

Deterrence was achieved by the involvement of communities so that clear bonds are strengthened and there is a sense of ‘we are in this together’ (CFO11). The focus on reducing reoffending revolves around asking, ‘how did we get here [to the wrongdoing]?’ and ‘how can we avoid getting here again?’ (CFO11). This

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¹⁷¹ By comparison, Roche (2003:12 fn14) in his own data report gives a playful example of a conference with ‘more modest success’ in terms of its deterrent effect. A young offender when asked at the end of a conference by the victim ‘So, do you think you’ll ever steal a car again?’ replied ‘Well, I’m definitely not going to steal *your* car again’.
reconnection with community (and with community resources) may have the effect of reducing offending totally or reducing it to less serious offending (CFP4).

The restorative process contains deterrence talk and deterrence procedures both aimed at establishing measures that may support non-offending patterns. For instance, in the case of young offenders, the conference may look for conditions that may help offenders to ‘self-police’ like curfews or non-associations, or abiding by house rules. These can be tough to monitor but can work to prevent reoffending (AFP41). Such measures equip the young person so that they have ‘excuses’ they can offer to mates etc for staying away from them (AFP42).

It is in these ways that restorative practice can have a deterrent effect on offenders. This is justice promoting because it acts to renew and reinforce the victim’s and the community’s collective sense of safety and security.

Interviewees were provided with the definition of ‘proportionality’ developed in Chapter 4 -

By proportionality I mean sanctions being proportionate in their severity to the culpability of the wrongdoing done, or the degree of restorative effort required to remedy the harm done.

Proportionality was not reported as a strong justice factor for restorative practice. The focus instead is upon what needs to be done to repair the harm; and [what is required for] each person’s response [to this] is very different (AFP34). The place of
proportionality in restoration is small because the restorative process is a process which is about addressing harm and restoring relationships by focusing on respect, concern and dignity, [and this means that] some things are taken off the table. When the root of the process is in restoring the relationship and repairing the harm, then strict mathematical proportionality becomes less relevant (CFO11).

Proportionality as ‘censure proportionate to the severity of wrongdoing’ was not seen as a restorative function, and so ultimate oversight, by enforcement/variation of agreements ...stands [outside] under the control of the criminal justice system (NMP27). Comments from judicial respondents in particular explained how this oversight worked

I often look at a FGC plan and say, for example, ‘this number of hours of community service is way over the top/or way too inadequate’ and I change it to something more appropriate (NMO23).

Within the process itself there is no attempt to make a comparison with other outcome plans..., [our focus is] to make it case specific (AMP39). As such, restorative practice couldn’t have anything like a punishment scale; there needs to be consequences but it is different for different people (AMP35).

In the same way, proportionality even seen in terms of ‘repair proportionate to the harm done’ is tricky because restorative justice is a process where those directly involved come up with a decision, and that decision can be simply an apology made by the offender (AMP45). For the same reason, you can’t have a scale, everyone is different. The requirements of the outcome agreement may appear minor, but following
through on the commitments may be really tough for the offender. It has to be proportionate to the person, not to what society thinks is appropriate (AMP35).

Respondents saw a risk to the core reparative functions of their processes if there was a requirement that any outcome agreement be proportionate. That would change the situation and maybe those involved would overstretch to try and find an outcome that is more prescriptive (AMP45). This was because in large measure conferences are completely unrelated to one another. ...Two conferences are never the same, so proportionality doesn’t come into it as much (AFP41). The emphasis is more on ‘individuality than proportionality’ (AMP40). As such, the focus is not the offence but the offender. [We are not like] the criminal justice system which compares charges with charges – restorative justice is the antithesis of that (CMP22).

Some convenors did say they sought to ‘guide’ outcome agreement provisions so that there was some minimum measure of proportionality by stipulating what can and can’t be done in an outcome agreement (AMP33). In some situations participants did look to facilitators for parameters or ask the police officer [or lawyer] if one is present (CFP19). There was skepticism expressed about the value of using the ‘upper limits’ criteria as a guide. It was not seen as a helpful model at all, given that these limits are punitive not restorative (AMP45).

In many instances, outcome agreements are more substantial [in terms of their requirements] than what a court might impose (AFP37), [and this is because they were] deliberately more specific and individualised (AFP41). When proportionality was
needed to act like a protection mechanism, then it was important that this control be provided by the criminal justice system (AMP36).

Restorative practice is seen as providing a deterrent effect on offenders which can be justice promoting purely as a consequence of the personal nature of the encounter. But restorative practice’s emphasis on ‘individualising justice’ means that ensuring proportionality of treatment between offenders is not part of its justice rationale. Proportionality in the sense of ‘the degree of restorative effort required to put things right’ is tempered by a focus on what is required to make the harm good. The proportionality principle (in either its ‘sanction’ or ‘repair’ senses) was not reported as part of restorative practice’s justice promoting strategy.

**Truth telling**

Interviewees were provided with the definition of ‘truth telling’ developed in Chapter 4-

> **Truth telling** refers to the practice of providing persons affected with opportunities to find or tell the truth of the wrongdoing and its consequences to the extent necessary.

**Truth telling**’s close tie in with responsibility and accountability (AFP33) meant that it is central to the full expression of an acceptance of responsibility. Victims and other persons affected by the wrongdoing consistently want the truth about what happened and about the decisions the offender made about what led to the offence (AMP33).

What the restorative process can deliver is
a very high level of detail both as to what occurred - what happened and when? 
and the offender’s motivation - What were you thinking? What have you thought about since? The level of detail of what happened is very important for the victim to know, for example - Was the car locked? What rooms did you go into? and so on and so on (AFP34).

The restorative process is most effective in allowing that detail to come out in response to victims’ demands and so it meets the crucial need to get the story as complete as possible (AMP33).

It was conceded that it may not always be possible to get the full truth (for example if there are disputed factors we tell the victim in preparation that there is a dispute as to the facts)....However, we do not allow central facts to be disputed in a restorative justice process (AMP33). ‘Non-dispute’ (rather than ‘agreement’) about the core facts was crucial even if, it may take some time to get to this stage of agreement – but this can be done by shuttle dialogue before the conference is held (AMP45).

As well, the manner of the disclosure adopted by the offender was important, in the sense that they are being straightforward in how they deliver their story, and that they are not intent on self-justification. Even if their own version of what happened is actually different from the victim’s in some respects (AMO49).

The process of truth telling is aided by the deliberative nature of the restorative process in that the [offender’s] story can be taken apart to get the full details out (AMP40). While this may seem as if the process is making an imposition on the offender, the purpose of the deliberation is the opposite of the criminal justice system because it is to
[the offender’s] benefit to be totally honest (CMP22). The deliberative structure opens the process of truth telling up; it often adds the details via the victim’s questions. [In this way] it goes beyond just the admission to getting more of the truth out (AMP39).

Restorative practice delivers the possibility of a more open and comprehensive truth telling, both because the rules of evidence constraint is absent and because there was a direct role provided for victims who may have had at least partial knowledge of the facts of the incident themselves from which to draw (CMO10).

Truth telling is seen as a core generative mechanism for restorative practice. The difference with restorative practice is that its deliberative nature can reveal more of the truth of the wrongdoing and its consequences that is possible through a strictly forensic truth finding exercise.

**Reparation, Apology & Forgiveness**

Interviewees were provided with the definition of ‘reparation’ developed in Chapter 4 -

**Reparation** is the act of making amends, offering expiation, or giving satisfaction for a wrong or injury.

The aim for many practices was to address in practical and symbolic terms questions such as

‘What can be done to make things right?’

‘What can be done to make sure this doesn’t happen again?’ (AFP38).
Restorative practice was seen to address reparation questions by focusing on three aspects of reparation – a spiritual aspect in terms of expiation, an emotional aspect in terms of ‘satisfaction’ and a material aspect in terms of restitution or compensation (CMO10). Because of these combined aims there was explicit ‘talk about reparation’ to show participants that the conference isn’t just a conversation (AMP40), but a process that has as its purpose finding ways to address the harm done.

The reparation comes through symbolic and material means either in the conference itself or as a consequence of a promise to do something following the conference. Symbolic reparation can come simply from an apology or from the victim hearing [the offender’s] acknowledgement of responsibility (AFP34). Or it may flow from some other form of response that shows the offender feels what it is like to be out of their comfort zone for a time (AMP35).

Material reparation means agreeing to pay money to the victim, or agreeing to give something back to the community (in terms of volunteer work or more formal community service) or committing to do something (such as undertaking a rehabilitative program).

Both these forms of symbolic and material reparation were seen as a key thing for victims – since such behaviour addresses their need for an answer to the question ‘How can we get back what we’ve lost?’(AMP36). For offenders, there is a sense of being required to address the harm [themselves] but [with their] communities and victims having obligations and responsibilities in a similar vein (CFO11).
A core principle of restorative practice was that the offender is not the only person who has to think about what needs to be done to repair (CFO11). Victims can also make a contribution by moving their focus away from punishment to placing the onus on the young person to take responsibility for not offending again (AMP39). Communities also contribute to reparation by taking tangible steps that allow the offender to give back to the community and to be reintegrated into it as a consequence.

Reparation is an important justice generating mechanism for restorative practice because it provides a tangible answer to the question about what can be done to make things right. The restorative process provides an opportunity to discover what particular forms of symbolic or material reparation are needed to achieve this purpose.

Interviewees were provided with the definition of ‘apology’ developed in Chapter 4 -

By apology I mean the wrongdoer expressing sorrow about the effect their offence has had on the victim and other persons affected.

Apology is a central moral ritual [in the sense that] to take responsibility ‘means’ apology, and if you haven’t apologised you may not in fact be accepting responsibility (AMP45). Its power flows from how it sums up vindication, acknowledgement, denunciation and repair of harm – it is the essence of all these things because it says ‘you’re worthy of me’ (NMP27).

Apology is the core way of expressing acceptance of responsibility because it provides evidence that the offender [has been] confronted with the reality of what they’ve done.
Apology was seen to be a ‘natural harm response’ that only restorative processes can do with such immediacy. This is because once the reality of harm is realised, apology flows as a response which has enormous power to validate the trauma of the victim and convert the offender (NMO31).

The power of apology was seen to come from its two key elements - its unconditionality which leaves excuses behind [and] its expression of a resolve not to cause pain again (CFO11). These elements together were often able to dissipate the angriest victim (AMP35) and shift something in the victim as a result …so that they express an acknowledgement of the apology in some way (AMP40).

Good preparation was crucial since apology may not come naturally to offenders (AFP34). Such preparation needs to be explicit

We tell them there is a point in the conference where the convenor will say something like ‘Is there anything else you would like to say?’ and that is their opportunity to give an apology if they want (AMP33). As well, the offender may need to be prepared to make an apology more than once because the first apology can often be heard but not registered and so needs to be repeated several times (AMP50).

Apology was seen to take many forms, including verbal apology given in the conference and ideally accepted there as genuine and coming from the heart (AMP35), or written later, sometimes in response to the victim asking the young person to ‘write down what you heard me say about the effect of your offending on me’ (AFP38). In other cases, apology may not be articulated as such [but shown] instead by an
apologetic attitude which expresses remorsefulness (AMO49). This expression can be simply offering a handshake or in some specific cultural situations offering a song or cooking a meal for a victim (NMO23).

The effect of apology, especially when you do get an apology from someone who has had a ‘deny always’ attitude (NFO28) is significant. But in spite of its powerful effects, apology cannot be a ‘requirement’ of a justice process (CFO11). As well, no consequential connection can be drawn between apology and forgiveness since apology expresses the feeling that ‘I hope that you can forgive me and trust me in the future’ [but] it cannot be given with the expectation of forgiveness being given in return (AFP41).

Apology is a core justice generating mechanism in restorative practice directed at the victim’s personal harm and at the normative harm done. Apology was seen to sum up many of the other mechanisms because by apologising the offender acknowledged responsibility and provided vindication for victims that the wrong done was not their fault.

Interviewees were provided with the definition of ‘forgiveness’ developed in Chapter 4.

By forgiveness I mean people wronged willfully abandoning resentment and endeavoring to respond with compassion. Forgiveness is a response that the wrongdoer has no right to ask.
One respondent expressed the view that the word ‘forgiveness’ itself can be an impediment with its many unhelpful connotations, [such as] the religious duty to forgive, ‘blank slate’ forgiveness, ‘forgive and forget’, and so on, [all] suggestive of a duty or an obligation to forgive (AMP45). But there is evidence of forgiveness in restorative processes

because [victims] want to move on with their lives, they want to be released from the emotions of defiance, they are open to communicating with and accepting the offender as a fellow human being... If apology is a gift that is offered in the hope that it will be accepted, accepting the apology is at least part of what it means to forgive (AMP45).

For these reasons, forgiveness was on the minds of some participants, even though forgiveness is not a matter of justice. [Rather] forgiveness is [seen as] a matter of grace, that is to say the unearned generosity of others (CMO10). It was emphasised there can be no necessary connection made with apology since victims can accept a non-apology from the offender and still give forgiveness – they are not mutual. Some bond builds up for the offender and there is something useful in the victim being able to put the events to rest (NFO28).

Forgiveness was seen to provide benefits to the both victims and offenders. For victims, the benefit is in allowing them to dissipate emotions of defiance (such as anger) which can be so destructive. The act of forgiveness provides an acceptance that the other person is responsible, not that I as the victim is responsible’ (AMP45). The beneficial effects that flow from these insights are an expression of relief for the victim (CFP8) and for many victims this is helpful, [since] it releases them from their burdens
Victims also move to self-forgiveness in the sense of ‘I can rest easy myself’, ‘I can forgive for my own self now’ (NFO28). But it was recognised that for a lot of victims, forgiveness is not the first or most important thing. It is not necessary that it occurs. Rather it is more about [their] understanding of what has happened and what is happening in the process (AMO49).

Forgiveness provides direct benefits to the offender either by getting the message across that it is about forgiving themselves or through others overtly offering forgiveness by saying ‘I forgive you for what you did’ (AFP34). For some offenders and their supporters culturally for them forgiveness is quite important. It is important for them to hear forgiveness (AFP34).

The restorative process accommodates forgiveness because the process is consistent with the dynamics of forgiveness, it can set a process in train ...where the legacy of the harm is finally put to rest (NMP27). Such forgiveness may come at a later date but the process has begun. Sometimes victims will say ‘I sort of accept your apology. I’ll want to see something concrete. Maybe when you attend a program or make a payment I’ll know then it is genuine’ (NMP25). In this way, the seeds are planted...and are the beginning of a process that has long-term meaning for the victim and the offender, the interchange itself presents the potential for change (NMO29).

It was agreed that in most conferences it is too early for forgiveness. [This can have the effect that] some victims disappoint young people when they say ‘I won’t respond to your apology just yet, I’ll think about what I think of you in time and then decide how I feel’ (AFP41).
None of the programs saw forgiveness as a necessity for justice. The consistently expressed view was that *forgiveness shouldn’t be an expectation of what is to happen* (AFP38). The aim was *one rung lower on the ladder – understanding, not forgiveness* (CMP22). What this often meant in practice was *a movement towards understanding or a sense of why the action was taken or some other sort of reconciliation* (CFP19). The benefit of the restorative process was that *most victims left with an understanding of where the other person was coming from…. This doesn’t quite fit into forgiveness but may be the beginning of it* (AMP35).

Acts of forgiveness or acceptance were seen to provide real restorative benefits to those affected by wrongdoing. But forgiveness is a gift that cannot be demanded and as such is not a core justice promoting mechanism.

**The justice generating mechanisms of restorative practice**

Drawing together the threads of these narratives about each mechanism can provide a summary of the importance placed by interviewees on each as a means to generate justice in their practices. From this it is possible to isolate the particular mix of mechanisms given prominence.

**Mechanisms seen as justice generating**

The conclusions drawn from these responses about the generative mechanisms seen as justice generating indicate these particular types of behaviour and these particular guiding principles contributed to participants experiencing a sense of justice.
Active acceptance of **responsibility** by an offender for his or her wrongdoing and its effects on others is a core behaviour that generates a sense of justice. Restorative practice acts as a catalyst to move the offender towards such acceptance. The process’s discursive structure defeats attempts to deny wrongdoing or downplay its effects.

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 generate a sense of justice.

**Vindication** is critical to justice promotion because it is behaviour that openly acknowledges that the victim is blameless when that is the case in particular circumstances. Such behaviour assists victims by restoring their feelings of safety and security and by giving them normative affirmation. Restorative practice as a process provides vindication in its open acknowledgement that the harm experienced by the victim was wrong and reprehensible.

**Deterrence** is an important effect of restorative processes because it addresses the victim’s desire to reaffirm a sense of community in which the wrongdoing done to them will not reoccur. This deterrent effect is achieved by focusing on creating stronger communities of accountability and by personalising the offending and its effects.

The facilitation of **truth telling** is crucial to justice generation because telling the truth provides a tangible recognition of the offender’s full acknowledgement of responsibility. Truth telling activates the core flow of harm-related benefits and burdens required for just outcomes.
Reparation is an important restorative justice promoting activity because it meets the need for amends, expiation and emotional satisfaction. Reparation in both practical and symbolic terms, addresses the core restorative requirement to make things right and in doing so facilitates a sense of justice.

Apology is a crucial justice promoting activity of restorative practice because it sums up all that is needed for vindication, acknowledgement, denunciation and repair of harm. Apology provides tangible evidence that offenders have confronted the reality of their wrongdoing and have accepted responsibility for making things right.

Mechanisms not seen as justice generating

Conclusions are also drawn about the generative mechanisms that were not seen as justice generating based on the perceptions of respondents that particular types of behaviour and particular guiding principles did not contribute to participants experiencing a sense of justice.

Being held accountable in an overt external sense was not seen as justice generative. Rather than being held accountable, the offender accounts for their own wrongdoing by accepting responsibility. This alternative form of self-accounting is better demonstrated both by acknowledgement and by external signs of accepting responsibility through making amends.

Overt censure which is deliberate in the sense of ‘publicly denouncing harmful behaviour and providing consequences for offenders’ was not seen as a means to generate a sense of justice in restorative practice. ‘Self-censuring’ however did so.
Overt censure implies denunciation that is outside and imposed upon the offender. Restorative practice rejects such censure and substitutes instead a form of reproach which can bring an offender to a state of self-censure.

Restorative practice did not use punishment as a justice generating mechanism. Though punishment is on the minds of most victims and their supporters when they agree to participate in a restorative encounter, it does not provide the means for justice generation. Neither is punishment its means to express censure. Restorative practice highlights instead the expressive powers of the process and of the reparation and apology which flows from it.

Adhering to the principle of proportionality was also not seen as a means by which to generate just outcomes in restorative practice. This was the case both with determining sanctions that were commensurate with the severity of the wrong or with determining the amount of restoration needed to match the harm done. The focus of restorative practice is instead on the repair of harm, and proportionate censure or proportionate repair were not seen as relevant to affecting this repair.

None of the sites of restorative practice saw forgiveness as its means of justice generation. A consistently expressed view was that forgiveness could never be an expectation of the restorative process. A more modest expectation of victims and other affected by the wrongdoing was that they would find relief from some of the harm done and move towards a sense of understanding.
The justice generating mechanisms of restorative practice

Drawing on the reality of practice captured in these narratives, we have identified the unique justice generating power of restorative practice as flowing from the encouragement of the following behaviours:

- acknowledgement of responsibility,
- expressions of remorse,
- vindication of the victim,
- deterrence of reoffending,
- truth telling,
- material and symbolic reparation, and
- offers of apology.

Conclusion

This chapter has considered the views expressed by practitioners and others involved in a number of selected sites about the generative mechanisms important for generating an experience of a sense of justice in their practices. There was a consistently expressed view that acknowledgements of responsibility, expressions of remorse by offenders and the vindication of victims were important in creating this experience. It was found that deterring reoffending, encouraging truth telling, providing reparation and facilitating offers of apology were also important factors. Conversely, interviewees consistently said that holding the offender to account, overt censure, inflicting punishment and ensuring proportionate responses were not important in their practices to generate such
an experience. Acts of forgiveness were neither an expectation nor a means of justice generation in restorative practice.

Abstracting from these empirical findings it is possible to surmise that justice creation is a deliberate (albeit not necessarily a conscious) part of the restorative process. The encouragement of certain types of behaviour and the adherence to certain guiding principles acts as the catalyst for this. There is commonality in this regard with legal practice in a number of respects. But the emphasis that is given to certain other factors (apology, reparation, remorse, vindication of victims) shows a clear departure. The image of justice generation which emerges from these interviewees is one that is markedly different from that of legal practice.

At the end of Part Two, two related expectations about restorative practice were raised. It was firstly suggested that since restorative practice displayed such different potentials as regards the evaluative standards of justice (measuring well in terms of the relationships and equality standards, but poorly in terms of desert and rights), there was something markedly different in the way it generates an experience of justice. The ‘generative mechanism typology’ developed in Chapter 4 has been used to test this assertion. The differences predicted have been borne out in the reality of practice captured in these narratives. The analysis of the data suggests a distinct mix of generative mechanisms is at play in restorative processes and that this distinctiveness produces a different form of justice generation.

In the course of this analysis the paradigmatic unity and the paradigmatic shift in the generative mechanisms used by restorative practice as compared with legal practice is
confirmed. Restorative practice utilises many of the same mechanisms as legal practice by placing importance on responsibility, remorse, vindication and truth telling to open the gateway to accountability. But restorative practice shifts markedly in the way it generates censure and repair, preferring to use reparation and apology rather than punishment. This helps to explain why restorative practice has greater potential to satisfy the requirements for equal treatment and harmonious social relationships and relatively poor potential to impose just deserts and always guarantee rights protection. It also confirms that restorative practice looks more to ‘equal appropriateness’ through individualising responses than it does to strict equality (Hudson 1998a).

The second expectation raised was that because the two forms of practice mirrored each other’s adherences and non-adherences so well, some combination of the two practices might have the potential to deliver more just outcomes. Offering restorative practice as a complete substitute in response to wrongdoing will simply substitute new deficiencies for old. But bringing the two forms of practice together in some complementary form offers greater potential. Part Four considers the feasibility of such integration. Chapter 9 first reviews the developing criminal legal jurisprudence for indications that restorative approaches are currently being accommodated within legal practice to some degree that does not diminish their distinctiveness. Chapter 10 then proposes an institutional design model in which the practices could be integrated.
PART FOUR

DEVELOPING AN INTEGRATED MODEL OF JUSTICE PRACTICE
Chapter 9

Jurisprudential accommodation of restorative practice

Introduction

Part Four explores the possibilities for the integration of legal and restorative forms of response to wrongdoing. This chapter first examines the legal jurisprudence for indications that restorative practice has been accommodated in varying degrees within legal practice. A fresh methodology is employed for this purpose in the form of legal case analysis. Chapter 10 draws from the finding of this analysis in suggesting a series of design ideas about how a ‘restorative question’ model of integration could best be institutionalised in practice.

It has been argued throughout that to provide a full justice response to wrongdoing it is necessary to satisfy four normative standards first identified in Chapter 3. It was shown in Chapter 5 that legal practice has poor potential to meet two of these standards – those of equality and harmonious social relationships. It was similarly shown in Chapter 6 that restorative practice for its part has poor potential to meet two other standards – desert and rights. Neither legal practice alone nor restorative practice could provide an adequate justice response. Instead, it has been suggested that some means of integrating the two forms of practice is necessary to do this. The ‘criminal justice process’ is the institutional locus for this to take place.

This chapter looks to the legal jurisprudence for indications that restorative forms of response can indeed be accommodated within this criminal justice process. Legal
practice traditionally meets the essential aims of responses to wrongdoing in its own settled ways – retribution through punishment, restoration through normative repair and consequential aims through deterrence, rehabilitation or by separation. This chapter explores whether this traditional approach has altered in the face of interactions with restorative practice’s alternative approach of meeting retribution by means other than punishment, restoration through a keener focus on the repair of personal harm, and consequentialist aims met instead by an emphasis on guaranteeing future right-doing. The focus is current sentencing practice in the three jurisdictions reviewed – New Zealand, Canada and Australia.

This analysis will show a distinctive approach in two of these jurisdictions, both of which mandate a requirement to consider restorative approaches in their legislation. The first approach is to enlarge legal practice’s own practice to include within it restorative conceptions of justice. This has become the jurisprudential direction in Canada. The second approach instead allows restorative forms of practice their own autonomy to deliver alternative forms of response. This has been the New Zealand approach. Both modes of accommodation have aspects which recommend them. It is possible to glean a number of institutional design ideas from each about how a model of integration can be built.

**Meaning of ‘sentencing jurisprudence’**

In the jurisdictions considered, legal practice responses to wrongdoing are governed by an interplay of existing sentencing legislation and developing judicial or ‘general law’
principles. If restorative approaches are to play a more significant role in such responses they must first be accommodated within this existing ‘sentencing jurisprudence’.

The notion of ‘jurisprudence’ in broad terms refers to the development of the law in particular ways, in order to serve particular normative purposes. Twining (1974:157-61) defines ‘the proper province of jurisprudence’ in these broad terms to include ‘lower order’ questions (for example, working theories of justice which provide general guidelines about how to perform the particular tasks of law) as well as questions of ‘high theory’ (the nature and function of law, the concept of a legal system, the relationship between law and morality). It is in the first of these categories that our interest lies, namely with a focus on sentencing jurisprudence as a ‘working theory of justice’.

Legislation

Each of the three jurisdictions has its own primary ‘sentencing’ legislation. Such legislation is typically designed to achieve ‘just outcomes’ in response to wrongdoing.

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172 With some small modifications the form of legal citation used in this chapter follows that recommended in the second edition of the Australian Guide to Legal Citation (AGLC) published in 2002 by the Melbourne University Law Review Association. One modification is to include dates of decision for all judgments (and judicial officers when known) as this assists in tracing the development of a restorative sentencing jurisprudence in each jurisdiction. The AGLC provides Australia with a uniform system of legal citation. See the guide accessed 16 September 2009 at http://mulr.law.unimelb.edu.au/index.cfm?objectid=EC680959-CA26-5FED-64377B996D86A395

As well as the development of sentencing jurisprudence through legislation and case law, a number of jurisdictions have seen the influence of sentencing advisory bodies. Such bodies are designed primarily to draw upon external expertise and experience to develop sentencing policy acceptable to the community and to give voice to community perspectives. See Freiberg & Gelb {Freiberg, 2008 #835}

173 For New Zealand and Canada there is one single nationwide provision (the Sentencing Act 2002 (NZ) and the Criminal Code RSC 1985 c. 46 respectively). In Australia, each of the states or territories has its own separate legislation (for the jurisdictions focused on here these are the Crimes (Sentencing Procedure) Act 1999 (NSW); the Crimes (Sentencing) Act 2005 (ACT); the Criminal Law (Sentencing) Act 1988 (SA) and the Sentencing Act 1991 (Vic).
The legislation may also seek to meet additional functions more strictly regulatory than justice-focused, such as the prevention of crime, the maintenance of public safety and the giving of expression to normative standards.

Each jurisdiction expresses its legislative intentions differently, giving more or less attention to particular factors. However, there is sufficient uniformity of purpose to permit some general analysis. Each jurisdiction’s legislation states more general ‘purposes or objectives of sentencing’ and then specifies these ‘purposes’ in more detail. The statement in s.7 of the Crimes (Sentencing) Act 2005 (ACT) is representative of these commonly expressed purposes. In that legislation a ‘sentence’ may be imposed for the highlighted core ‘purposes’:

- to ensure that the offender is adequately punished
- to prevent crime by deterring the offender and other people
- to protect the community
- to promote the rehabilitation of the offender
- to make the offender accountable for his or her actions
- to denounce the conduct of the offender
- to recognise the harm done to the victim of the crime and the community.

There is little explicit reference to ‘justice outcomes’ in most of the legislative provisions. The Canadian legislation does say in Part XXIII of its Criminal Code RSC

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174 The ACT legislation is chosen because it is the most recent (2005) and because it is clear that its drafters had regard to similar legislative statements in the other jurisdictions examined.

175 Interestingly, neither the equivalent Canadian nor New Zealand legislation include ‘punishment’ as one of its specific purpose, though the Canadian legislation implicitly does so by including as a specific purpose the need ‘to separate offenders from society’ which of itself is an obvious punishment.
1985 C. 46 (c.718) that ‘the fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful society by imposing just sanctions’, but direct references to ‘just outcomes’ is the exception rather than the norm.

Case law

In addition to these legislative provisions, there is a body of general or common law that determines the application of sentencing law and practice. This essentially ‘judge-made’ law complements and interprets the legislative provisions. It is within the context of a combination of both sources that sentencing decisions are made. The process by which individual sentences are arrived at may reflect a more ‘instinctive or intuitive synthesis’ approach than any transparent or systematic reference to existing legislation or guiding judicial principles. It is rare therefore that the reasons for decision will be explicitly explained by reference to each of the stated purposes.176

Restorative jurisprudence

For the purposes of this analysis, the legislative and general law provisions taken together are seen as constituting a ‘jurisprudence’ of sentencing. These principles are seen as performing both the practical and ‘symbolic function[s] of pronouncing on the wrongness of the behaviour with which [they] deal’ (Hudson 2002:628). More specifically, this jurisprudence has emphasised retributive aims, often designed to provide an ‘authoritative condemnation of the class of behaviours’ proscribed by the

176 The High Court of Australia in Johnson v The Queen (2004) 205 ALR 246 considered these opposing approaches with Kirby J saying ‘in sentencing, as in many other judicial tasks there is a role for instinct. I have confessed to it myself; but also referred to the need to keep it under tight control’ (para 42).
criminal law (Hudson 2002:629). The focus in this chapter is to search this jurisprudence for evidence of restorative influences on traditional legal concepts like ‘accountability’, ‘denunciation’ and ‘acknowledgement of harm’ which would normally ‘disgorge retributive responses’ (Bowen and Boyack 2003:6). The search is for evidence that restorative alternatives (such as the use of apology and reparation to express censure) are being accommodated within the developing sentencing jurisprudence in ways that influence outcomes.

**Legal methodology**

The methodology adopted to investigate these developments consisted in a review of recorded sentencing decisions in three jurisdictions selected. Each jurisdiction maintains a database of sentencing decisions in which some form of written record (variously called ‘sentencing notes’, ‘sentencing remarks’ or ‘comments on passing sentence’) are available.\(^{177}\) There are two caveats to using these records as a means of determining current developments in sentencing jurisprudence. Firstly, these records do not constitute a full record of all sentence decisions delivered in each jurisdiction. Some decisions are simply not centrally recorded, and many decisions are given orally without any written transcription being made. Secondly, there is a broader risk in relying too heavily on the content of these ‘sentencing notes [so as] to gauge from them how [well] judges incorporate conference outcomes, or their view/support towards restorative justice’ (NZ Ministry of Justice 2005a:n.223). This risk is real because such notes seldom record earlier, perhaps more substantial discussions about restorative practice in the exchanges between lawyers and the court during the sentence hearing itself. These

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prior discussions go unreported unless they are specifically referenced by the judge in his or her recorded remarks (by references such as ‘as I said to counsel during his [her] submissions…’). What is only captured in ‘the transcribed sentencing notes [is] the “end bit” of the sentencing’ (NZ Ministry of Justice 2005a:n.223).¹⁷⁸ The best way to address the restrictions in the data is to refrain from drawing conclusions about developing practice based on single sentencing decisions but rather seek instead to trace a pattern of changing judicial behaviour if that can be determined from a sequence of judgments.

Allowing for these qualifications the developments traced can be summarised as follows. In New Zealand, the use of restorative practice as a response to wrongdoing was judicially approved by the New Zealand Court of Appeal in the decision of R v Clotworthy ¹⁷⁹ and subsequently mandated in national legislation. The ‘Clotworthy principle’ which has developed from this has since been applied in ways that clearly mark a radical departure from existing judicial approaches. Specifically, there is evidence of an acceptance that restorative aims can be achieved by addressing personal, as well as normative harm. There was also the judicial acceptance that consequentialist aims, such as deterrence and rehabilitation are equally capable of being achieved through the use of restorative conferencing processes. There nonetheless remains continuing reluctance to allow that retributive aims can also be addressed restoratively. The development of these jurisprudential departures is traced further in what follows.

¹⁷⁸ Remarks from judges who formed part of the interview subjects reported in Chapter 8 showed they possessed a more detailed and sophisticated knowledge of restorative responses than would have been apparent from merely reading their sentencing remarks (especially those from the New Zealand and Canadian benches).

¹⁷⁹ (1998) 15 CRNZ 651 (CA)
In Canada too, certain parts of overtly ‘neutral’ national sentencing legislation have
been interpreted to provide mandatory restorative requirements as a consequence of the
decision of *R v Gladue*. The ‘Gladue principle’ which developed from this marks a
similarly wide departure from traditional sentencing jurisprudence. Specifically in the
case of restorative aims, there is also a wide acceptance that restoration is achievable by
addressing personal as well as normative harm. In the case of consequentialist aims,
there has been substantive jurisprudential refinement that allows that these aims are
often as well or better achieved through restorative means. But even more than was
found in the case of New Zealand, there is very little evidence of any change in the view
that retributive aims can be delivered restoratively. Canada’s jurisprudential
developments are similarly traced in more detail in what follows.

In the case of Australia, there is both an absence of mandatory requirements to give
consideration to restorative approaches and the absence of a single guiding
jurisprudential response to restorative practice similar to *Clotworthy* or *Gladue*. This
can partly be explained by the absence of national sentencing legislation, and partly
because most restorative practices operating in the Australian jurisdictions deal only
with juvenile offenders and so produces fewer appellate decisions. However two paths
of response are discernable in individual Australian state or territory legislative reforms.
The first is a minimalist approach where ‘restorative aims’ are added to sentencing
principles and implicitly allow for the possibility of wider sentencing aims being
delivered by ways other than through punitive means. The second more substantive

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180 (1999) 1 SCR 688
181 In the early developments of restorative practice in the United Kingdom a number of appeal court
decisions, notably *R v Collins* (England and Wales Court of Criminal Appeal 2003) and *R v Barci*
(England and Wales Court of Criminal Appeal 2003) enunciated as a principle that participation in a
restorative encounter ‘before sentencing can provide evidence of mitigation that should normally reduce
the length of imprisonment’ (Sherman and Strang 2007:13). There is no evidence that this has developed
however into a guiding principle.
approach explicitly permits the use of ‘restorative processes’, as a means to address some of the ‘relational requirements of justice’. This more limited scope for accommodation of restorative approaches is examined further in what follows.

The New Zealand accommodation

The Clotworthy decision

The case of Clotworthy in 1998 provides a strong single guiding principle on restorative practice in New Zealand.\(^{182}\) The case involved an unprovoked attack during which a drunken offender slashed the victim’s face with a knife and stabbed him six or more times in the chest and stomach. These attacks caused life threatening injuries and permanent facial scarring. The offender pleaded guilty and sentencing was delayed in order to conduct a restorative justice conference facilitated by a community-based group. A report of that conference was considered by the judge (before sentencing) who said in part:

\[
\text{The main emphasis of submissions today have been for me to consider the implications of the restorative justice conference. In a rare and almost unbelievable communication from the victim, it is clear that he does not see any}
\]

\(^{182}\) R v Clotworthy includes a first instance sentencing decision in the District Court at Auckland (Thorburn J 1998) and a Crown appeal (Court of Appeal of New Zealand 1998). Prior to Clotworthy, a series of lower court sentencing decisions had begun to introduce restorative approaches into sentencing practice beginning from about 1995. These included R v Symon (1995) which involved a street robbery where a referral was suggested by the judge for a conference ‘generally described as restorative justice’ (Thorburn 2005:5); R v Taparau (1995) (a serious assault on police); R v Currie (1995) (a shaken baby syndrome assault); R v Murphy (a kidnapping at knife point); R v Miskea (1996) (an assault with a knife), and R v Akurangi (1997) which involved an assault. An illustration of how these developments were judge-driven is evident in R v Akurangi where the judge said to defence counsel ‘I would like to see the possibility of some restorative justice initiative being undertaken in this matter’ (Bowen and Consedine 1998:143).
The judge was of the view that the relative seriousness of the offence did warrant a term of imprisonment of two years (which was the maximum period that could then be suspended under the existing legislation). The then operative Criminal Justice Act 1985 (NZ) also required the judge in case of serious violence offences to impose a full time custodial sentence, unless satisfied there were ‘special circumstances’ to depart from this (s.5). The judge reached the view that the outcome of the conference did provide such ‘special circumstances’ and so suspended the sentence of two years, imposed a community service order and a reparation order of $15,000 intended to facilitate plastic surgery for facial scars ($5000 had been paid at the time of sentence and an installment order was made for the balance). The judge made specific reference to the purposes of sentencing saying that ‘for the prisoner before this court, the issue of deterrence is almost non existent’ and thus, ‘the only purpose served in this particular case by an unsuspended sentence of imprisonment, would be to satisfy that perceived community need for the court to be punitive’ (Thorburn J 1998:paras 7 & 9). At the time the decision was reached there were no specific restorative purposes of sentencing but the provisions of the Criminal Justice Act which required courts to explore reparation possibilities (s.11), to take account of any offer of compensation and to consider whether such offer had ‘been accepted by the victim as expiating or mitigating the wrong’ (s.12) were read in a restorative fashion by the sentencing judge.

The prosecution appealed the decision on the basis that a non-custodial sentence was an inadequate response to such serious offending. The Court of Appeal considered the
sentence imposed and reached the view that the sentencing judge had erred, since ‘by no process could the appropriate starting point [of penalty] properly have been reduced to a sentence of 2 years imprisonment so as to permit suspension’ (Court of Appeal 1998:654). The Court set the starting point instead at five years and the effect of this was to mandate a custodial sentence. Applying the s.12 considerations, the Court was of the view that ‘substantial weight should be given to this dimension, in particular because Mr Cowan [the victim, who had addressed the Court] was prepared to accept that offer as expiating the wrong’ (Court of Appeal 1998:660). The Court reduced the period of imprisonment substantially from five to three years. Because the offender was as a consequence sent to jail, the Court also reduced the reparation order to the $5000 already paid.

The Court in an oft quoted passage made these comments about restorative justice as a sentencing consideration:

We would not wish this judgment to be seen as expressing any general opposition to the concept of restorative justice (essentially the policies behind ss11 and 12 of the Criminal Justice Act). Those policies must, however, be balanced against other sentencing policies, particularly in this case those inherent in s5, dealing with cases of serious violence. Which aspect should predominate will depend on an assessment of where the balance should lie in the individual case (Court of Appeal 1998:661).

The Appeal Court’s analysis of the restorative aspects was narrowly focussed on reparation since this was then the only legislative licence available. These limited
‘restorative aspects’ were accepted as having ‘a significant impact on the length of the term of imprisonment which the Court [was] directed to impose’ by the legislation (Court of Appeal 1998:661). In some quarters the Court of Appeal has been strongly criticised for ‘fail[ing] to seize the opportunity to fully consider restorative justice principles’, since it gave little attention to restorative practice’s commitment to the deterrence principle, particularly the ‘personal deterrent element’ of the process (Bowen and Thompson 1999:5, 7-8). The facilitator who had conducted the conference had emphasised in his report the conference’s potential deterrent effect. He described the offender as being ‘a basically law-abiding citizen who offends, however spectacularly, once or infrequently’ and who ‘by experiencing his victim’s pain in the restorative justice conference, [has been] deterred by this experience’ (as quoted in Bowen and Thompson 1999:8).

Conversely, the original District Court decision has been criticised for providing a false diminution of the objective seriousness of the harm caused. Davis (2007a; 2009:13) interpreted the sentencing judge’s remarks as in fact ill-serving the development of a restorative jurisprudence as a consequence of the judge’s attempt to diminish the objective gravity of the wrongdoing. She argues that the sentencing judge ‘used Just World strategies to create an illusion of justice’ so as to justify a more lenient sentence than appropriate. Davis’s claim is that this original decision attempted ‘to create the illusion that the facts themselves dictated a lenient sentence [which they did not]’ and that in fact the decision ‘represents a lost opportunity to test restorative justice’s power to transform the criminal justice system’ more fully (2009:13).183

183 Davis provides a radically different analysis of the original Clotworthy decision citing it as an example of Lerner’s (1980) Just World Delusion being evident in judicial sentencing. She argued that the judge emphasised the subjective aspects of the offender and severely downplayed its objective seriousness of the offence (noting the behaviour as ‘utterly bizarre, defying explanation, understanding or intelligent
Nonetheless the appeal decision that reversed a ‘lenient sentence’ has become the catalyst for a substantial change in New Zealand sentencing jurisprudence. Restorative encounters and the commitments made in outcome agreements have as a consequence come to be accepted as being capable of achieving some retributive aims (albeit limited mainly to facilitating the pain of remorse and the denunciation of wrongful conduct); restorative aims (more substantially by addressing both personal and normative harm) and consequentialist aims (particularly in terms of encouraging deterrence and rehabilitation and finding alternatives to full time separation). These developments have been the result of the recognition of an obligation to balance restorative approaches against more ‘punitive’ means when meeting sentencing aims. This legacy can traced through a series of post-Clotworthy decisions.

**Developments post-Clotworthy**

The core principle abstracted from Clotworthy was a need to always find ‘where the balance should lie in the individual case’ when sentencing offenders. This has been taken to mean a balance ‘between retributive and restorative purposes on sentence’. As such it has provided a vehicle for expanding the impact of restorative approaches within the sentencing jurisprudence, rather than being seen as a ‘defeat’ for restorative approaches to wrongdoing. The appeal decision has instead been interpreted in positive terms as providing the means to ‘cement… confidence that restorative justice was a recognised concept that could be applied in serious offences’ (Thorburn 2005:4). More appreciation’) whereas the Court of Appeal noted the ‘extreme and near fatal violence for the purposes of an attempted street robbery’. She said the judge in doing so was deluding himself that the decision was just. In doing so, the judge missed the opportunity to ‘explain exactly why a restorative approach should be fully incorporated into criminal sentencing and extended to serious cases like this one’ (2009:13).
specifically, the decision has seen a growing acceptance of the ability of restorative approaches to deliver on each of the essential aims of responses to wrongdoing. \(^{184}\)

In a 1999 decision of *D v Police* \(^{185}\) a successful appeal against the severity of an initial sentence was granted on the basis that insufficient regard had been given to the effect of a restorative encounter in meeting the need for personal and normative repair. The offender had confessed to serious sexual assaults on his two teenager daughters. The appeal judge gave particular emphasis to how the conference and its outcome agreement had addressed restorative aims through the ‘help that it gave to the victims in healing the hurt which the offending had caused them, particularly by helping with family difficulties to be healed for the benefit of all’.

In a 2000 decision of *R v Fletcher* \(^{186}\) restorative principles were again considered. This case involved facts similar to *Clotworthy* in that an offender had pleaded guilty to a malicious wounding offence where he had attacked and bitten off a large portion of the victim’s ear in a bar room fight. The judge while concluding that ‘a prison sentence is an inevitable outcome of today’s hearing’ (para.6), suspended that sentence and ordered reparation of $25,000 to cover the victim’s loss of earnings and medical treatment. The judge was satisfied that the outcome agreement reached in the restorative encounter had sufficiently met the need for personal restoration and reparation.

\(^{184}\) The Court of Appeal has not revisited the *Clotworthy* decision. Two matters have come before the court where restorative justice was mentioned, but in each case a conference had not been held. In the appeal of *R v Nikolao & Ors* (2005) CA375/04;CA386/04;CA414/04 (15 March 2005) which involved a serious wounding the court said ‘restorative justice appears to be raised for the first time on this appeal’ (para 38) and in *R v Wilcox* (2005) CA14/05 (27 April 2005) involving assault with a rifle and threats to kill the court noted that ‘the appellant had contacted Restorative Justice Services with intention of seeking a conference with the victim’ but one was not held (para 26).

\(^{185}\) *D v Police* unreported High Court Auckland AP 161/99 (Nicholson J) (5 November 1999).

\(^{186}\) *R v Fletcher* unreported District Court Auckland T 990070 (Gittos J) (29 March 2000).
In a 2001 decision of Police v Stretch\textsuperscript{187} a Crown appeal was lodged concerning the adequacy of a prison term of 18 months for a charge of culpable driving causing death. In this case, while there had been no formal restorative conference, the court still considered meetings between the affected families as constituting restorative encounters. The appeal judge recognised that the sentencing judge had considered the capacity of these meetings in terms of addressing consequentialist aims:

\begin{quote}
It appears the principles of restorative justice may stand in conflict with principles of deterrence which represent the norm, but if the recognition of restorative justice in Clotworthy is to have practical effect, then I think a balance must be sought, no matter how difficult it might be to find that balance. That is what the sentencing Judge sought to do (para.45).
\end{quote}

On this basis the appeals court was satisfied that such aims had been met restoratively and did not increase the sentence.

Other decisions show the scope given to addressing retributive aims through restorative approaches. In a 2001 severity appeal of Kalim v Police\textsuperscript{188} the appeals court considered the retributive penalty necessary for an offender who had carried out a violent road rage assault. The court accepted that the restorative conference had provided ‘a valuable source to evaluate the depth and quality of [the expression of] remorse’. The appeals court rejected the sentencing judge’s view that the restorative encounter ‘did not achieve a great deal’ and varied the imprisonment term of four months (Thorburn 2005:10).

\textsuperscript{187} Police v Stretch unreported High Court Nelson AP 9/01 (Durie, J) (9 October 2001).

\textsuperscript{188} Kalim v Police unreported High Court Auckland A198/01 (Glazebrook J) (4 December 2001).
Similarly, in *Police v Carter* 2001\(^{189}\) an offender had pleaded guilty to drink driving causing the death of ‘his lifelong best friend’. A restorative conference took place. The judge sought to balance the recommendation of that conference with the then existing legislation that said an offender ‘deserves to suffer punishment’ in such a case (Carruthers 2005:3). The judge departed from this strict requirement to impose a custodial sentence by suspending it for a period of eighteen months, as well as imposing conditions to attend community service sessions involving addressing students on drink driving. The court was satisfied that some retributive aims has been addressed on the basis that:

> the restorative justice process resulted in an agreement that went some way to redressing the harm caused to the victims, whilst also recognising the harm that the offender had brought upon himself [and the need for] denunciation (Carruthers 2005:5).

A 2002 case of *R v Castles*\(^{190}\) involved a Crown appeal against a sentence of two and a half years imprisonment for a serious sexual assault by a group of men on a fellow male, which was part of a pattern of bullying. The Court of Appeal accepted the sentencing judge’s decision that the need for retribution had in part been met by one offender’s attendance at a conference with the victim’s parents, where he apologised to the victim and his family (2002:para 19). The court accepted that the apology has provided partial satisfaction of the need for retribution and so mitigated the length of the punitive sentence imposed.

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\(^{189}\) *Police v Carter* unreported District Court Wanganui CRN 1083010524 (Becroft J) (30 October 2001).

The influence of the Sentencing Act 2002

Following these early post-Clotworthy decisions, the new Sentencing Act 2002 (NZ) had the further effect of ‘crystalliz[ing] into one broad principle for sentencing’ these varying accommodation (Thorburn 2005:11). In s.8, the Act specifically required courts ‘to take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur’. As well, s.10 widened the list of specific purposes of sentencing making it easier for restorative approaches to be used to satisfy a broad range of sentencing purposes. Courts were now required to take into account more specific purposes which could be interpreted restoratively, including:

- *any offers of amends,*
- *any agreement between the offender and the victim as to how the offender may remedy the wrong, loss or damage,*
- *the responses of the offender or the offender’s family, whanau, or family group of the victim, and*
- *any measures taken …to make compensation, apologise or otherwise make good the harm.*

These additional provisions established the Clotworthy requirement to determine ‘where the balance should lie’ between restorative and punitive approaches as mandatory (Thorburn 2005:11). The reforms were seen as an indication that the ‘paths of reasoning are now being carefully laid to demonstrate how conference outcomes [can be] taken into account’ to address such aims (Thorburn 2005:12). It is useful to trace further jurisprudential accommodations that were made following this legislation.
In *R v Edwards* the court had imposed as a special condition for early release on an arsonist that he would undertake ‘such restorative justice processes as may be arranged by or through the probation service, with his consent and the consent of the victims of his arsons’. It was specifically noted in the decision that such contact was intended to have the effect of deterring further offending.

*Feng v Police* involved an appeal court’s reversal of a refusal of home detention on a two year term of imprisonment for dangerous driving causing death. The court in overturning the original decision was satisfied that the deceased’s mother’s remarks during the restorative conference that ‘we are not here to punish you or judge you’ indicated that a measure of retribution had been achieved in the conference other than by punishment (2002:para 18).

In the 2003 case of *R v Cassidy*, the offender’s ‘willingness to partake in a restorative justice conference’ was recognised as an acceptable means by which to express remorse. The offender was a staff member in a bar who had been convicted of manslaughter after striking and killing a patron while removing him from the premises. A restorative conference took place with the deceased’s family. The judge addressed the offender about that conference:

> At it [the conference], it is to your credit that you accepted full responsibility for what happened and expressed your sorrow and deep remorse....A facilitator of

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192 *Feng v Police* unreported High Court Auckland A127/02 (Salmon J) (4 September 2002).
the conference noted... [that this] would be a starting point for the healing process for all involved (2003: para 10).

Though the offender was imprisoned for two years there was recognition that the requirement for retribution had been partly satisfied through the pain of expressing remorse in the conference and that this could be reflected in reduced time to be served.

A similar view was taken in the 2004 case of *R v Folaumoeloa*\(^\text{194}\) which involved a young offender involved in an aggravated robbery of a service station. In imposing a reduced period of imprisonment the sentencing judge referred to the fact that the offender had expressed:

> the sort of embarrassment and shame that is of a nature that engenders a deep desire to do better and not offend again for the sake of avoiding embarrassment for a family or close community (2004:para 24).

Finally, in a more recent 2006 case of *R v Sami*\(^\text{195}\) involving a violent purse-snatching, the judge expressed satisfaction that the necessary denunciation of the defendant’s wrongdoing had occurred as a consequence of the restorative conference:

> I am sure that denunciation has already occurred through the defendant’s family and the restorative process. [You have] been held accountable not just through the Court but in a direct, face-to-face way.


The judge considered imprisonment in that case was not warranted, and that retribution at the conference had provided denunciation and that this could be sufficiently supplemented by community work, supervision and reparation.

This small selection of New Zealand sentencing decisions reflects a growing embedded focus that some of the requirements of responding to wrongdoing can be met through restorative approaches. There is considerable evidence of this growing acceptance in its judiciary (including appeal courts). Restorative approaches are accepted as capable of providing not only restoration itself, but of meeting some aspects of retribution (specifically the need to provide a forum in which offenders are accountable, their behaviour is denounced and self-censure is evident through remorse) and some elements of the consequentialist aims (most notably deterring further offending).

These accommodations have been substantial because legislative provisions now require courts as a compulsory step to take account of what takes place at a conference and what can be achieved through outcome commitments agreed there. Certainly this is a slow process as Judge McElrea (of the NZ District Court) notes:

*I would like to tell you that the provisions of the 2002 Act have brought about a vast difference in the way the courts approach sentencing, but the truth is that progress is slow. We have very far-sighted legislation, but lawyers (including judges), prosecutors, government advisers and others are slow to give up their old court-based, adversarial mindsets* (McElrea 2007:102).
However, what can be seen to have begun in the New Zealand jurisprudence is recognition that restorative approaches can play a substantial role in achieving the essential aims of responses to wrongdoing. This recognition is routinely framed in jurisprudential language as meeting ‘sentencing objectives’. In particular, restorative approaches with their emphasis on acceptance of responsibility, reparation and apology are increasingly accepted as capable of meeting core restorative and consequentialist aims. The position is much slower with respect to recognising the role of such approaches in meeting retributive aims. At present, their place in meeting the need for retribution is confined largely to an acceptance that encounters can facilitate expressions of remorse and can denounce wrongful behaviour directly. Though these developments are small, it is instructive in terms of developing the model of integration to compare this New Zealand experience with a different approach taken in Canada.

The Canadian accommodation

For Canada, its ‘somewhat controversial jurisprudence of restorative justice’ (Roberts and Roach 2003:246) began with the influence of the landmark decision of R v Gladue (1999)\(^ {196}\) and its subsequent revision in R v Proulx (2000).\(^ {197}\) These two cases were themselves judicial responses to significant codified sentencing reforms introduced Canada-wide in 1996.

\(^{196}\) R v Gladue [1999] 1 SCR 688 (23 April 1999) [Gladue].


**Statutory reforms**

The 1996 reforms added a new statutory statement of the purposes and principles of sentencing to the *Criminal Code*, principally in ss 718 and 742.

Section 718 provides for ‘just sanctions’ to meet certain objectives:

> The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

   a. to denounce unlawful conduct;
   b. to deter the offender and other persons from committing offences;
   c. to separate offenders from society, where necessary;
   d. to assist in rehabilitating offenders;
   e. to provide reparations for harm done to victims or the community;
   f. to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and the community.

Section 718.2 (e) forms part of a provision dealing with other considerations on sentence, including the need to take account of mitigating and aggravating factors, consistency and concurrent penalties:

> A court that imposes a sentence shall also take into consideration the following principles:

[.....]
(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

A further important element of the reforms was the creation of the intermediate sanction of a ‘conditional sentence of imprisonment’ in s.742. Section 742.1 provided (at the time the reforms were introduced)\(^{198}\) certain conditions for imposing of conditional sentences:

\[
\text{Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court}
\]
\[
a. \text{ imposes a sentence of imprisonment of less than two years, and}
\]
\[
b. \text{ is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,}
\]
\[
\text{the court may, for the purposes of supervising the offender’s behaviour in the community, order that the offender serve the sentence in the community, subject to the offender’s complying with the conditions of the conditional sentence order made under section 742.3.}
\]

As this section of the legislation makes clear the conditional sentence is ‘a term of imprisonment that is served in the community’. As such, it is a hybrid measure so that

\(^{198}\) As a result of reforms to the Code introduced in the Conditional Sentencing Reform Bill (2007) this section now excludes ‘a serious personal injury offence as defined in s. 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more’. Section 752 defines a serious personal injury offence as including an offence involving violence, conduct endangering the lives of others and certain sexual assault offences.
‘semi-separation’ remains punitive, but ‘serving’ it in the community is potentially restorative. The legislation has been judicially interpreted in such a way that conditional sentences are seen as ‘intermediate sanctions with the potential to impose restorative conditions on offenders who would otherwise be sentenced to jail’ (Roberts and Roach 2003:246).

**The Gladue decision**

The legislative reforms were given close judicial scrutiny in *Gladue*, most specifically the effect of s.718.2(e) in requiring that sanctions other than imprisonment should be considered particularly in the case of Aboriginal offenders. The case also considered the effect of the new sentencing objectives in s.718 more broadly. In this case the defendant was an aboriginal woman who had stabbed her partner to death during the course of an argument in which he had taunted her with his infidelities. She pleaded guilty to manslaughter and was sentenced to three years imprisonment by the trial judge. This sentence was appealed and confirmed by the Court of Appeal for British Columbia. On further appeal to the Supreme Court of Canada, the court did not interfere with the sentence imposed saying it was ‘not unreasonable’ (and indicating in any event that ‘the accused was granted, subject to certain conditions, day parole after she had served six months’ (para 98)). But the court did make comment about the effect of the reforms on the satisfaction of the sentencing objectives.

The court acknowledged that the legislative reforms represented a significant departure from existing sentencing jurisprudence and therefore requires it to consider whether this had been properly accommodated in the original decision. The court recognised that certain sentencing aims now included restorative requirements:
Clearly, s.718 is, in part, a restatement of the basic sentencing aims, which are listed in paras. (a) through to (d). What are new, though, are paras. (e) and (f), which along with para. (d) focus upon the restorative goals of repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender (para 43).

Additionally there was a recognition that ‘restorative sentencing goals do not usually correlate with the use of prison as a sanction’ (para 43), and can be better served via community based sanctions. In this case the offender had not participated in a restorative encounter and as such it could not be claimed that some of the sentencing aims were addressed in that conference (as was the case with the New Zealand experience). The court therefore did not have the benefit of a report about certain elements having already been addressed (Roberts and Roach 2003:247). As a consequence the expectation of the legislation was that courts themselves would include what were seen as ‘restorative components’ in the sentence imposed. This has meant that achieving the new sentencing objectives has been confined to using ‘less intrusive alternatives’ in the sentence imposed, rather than seeing some aims already partly achieved through a restorative encounter (Roach and Rudin 2000:363). The court noted in this regard (at para. 48) that the principle objective of the legislation was ‘expanding the use of restorative justice principles in sentencing’ rather than licensing a form of non-judicial response through restorative conferencing.

199 As was occurring in the case of offenders who had participated in the Ottawa Collaborative Justice Project discussed in Chapter 7.
Nonetheless the *Gladue* decision did provide important judicial recognition for the newly added sentencing purposes of ‘reparations for harm’ and ‘responsibility’ and ‘acknowledgement of harm’ and recognised these were not ‘neutral’ provisions, but were intended to open up potentially different responses to wrongdoing. These provisions were to give restorative forms of response a focus previously missing (Roach and Rudin 2000:362). At the time of its decision, it was predicted that *Gladue* would be ‘a leading case whenever any offender asks a court to consider a sentence that has a restorative purpose’ (Roach and Rudin 2000:362) and this has proven to be the case, though some of the potential breadth of the *Gladue* principle has receded.

**Developments post-*Gladue***

*Proulx* was a further appeal review by the Supreme Court of Canada in 2000 where the specific focus of the court’s decision was concerned with the interpretation of s.742 specifically dealing with conditional sentences. The court also re-considered the effect of the new statement of purposes in s.718 as stated in *Gladue*. In its decision the court found ‘punitive objectives’ in s.742 where, at least explicitly, there were none (Archibald 2005:252). The effect of *Proulx* was to narrow the scope that the *Gladue* interpretation of s.718 had promised.

*Proulx* was a case involving a recently licensed non-Aboriginal driver crashing his car after drinking alcohol, killing his passenger and seriously injuring another driver. He pleaded guilty to dangerous driving causing death and was jailed for eighteen months by the sentencing judge. The Court of Appeal allowed an appeal by the defendant and substituted instead a conditional sentence of the same term. This decision was then reversed by the Supreme Court which reinstated the original custodial sentence (though
by the time of the appeal the accused had completed his conditional sentence). In considering whether a conditional sentence was in fact the appropriate response in the circumstances, the original sentencing judge had described such an option as a ‘sort of a halfway house’ through which could be achieved both punitive and restorative objectives (as cited in Archibald 2005:252).

In its review the Supreme Court recognised that suitably fashioned restorative responses could provide the necessary ‘symbolic, collective statement’ of retributive denunciation (para.109). It also allowed that the consequentialist ‘objectives of rehabilitation, reparations, and promotion of a sense of responsibility in the offender’ (para.109) could be achieved by restorative means. But it did not depart from the traditional view that punitive measures such as ‘incarceration will usually provide more denunciation [and by implication “more deterrence”]’ than restorative means (paras. 102, 107-8).

When considering the objectives of sentencing in s.718 more generally, the Supreme Court divided the provisions of this section into two sets. The first set were seen as ‘punitive objectives’ (essentially denunciation, deterrence and separation s.718(a)-(c)) best carried out by responses that promoted traditional retributive means (that is punishment, particularly involving separation). The second set were ‘restorative objectives’ (rehabilitation, reparation and promotion of a sense of responsibility s.718(d)-(f) best achieved through restorative means (that is in the Canadian context non-custodial ‘conditions’ on sentencing). This separation does have the potential to curtail any possibility that denunciation, deterrence and separation (in its ‘semi-separation’ guise) could even be accepted as attainable through restorative means.
The effect of these comments in the appeal judgment was to narrow the scope for restorative forms of response to meeting essentially consequentialist aims of rehabilitation, reparations, and promotion of a sense of responsibility but leaving other (by implication ‘more serious’) retributive elements of denunciation, deterrence and separation to punitive legal means. Interpreted this way, *Proulx* provided at best limited recognition of the potential for denunciation and deterrence to be gained from restorative means using the ‘semi-separation’ of a conditional sentence of imprisonment served in the community (para 35). While the court did acknowledge the ‘importance of reconciling, if not integrating, the restorative and retributive perspectives’, it essentially retreated to the conservative position that the legislatively created restorative device of conditional sentences could not deliver most retributive aims (Roberts and Roach 2003:247-8).200

It is interesting to trace the subsequent application of these principles. In a concurrent decision of *R v Wells* 201, heard with *Proulx*, the Supreme Court’s specific focus was on the s.718.2(e) reform which now provided that non-custodial sentences should be the first sentencing consideration. The court firstly confirmed s.718.2(e) was intended to have ‘a remedial purpose for all offenders [both Aboriginal and non-Aboriginal offenders], focussing as it does on the concept of restorative justice’ then narrowed that application in the views it expressed (Roach and Rudin 2000:363). In *Wells* the Supreme Court upheld a sentence of 20 months imprisonment for an aboriginal offender.

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200 Conditional sentences have drawn the ire of public comment (two separate court reports of such sentence proceedings in the *Winnipeg Free Press* 12 June 2004 are.headlined ‘Slap angers victim’s family’ and ‘Retribution, punishment missing: Crown’ are indicative). This led to pressure to exclude matters such as drink driving causing death and manslaughter from the conditional sentence option. The *Conditional Sentencing Reform Bill* (2007) amended the *Criminal Code* in 2008 to exclude the use of conditional sentences for such serious ‘personal injury’ offences.

convicted of sexual assault categorised by the sentencing judge as a ‘major’ or ‘near major’ (para 48). The court said:

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\text{Gladue does not mean that aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice and less weight to goals such as deterrence, denunciation, and separation (para.44).}
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It had been specifically argued in that case that ‘a healing-based community sanction [could] promote the difficult and painful process of denouncing unlawful conduct’ just as effectively as imprisonment (Roberts and Roach 2003:252). But the court rejected this argument and reverted to a traditional view that in cases of serious offending ‘the goals of denunciation and deterrence are accordingly increasingly significant’ (para 42) and these goals are best achieved (or at times only achievable) by punitive means involving total separation. The court equated meeting denunciation and deterrence objectives with punitive measures and ‘discounted the ability of restorative justice to denounce and deter’ (Roach and Rudin 2000:367). This represented a major departure from the promise the original Gladue interpretation had offered.

**Developing a restorative jurisprudence**

Proulx (and Wells) was to have the effect of producing a changed sentencing jurisprudence but one limited in scope. Interestingly, the potential breadth of the original Gladue interpretation was suggested in the outcome of an appeal decision of *R v Logan* 203, which the Ontario Court of Appeal heard before the Proulx judgment had

\[202\] The Aboriginal Service of Toronto (ALST) represented by Kent Roach were granted leave as intervenor to appear in this matter (and also in Gladue) and made this and other arguments.

been handed down. In *Logan*, the appeals court took the yet to be revised view in *Gladue* as giving judicial licence that ‘in many instances more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing can occur through [such] means’ (para 414). In this case an Aboriginal defendant had been convicted of dangerous driving causing death and bodily harm where alcohol was a contributing factor. The sentencing judge had imposed a period of 30 months imprisonment. The appeal court substituted a 20 month conditional sentence, including conditions that the defendant perform community service which included being involved in the counselling of young people on the dangers of drinking and driving. The imposition of such conditions in lieu of imprisonment was intended to signal a recognition that such restorative devices could contribute to ‘denounc[ing] and deter[ring] drunk driving’ specifically, and wider crime more generally (Roach and Rudin 2000:377). This decision had promised a wide scope for using restorative means to meet restoration and consequential aims, as well as to meet some retributive aims. However the potential breadth of this recognition was substantially reduced following *Proulx*.

There is some independent research support for the view that sentencing jurisprudence was open to more considerable change of direction before the *Proulx* decision. In a national survey of judges in 1999 more than seventy per cent of judges (in a sample of 461 judges representing a third of the total Canadian judicial population) had agreed that conditional sentences were ‘always’ or ‘usually’ as effective as imprisonment in achieving rehabilitation (Roberts, Doob et al. 1999; Roberts and LaPrairie 2000:8). Approximately one-third of the respondents had also expressed similar views about the
effectiveness of conditional sentences to meet certain retributive aims, notably to express deterrence (35%) or denunciation (35%) (Roberts and LaPrairie 2000:7).\textsuperscript{204}

It is also evident from the nature of the conditions imposed by many of judges in this sample that they were using conditional sentencing as a means of achieving treatment and separation aims by non-punitive means. Almost ninety per cent of judges canvassed said they ‘often’ imposed treatment conditions (alcohol, drug, psychological, other counselling) in their sentences. In terms of measures designed to meet consequential aims, judges reported ‘often’ imposing non-contact orders (85%), curfews (70%) and abstentions on alcohol consumption (74%) and drug use (79%) with these purposes in mind (Roberts and LaPrairie 2000:12-3).\textsuperscript{205} These devices allow for the possibility that consequentialist objectives could be met by conditions which did not involve full time separation. These conditions instead placed restrictions on everyday behaviour (home detention, curfews, non-association orders, reporting requirements) designed to change behaviour so as to reduce reoffending.

The cumulative effect has been that even though the \textit{Proulx} decision has confined the wider accommodation of restorative means promised by \textit{Gladue}, Canadian sentencing jurisprudence has nonetheless altered appreciably in a restorative direction. There is now an acceptance of the potential for restorative means to meet certain sentencing objectives.

\textsuperscript{204} Interestingly, the evidence showed judges who were more familiar with conditional sentencing (assessed as judges who had imposed at least 11 such sentences) were more optimistic about their effectiveness in achieving such denunciary and deterrent aims (Roberts and LaPrairie 2000:8).

\textsuperscript{205} There was a concern that the onerous nature of these conditions would be likely to see high rates of breach (one estimate suggested this might be as high as one-third) which given the direction in \textit{Proulx} that ‘where an offender breaches a condition without reasonable excuse, there should be a presumption that the offender serve the remainder of his or her sentence in jail’ (para.39) might negate this sanction as a truly restorative approach (Roberts and Gabor 2003:47).
This influence can be highlighted in a review of a number of post-Gladue decisions, particularly cases involving conditional sentencing options. Overall in the first three years of its use (1996-1999), nearly 43,000 such sentences were imposed (Roberts and LaPrairie 2000:viii). Available sentencing data for subsequent periods show that from the 2003-2004 year onwards the rate had settled into a pattern of approximately 13,000 sentences per year which represents approximately five per cent of all sentences imposed Canada-wide (Canadian Criminal Justice Association Canadian Criminal Justice Association 2006:2).

In a broadly representative case of *R v Knoblauch* 208, the appeals court was satisfied that the imposition of a conditional sentence of two years which required the defendant to reside in a locked psychiatric treatment unit until approved for release could meet incapacitative purposes while still being primarily restorative. The accused had a lengthy history of mental illness and had pleaded guilty to unlawful possession of explosive substances after police found in his apartment a large weapons arsenal. A Crown appeal was subsequently dismissed on the basis that the restoratively focused resolution did provide adequate community protection.

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206 The introduction of the conditional sentence with its emphasis on achieving restorative purposes has had a dramatic effect on the level of incarceration. Research suggests the ‘national 13% reduction in the number of admissions to custody represents 53,990 individuals over the 4-year period [1993/94-1997/8]’ (Roberts and Gabor 2003:46). Remembering that it is likely that a substantial number of offenders (perhaps up to a third) did end up in jail as a result of a breach of their conditions given the ‘extraordinary’ breach provisions for such sentences (Roach and Rudin 2000:370).

207 Data for 2005-6 does show a decline to 11,154 (Statistics Canada 2006) which is likely to further reduce further in view of the 2008 reform effects.

208 *R v Knoblauch* [2000] 2 SCR 780 (16 November 2000) [*Knoblauch*].
In a further 2005 decision of *R v Fice* 209 the Supreme Court similarly accepted that a conditional sentence met restorative aims. That case was primarily concerned with the effect of pre-sentence custody on eligibility for a conditional sentence, but in both the majority decision (5 judges) and the dissenting decision (2 judges) the use of such a mechanism as a vehicle to achieve restorative aims was noted with approval.

This acceptance of a judicially imposed conditional sentence (rather than a restorative encounter through which sentencing aims are met as in the New Zealand experience) is at the core of the developing Canadian restorative jurisprudence. This is made clear in a 2006 decision in *R v Brizard* 210 where the Ontario Court of Appeal specifically described a non-custodial sentence as ‘the restorative approach [which could] assist the appellant with his treatment for substance abuse and to upgrade his education so that he may obtain employment’ (para.4, emphasis added).

This Canadian accommodation of restorative means to meet sentencing objectives has had the effect that

*It is now no longer possible to understand the jurisprudence of sentencing without understanding restorative justice as understood by the Supreme Court* (Roach 2000:3.3).

The qualification of ‘restorative justice as understood by the Supreme Court’ is pertinent. Certainly, the Canadian approach marks a new jurisprudential path. The position that the Canadian sentencing jurisprudence has reached is characterised by a

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209 *R v Fice* [2005] 1 SCR 742 (20 May 2005) [*Fice*].

clear acceptance of ‘the use of restorative justice principles in sentencing’ (Proulx at para. 48). While this represents a substantial accommodation there is much less reliance on direct restorative engagements to meet the essential aims of responses to wrongdoing. Instead the Canadian approach remains predominately judge centred and directed. Restorative approaches are seen to mean courts themselves being cognisant of what is achievable in sentencing terms through a focus on restorative rather than punitive purposes. The absence of the encounter has meant that some of the scope given to achieving retributive aims (accountability, denunciation, the self censure of remorse) is absent.

Importantly, however, what the Canadian jurisprudence has recognised is that restorative principles can be mixed in some proportion with non-restorative principles when responding to wrongdoing. The mixture as narrowed in Proulx does tend to give priority to punitive approaches, particularly as the seriousness of the offending increases. This judicial interpretation does mean that in most instances ‘restorative objectives cannot dominate in a conditional sentence and they cannot be given equal weight either’ (Healy 2000:II.1). Moreover, the offender is still ‘told’ of the imposition rather than being a party to it as can be the case in restorative encounters. As such the message may be mixed in that they are being given ‘a limited opportunity of rehabilitation and restorative justice while being punished’ (Healy 2000:ii.2). However the onerous conditions likely to be imposed provide a high potential for breach and subsequent full time imprisonment (Roberts and Gabor 2003:46). Nonetheless, there is evidence of movement in the Canadian sentencing jurisprudence to allow restorative means to coexist with punitive means in achieving the essential aims.
The Australian accommodation

Each of the Australian states and territories has sentencing legislation capable of accommodating restorative responses to varying degrees. However there are insufficient sentencing decisions in which the use of restorative approaches have been considered to constitute a restorative sentencing jurisprudence. This in large measure is due to the absence of mandatory requirements in any of the jurisdictions requiring courts to take account of restorative approaches. The following section reviews the relevant legislative provisions in each of the four jurisdictions studied and traces the scope given to restorative approaches in the small number of decisions available.

Legislative developments

In New South Wales the Young Offenders Act 1997 (NSW) creates the Youth Justice Conferencing Scheme operating since 1998 in which restorative principles play a significant part. The Crimes (Sentencing Procedure) Act 1999 (NSW) also has two general sentencing provisions which permit restorative approaches. In s.3A there is a requirement to ‘recognise the harm done to the victim of the crime and the community’ as a ‘purpose for which a court may impose a sentence on an offender’. Similarly, s.21A

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211 A recent controversial case in Queensland may have represented a lost opportunity to develop such principles. Earlier non-judicial remarks by District Court Judge Bradley (Bradley 2006; 2007) suggested she was motivated by restorative principles when she imposed non-custodial sentences on a group of Aboriginal offenders convicted of rape in a remote Aurukun community on Cape York (24 October 2007). The perceived leniency of the penalties provoked a public outcry. On appeal in R v KU & Ors; ex parte A-G (Qld) [2008] QCA 154, the Supreme Court of Queensland reversed the suspended sentences. The original decision had not articulated any restorative basis for the suspension and had been conducted at such speed on circuit (such courts were described as dealing with cases at ‘warp speed’ in a subsequent inquiry (see Davis 2008)) that any opportunity for the appeal court to consider whether restorative approaches could have met the twin need for retribution and restoration was not possible.

212 An exception is the amendment made to the Crimes Act 1900 (ACT) following the introduction of its restorative justice scheme. This legislation requires courts to have regard to the fact that a person ‘has accepted responsibility for the offence to take part in restorative justice’ (s.342(1) u) when considering penalty.
provides that in determining the appropriate sentence for an offence, the court is to take into account ‘mitigating factors’ which include that ‘the offender has shown remorse for the offence by making reparation for any injury, loss or damage or in any other manner’. Participation in a restorative process has been accepted as a tangible way to recognise such harm and express such remorse.

In the **Australian Capital Territory** legislation was introduced to revive the use of restorative approaches from the police-led diversionary scheme in the form of the *Crimes (Restorative Justice) Act 2004*. The focus of the Act is on victims of crime and the repair of the harm caused to them by criminal offences. The objects of the legislation as stated in s.6 include:

- *enhancing the rights of victims of offences by providing restorative justice as a way of empowering victims to make decisions about how to repair the harm done by offences; and*

- *ensuring that the interests of victims of offences are given high priority in the administration of restorative justice.*

Participation by an offender in a restorative justice conference is accepted as a factor likely to impact positively on sentencing and is a matter to be taken into account on sentence. This legislation was part of the response to the *ACT Criminal Justice Strategic Plan 2002-2005* which added a victim perspective to a number of legislative provisions including the *Crimes (Sentencing) Act 2005*. The sentencing purposes listed in s.7 of that Act include clearly restorative provisions. Though the legislation accommodates the
use of restorative approaches, the moratorium on their extension to adult matters has limited their applicability.

In South Australia, the Young Offenders Act 1993 (SA) legislated for the system of ‘family conferences’ for juvenile offenders in operation there since 1994. The Criminal Law (Sentencing) Act 1988 (SA) also provides in s.10 certain ‘matters to which a sentencing court should have ‘regard’ and these include:

*The degree to which the defendant has shown contrition for the offence*

- *by taking action to make reparation for any injury, loss or damage resulting from the offence; or*
- *in any other manner.*

These conferences give considerable scope for the use of restorative approaches.

In Victoria, the Children, Youth and Families Act 2005 permits post-conviction or post-plea referrals to group conferences for juveniles. The Sentencing Act 1991 also details in s.10 as part of ‘the only purposes for which sentences may be imposed’ as including a requirement that a response ‘manifests the denunciation by the court of the type of conduct in which the offender engaged’.

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213 The Act does not refer to restorative justice and whether the provisions with respect to taking responsibility, making reparations and increasing the ‘child’s understanding of the effect of their offending on the victim and the community’ (s.415(4)(a)) are to be interpreted restoratively remains open. There are no reported cases which refer to restorative justice principles or the practice of group conferences generally.

214 In a recent high profile murder trial in Victoria DPP v Dupas (2007) the judge lamented the absence of a specific sentencing purpose that covered the ‘vindication of the rights of victims’ which could be seen as a core capability of restorative encounters.
Each of these jurisdictions has legislation that does accommodate the use of restorative approaches in the case of juveniles. Additionally, each jurisdiction has sentencing legislation of broader application which includes purposes clearly achievable through restorative means. But this accommodating legislative framework has not produced significant recognition of restorative forms of response in sentencing decisions.

**Caselaw developments**

In NSW the Court of Criminal Appeal in *R v Qutami* considered the application of restorative principles in a crown appeal against the adequacy of a sentence of 18 month imprisonment for an offence of solicit to murder (where the planned arrangements did not eventuate). In that case the defendant had sought to arrange for his niece to be murdered for cohabiting outside their strict religious community. The judge imposed a sentence designed to accommodate ‘the need to restore harmony to the community and make sure it is not disrupted again’ (para.41). In reviewing that sentence, the Court of Appeal recognised that:

*Over recent decades the issue of restorative justice has been of considerable and growing significance in discussions about the operations of the criminal justice system ...The role of victims has also been given more weight in matters of sentencing. This has included questions of empowering the victims in a restorative context such as conferencing. Attention has also been given to the*

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215 Similar legislation allows for restorative approaches for juvenile offenders in Queensland in the form of the *Juvenile Justice Act 1992* (Qld) under which approximately 2000 youth justice conferences are conducted per year; Tasmania in its *Youth Justice Act 1997* (Tas) under which approximately 700 conferences are conducted per year; Western Australia with approximately 1400 conferences conducted under the *Young Offenders Act 1994* (WA) and in the Northern Territory where something less than 100 conferences per year are conducted under its *Juvenile Justice Act 1997* (NT). These estimates are taken from Maxwell and Hayes (2006)).

significance of reintegrating offenders into their communities, including smaller communities such as extended families (para.74).

The court said the sentencing judge ‘did not commit any legal error in taking these matters into account’ (para.75) though it questioned the weight given to considerations of reconciliation. It said these did not properly serve ‘a public interest broader than the particular community affected or the family victimised in a particular way’ (para.77). As a consequence the court increased the non-parole period set to one of three years.

Restorative approaches were also considered briefly in *R v Moloney* \(^{217}\) which involved an offence of murder where the accused had used his car to injure three employees who had evicted him from a hotel for fighting, killing one and injuring the others. On sentence, the judge recognised the offender had sought to participate in a restorative conference but that this not taken place because the deceased’s family was unwilling to participate (para.16). The offender was sentenced to 20 years imprisonment with a non-parole period of 15 years. However no allowance other than the judge’s recognition was given for the offender’s willingness to attend a restorative process.

Neither of these early cases has provoked further comment in subsequent cases that could suggest a developing restorative jurisprudence.\(^{218}\) There has been some judicial comment elsewhere in a series of cases involving environmental damage. In


\(^{218}\) The NSW Supreme Court also referred to restorative justice with respect to the role of shaming (when considering the publication of the name of a juvenile who had been convicted of murder) in *R v M.B. No.2* [2006] NSWSC 1163 (16 November 2007). But the court’s remarks suggest a potentially distorted view of restorative justice as ‘emphasising the denunciation of the offender’.
the NSW Land and Environment Court considered the penalty to impose as a result of toxic pollution from a waste disposal landfill where an employee had accidentally left a pump to storage tanks on overnight. The resultant pollution killed most of the aquatic life in an area of the creek. This was a significant breach of s 120(1) of the Protection of the Environment Operations Act 1997 (NSW) which includes penalties of imprisonment.

The chief judge of that court said in a passage that closely reflects the need to address retributive, restorative and consequentialist aims:

In sentencing for environmental crime, the court ought take into account such [polluter pay] considerations in selecting the types and the severity of sentencing orders. In so doing, the court better achieves, first, retributive aims by ensuring the sentence is proportionate to the objective gravity of the offence, the offender is adequately punished and the conduct of the offender is denounced; secondly, deterrence aims by deterring the offender and other persons from committing similar offences which cause or are likely to cause environmental harm; and thirdly, restorative aims by achieving restoration of the environment harm and reparation for the environmental harm caused (para.23).

The court imposed a penalty to meet each of these aims by fining the defendant, through a publication order to deter offending and through a restoration order to repair the

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environmental harm caused. 220 Though there was no recognition that each of these aims could be delivered through restorative approaches, there was some accommodation of restorative aims.

In a further decision in that court, the case of Garrett v Williams 221 involved damage and disturbance to a large number of Aboriginal artefacts in the course of mining operations. The court recommended the defendant participate in a restorative conference with representatives of affected Aboriginal communities. 222 The outcome report from that conference detailed steps which the defendant had agreed to undertake to foster indigenous employment opportunities in an affected remote community (para.63). In considering whether ‘the fact and the results of the restorative justice intervention can be taken into account in this sentencing process’ (para.64), the court held that contrition and remorse were retributive aims specifically provided for in the Crimes (Sentencing Procedure) Act 1999 (NSW) and that these aims could be met by restorative outcomes of apology, reparation and steps taken to prevent reoccurrence.

In the ACT there have been no reported sentencing decisions to date dealing with the use of restorative approaches though more than 100 restorative conferences are

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220 The publication order was imposed as a deterrent on the understanding that corporate offenders were more susceptible to the influence of criminal stigma (Fisse 1982-83).
221 Garrett v Williams [2007] NSWLEC 96 (27 February 2007). This decision was cited in Plath v O’Neill [2007] NSWLEC 553 but no subsequent citations were found (27 April 2009).
222 The court’s judgment recited the assumptions, objectives and methods of restorative processes and used parts of the United Nations Office on Drugs and Crime Handbook on Restorative Justice Programmes to guide its judgement (2006a) (paras. 42-47). Additionally, to ‘assist the parties in understanding restorative justice and the process of conferencing’ the judge provided them with a copy of NZ Judge McElrea’s ‘The Role of Restorative Justice in RMA Prosecutions’ (McElrea 2004).
conducted each year for juvenile offenders (ACT Department of Justice and Community Safety 2006:13).  

In South Australia there have also been few judicial decisions dealing with the use of restorative means to meet sentencing aims. In the case of R v Payne the Court of Criminal Appeal was asked to establish sentencing guidelines for dangerous driving offences and one of the submissions argued that such guidelines should be directed ‘towards emphasising the importance, for sentencing purposes, of participation by the offender in processes or procedures that emphasise principles of restorative justice’ (para.37). It was suggested that:

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\text{a particular mitigating factor would be conduct demonstrating genuine remorse and acceptance of guilt by the preparedness of the offender to meet with the victim and family of the victim if they so wished, to offer an apology; by the preparedness to engage in community service by way of reparation, and by the preparedness to undergo treatment for aggressive tendencies, and for drug and alcohol abuse (para.42).}
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The court acknowledged that ‘these sentencing options based on the principles of restorative justice’ could provide the opportunity for ‘demonstrable proof of contrition and remorse’. In dismissing the formalising of any such engagement, the court said in:

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223 However, in a recent ACT Supreme Court sentencing matter of R v Bastow (27 May 2009) the potential for a restorative justice referral was facilitated between the parties in relation to a defendant placed on onerous deferred sentence conditions following an aggravated robbery conviction.

a particular case a judge may be able to encourage some of these things to happen. But if greater use is to be made of sentencing options based on the principles of restorative justice, it is necessary for the executive government to provide programs and procedures with appropriately qualified staff who have the necessary resources ‘(para. 57).

Other than the case of *R v Police* (2002) (referred to in Chapter 7) where the Supreme Court considered the range of offences referable to family conferences there are no recorded judicial comments on the use of restorative approaches in juvenile matters.

In *Victoria* similarly there is no evidence of caselaw currently that indicates restorative approaches are being given scope on sentencing.225

These Australian jurisdictions each have legislative provisions that could accommodate restorative approaches. These provisions routinely allow the fashioning of restorative responses, mostly in the case of young offenders. But to date there have been little or no development in sentencing jurisprudence which adds a consistent restorative dimension to sentencing. This seems to be primarily as a result of the lack of jurisprudential mandate to consider restorative principles on sentencing.

**The accommodation of restorative approaches**

The jurisprudential developments in New Zealand and Canada show markedly different approaches to recognising restorative practice as a legitimate means to address the

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225 A small number of cases refer to restorative principles elsewhere in the Australian jurisdictions. For example, in Queensland see *R v Tran* (12 February 2002), *R v Sat* (13 March 2006) and *R v Hamilton*. (21 April 2006)
essential aims in response to wrongdoing. In Australia, these developments have stalled with the passing of enabling legislation.

The New Zealand approach has focused upon the effect of restorative encounters and outcome agreements reached there. The New Zealand sentencing jurisprudence accepts that the encounter itself can meet some elements of retribution. There is recognition that the conference provides a forum where the offender suffers the deserved pain of denunciation and remorse, such that:

*what restorative justice allows is a very personal, face-to-face form of accountability that requires personal interaction, a willingness to explain one’s actions, and the opportunity to make an apology and an offer of amends (McElrea 2007:104).*

There is also stronger recognition that restorative approaches can meet the need to provide personal and normative repair following wrongdoing. There is some recognition that conferencing (both as a consequence of the encounter itself and as a result of meeting any commitments agreed) meets consequentialist aims, particularly the need for deterrence and rehabilitation. New Zealand’s pathway of accommodating restorative practice has been to incorporate the effects of these restorative encounters into its institutional sentencing practice. The application of the *Clotworthy* requirement means that a balance must always be struck between restorative and punitive means to achieve the essential aims.
In contrast, the Canadian accommodation has been to mandate a requirement for courts to consider restorative principles on sentence. There is therefore not the same emphasis on the aims being achievable through restorative encounters. The device of conditional sentences is used by courts to deliver some of the requirements of retribution (particularly, the pain of denunciation) and to meet some of the need for personal and normative restoration and to address certain consequentialist goals, in particular rehabilitation.

Canada’s strongest jurisprudential development is in how this sentencing device has developed as a means of essentially ‘restorative rehabilitation’. While this has meant there is limited judicial acceptance that restorative approaches can satisfy wider retributive aims, it is seen that:

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\text{this is the price of a strong ‘restorative rehabilitation’ developing in the jurisprudence. Restorative processes could ‘do’ the other (that is, could ‘do’ retributive purposes) but only if actual restorative encounters were occurring. This is the price paid for ‘zoning in on’ rehabilitation of offenders as the dominant interpretation of restorative purposes on sentencing.}^{226}
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The *Gladue* principle (as narrowed by *Proulx*) limits the scope for restorative means to address sentencing objectives beyond essentially rehabilitation, reparation, and promotion of a sense of responsibility. Stronger retributive elements of censure and sanction, and consequential aims of deterrence and separation are left to traditional

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226 Interview comments of Professor Kent Roach, 28 September 2007, Toronto, Canada.
punitive means, particularly in cases where a stronger retributive response is seen to be warranted.227

What is evident in these two varieties of judicial accommodation is the absence of a substantial acceptance that restorative approaches can meet retributive aims. The lesson from the New Zealand sentencing jurisprudence is that a restorative encounter does provide deserved remorse, censure and denunciation in ways that are both direct and emotionally painful. Additionally, the lesson from the Canadian accommodation is that restorative approaches can meet many consequentialist requirements fully through a legislative device that builds in the alternative protections of semi-separation rather than relying only on full time imprisonment. Such forms of sentences can allow restorative responses to grow to meet many consequentialist goals of deterrence, rehabilitation and protection.

It is crucial however to recognise that the generative powers of some of the mechanisms identified in Chapter 8 are best ‘activated’ through a restorative encounter. Their justice generating power can depend on promises made at such encounters to do certain things actually being carried out to fruition. This is particularly the case with offers to make amends, to undergo rehabilitation or to attend other treatment programs. Judge McElrea recognised in Auckland City Council v Shaw228 that ‘a just outcome is the consequence of a continuum of events and behaviours’ which the encounter merely begins.

227 Any failure to take proper account of the Gladue principle is now seen as a breach of legal principle giving automatic grounds for appeal. See R v Brizard (2006) O.J. No.729 (27 February 2006) which held specifically that ‘the failure to give adequate weight to an offender’s Aboriginal status …amount to an error of law’ (para.3) and R v Kakekagarnick (2006) Ontario Court of Appeal (22 August 2006) which widened that principle to all offenders.

Conclusion

The sentencing jurisprudence in three jurisdictions has been reviewed for indications that legal practice can accommodate restorative approaches. It has been found that there are differing levels of acceptance in each of these jurisdictions. The potential for accommodation was assessed against the scope allowed to restorative practice to meet each of the essential aims of responses to wrongdoing. Only a limited acceptance that retributive aims could be delivered via restorative processes was found. Traditional restorative aims had been widened to include the restoration of personal harm and achieved through restorative means. There is a partial acceptance that consequentialist aims can be effectively delivered via restorative means, particularly deterrence and rehabilitation.

What can be synthesised from these assessments is a slow (and varied) recognition that restorative approaches have developed judicial acceptance for meeting the essential aims of responses to wrongdoing. There is recognition that this provides one way to ‘lessen the very difficult task of judges to ensure these goals and requirements are met through sentencing’ (Shy 2006:17). There is growing recognition that the ‘tools to craft sentences that respond to the needs of victims and offenders’ could come from both legal and restorative approaches (Roberts and Roach 2003:247). However for a more substantial accommodation to occur some form of integration between the two forms of response is needed. Chapter 10 offers a number of institutional design ideas about how integration could be modelled. This chapter draws upon the institutional design theory of Goodin (1996) and others to suggest a series of normative and empirical design requirements such a model must meet.
Chapter 10

An integrated justice response to wrongdoing

Introduction

This thesis has attempted to capture and build upon the ‘imminence’ evident in criminal justice practice as it seeks to fashion just responses to wrongdoing. It has argued that fuller recognition of restorative approaches can provide one clear means by which to fill gaps identified in its normative compliance. This chapter seeks to further this contribution by suggesting a model for integrating the two forms of practice. The model is designed to harness the capacity of restorative practice so as to more fully meet the essential retributive, restorative and consequentialist aims identified. The breadth of methodology used in this thesis provides a number of sources from which to gather institutional design ideas about how best to structure such a model.

The doctrinal and philosophical investigations have developed a set of normative tests which all responses to wrongdoing need to meet. These prescriptions can now be used as a means to consider the best way for an integrated model to address the deficiencies identified in both legal and restorative approaches.

The ethnographic and historical studies have developed workable ideas about the form an integrated model should take. We have observed a number of diverse restorative practices – those which provide a menu of different restorative options (as in the case of Nova Scotia or the ACT), those which mainstream one single approach (as in New Zealand) and those which have innovated a variety of approaches embedded within
segments of the justice system (as in the diversionary models in NSW, Victoria and South Australia). With all these variations, a distinctive sensibility of justice was found which encouraged acceptance of responsibility, expressions of remorse and vindication of harm. These programs also produced powerful consequential results in terms of contextual crime prevention. These ideas can now be used to contribute to the model of integrated practice.

The legal and historical analysis of sentencing practice has provided insights about the capacity for the criminal justice system to accommodate restorative approaches. We found limited acceptance that retributive aims could be achieved restoratively. But there was more substantial acceptance that restorative and consequentialist aims could be achieved by restorative means. The developing sentencing jurisprudence confirmed this acceptance, as many aspects of the essential aims were met in practice. These ideas also contribute to the model’s design.

Without integration, restorative responses are likely to remain on the periphery of responses to criminal wrongdoing. It is necessary to add ‘the restorative question’ to a mainstream response to wrongdoing if a fully responsive model is to be available. Institutionalising the need to answer such a question is our suggested device for doing this.

The model is a minimalist one. Certain categories of wrongdoing are deliberately excluded. A legal response remains the mandated form of response where responsibility for wrongdoing needs to be established by forensic means. Restorative forms of response remain the preferred choice where issues of relational repair are overriding.
These exclusions are seen as being at the ‘extreme edges of wrongdoing’, leaving the remaining ‘middle ground’ where most personal and normative harm occurs open to integration.

The parameters of integration

Retaining current approaches for the ‘extreme edges’ of wrongdoing

These ‘extreme edges’ of wrongdoing are quarantined from an integrated model. These areas include circumstances where the need to meet either the desert standard or the harmonious relationships standard are so paramount as to exclude a combined justice response. In these situations as was made clear in Part Two, sometimes a purely legal response is required and sometimes a restorative one. For example, there are situations where issues of establishing responsibility, protecting rights and providing strong normative warnings are crucial and a legal response is appropriate. Conversely, there are circumstances where issues of relational or societal repair are crucial, and where the likelihood of establishing criminality so slim, such that a restorative response is best.

More specifically, an exclusively legal response is called for:

1. where the determination of criminal responsibility is required, and
2. where rights protection is fundamental, and
3. where a clarifying pronouncement on the normative harm is needed.

In such situations, only the protective architecture of legal practice can provide the necessary means to adequately determine liability, protect rights and pronounce on important normative prescriptions.
Similarly, an exclusively restorative response is called for:

1. where relationship repair (either individual or societal) is fundamental, and
2. where relationship risk is of larger concern than purely criminality, and
3. where the criminality of wrongdoing is likely to remain unprovable.

In these situations, only the open architecture of restorative practice can properly address the important relational requirements which override questions of criminality.

These exclusions should be seen as strongly presumptive rather than prescriptive. This allows for exceptions where circumstances demand. While legal practice is the presumptive choice where determinations of responsibility are required, in some cases restorative practice’s alternative means of establishing responsibility may be more appropriate, while not as forensically exact. This was the case in the Hollow Water Holistic Healing Circle response referred to in Chapter 7. There a deliberative method of truth telling was found more effective in addressing situations of endemic sexual abuse offending in an indigenous community. The restorative approach established responsibility more effectively because participation in a series of healing circles by offenders encouraged admissions which conventional forensic truth finding methods would have left unproven and hence unresolved (Griffiths and Hamilton 1996:182-3; Aboriginal Corrections Policy Unit 1997; Green 1998).\(^229\)

\(^{229}\) A similar example is the Bougainville transitional justice practice of replacing determinations of individual responsibility (in events of wrongdoing during periods of civil strife) with more traditional forms of community responsibility (Reddy 2006; Braithwaite, Cookson, Braithwaite and Dunn 2008).
Focusing on the ‘middle ground’ of wrongdoing

Between these ‘extreme edges’ sits the ‘middle ground of wrongdoing’ where a combination of both forms of response needs to play a significant responsive role. Legal practice has the capacity to be influenced and enriched by restorative practice as evident from the changes in judicial practice in New Zealand and Canada following their *Clotworthy* and *Gladue* decisions. Evidence of a similar capacity outside the mainstream judicial response is evident in some styles of prosecutorial practice, particularly in Japan.  

Restorative practice has similar capacity to be influenced and enriched by legal practice by being more infused with rights protection as suggested in Chapter 6. It can be enriched by this closer adherence to legal protections so as to add more adequate access to legal advice and assistance and to put in place stronger strategies to minimise double jeopardy and self-incrimination risk.

The normative benefits of integration

Once integration is confined in this way many of the normative shortcomings identified in earlier chapters are addressed. For instance, a model of integration with a focus on answering ‘the restorative question’ will fare far better on addressing each of the four normative tests set in Chapter 1. Such an approach will be better able to:

- meet the essential aims of responses to wrongdoing
- satisfy the evaluative criteria of justice

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230 Johnson (2002) noted this as building on the traditional openness to expressions of remorse and contrition as mitigating factors by Japanese prosecutors.
• distribute harm-related benefits and burdens, and
• accommodate justice generating mechanisms.

How these tests are better met by integration is clear from the evidence established in this thesis.

1. Better meet the essential aims of responses to wrongdoing

Firstly, an integrated approach means that the different perspective which restorative approaches bring to the essential retributive, restorative and consequentialist aims becomes part of the mainstream response and so addresses existing inadequacies in conventional approaches.

As argued in Chapter 2, all responses to criminal wrongdoing must address this need for ‘retribution’ (as a means to address the moral aspects of offending), ‘restoration’ (so as to address the harm caused by public wrongs), and must achieve certain consequentialist aims (so as to remove the desire, opportunity or need for future offending). The specifics of what this involves were tabulated as:
Table 8. The essential aims of justice responses to wrongdoing

<table>
<thead>
<tr>
<th>Retribution</th>
<th>Restoration</th>
<th>Consequential</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>The offender needs to experience</em></td>
<td><em>Those affected need to experience</em></td>
<td><em>The community needs to experience</em></td>
</tr>
<tr>
<td>denunciation of their wrongdoing</td>
<td>personal and relational restoration through reparation</td>
<td>deterrence through censure; and penalty</td>
</tr>
<tr>
<td>self-censure of remorse and censure of others</td>
<td>repair of normative harm through censure</td>
<td>rehabilitation, through education or treatment</td>
</tr>
<tr>
<td>the pain of sanction, extending to punishment</td>
<td>repair of relational harm, personal or normative</td>
<td>Protection, through constraints on behaviour, including exclusion</td>
</tr>
</tbody>
</table>

Particular elements of each of these aims were seen to be better addressed by either legal or restorative responses, though neither approach meets them all fully. However, an integrated approach can mean that a much wider range of these specifics are addressed.

2. Better satisfy the evaluative criteria of justice

Secondly, it was argued that justice’s primary ‘moral achievement’ is to ensure a ‘proper distribution’ of benefits and burdens takes place following wrongdoing (Chase 1996:429). A set of evaluative criteria was developed by which to assess this. The
favoured measures of ‘justness’ were those that gave people their deserts, treated them equally, in a manner consistent with their rights and promoted harmonious social relationships between them. Neither form of practice could satisfy all criteria.

Specific normative gaps were identified. Applied to legal practice (in Chapter 5) two measures (the equality and harmonious social relationships criteria) were not fully satisfied. Similarly, applied to restorative practice (in Chapter 6) two other measures (the desert and rights standards) were not satisfied. The respective deficiencies were tabulated as:

Table 9. Potential of legal and restorative practice to satisfy the justness measures

<table>
<thead>
<tr>
<th>Is the practice concerned with the standard</th>
<th>Legal practice</th>
<th>Restorative practice</th>
</tr>
</thead>
<tbody>
<tr>
<td>desert?</td>
<td>substantially, but in a negative sense</td>
<td>poorly, particularly in a negative sense</td>
</tr>
<tr>
<td>equality?</td>
<td>partially</td>
<td>significantly</td>
</tr>
<tr>
<td>rights?</td>
<td>significantly</td>
<td>partially</td>
</tr>
<tr>
<td>harmony?</td>
<td>poorly</td>
<td>substantially</td>
</tr>
</tbody>
</table>
Legal practice had strongest potential to meet the desert criterion but had an overemphasis on negative desert. Restorative practice lacked the capacity to meet this standard.

Legal practice also had the potential to treat people equally but the artificiality of its ‘formal equality’ often defeated this. Restorative responses were better at accommodating difference in their equal treatment of others.

Legal practice had good potential to legitimise, protect and enforce rights. Restorative practice lacked this capacity and at times its practices were open to rights abuses.

Legal practice had poor potential to promote harmonious social relationships. Restorative practice had this capacity because of its stronger emphasis on relational repair and restoration.

It was clear that there was complementarity in the satisfaction of these criteria between the two practices. Since none of these measures provided an overarching standard all needed to be met. Integrating the two forms of practice does this.

3. Better distribute harm-related benefits and burdens

Thirdly, justice responses to wrongdoing are distributive and we identified a range of harm-related benefits and burdens that needing to be distributed in responses to wrongdoing.
A distribution of the benefits was required to effect ‘repair’ and ‘restoration’. A distribution of the burdens was required to effect ‘censure’ and ‘sanction’. The specifics of these benefits and burdens were tabulated as follows:

Table 10. Harm-related Benefits and Burdens

<table>
<thead>
<tr>
<th>Benefits</th>
<th>Burdens</th>
</tr>
</thead>
<tbody>
<tr>
<td>Repaired or restored</td>
<td>Censure or sanction through</td>
</tr>
<tr>
<td>• Safety, injury, health</td>
<td>• Self censure of remorse</td>
</tr>
<tr>
<td>• Loss</td>
<td>• Censure of others</td>
</tr>
<tr>
<td>• Relationships</td>
<td>• Symbolic reparation</td>
</tr>
<tr>
<td>• Sense of community</td>
<td>• Material reparation</td>
</tr>
<tr>
<td>• Personal dignity</td>
<td>• Punishment</td>
</tr>
<tr>
<td>• Emotional damage</td>
<td>• Emotional burdens</td>
</tr>
<tr>
<td>• Sense of vindication</td>
<td>• Practical and personal burdens of the response process</td>
</tr>
<tr>
<td>• Sense of freedom</td>
<td></td>
</tr>
<tr>
<td>• The release of public catharsis</td>
<td></td>
</tr>
</tbody>
</table>

Legal practice’s emphasis was on delivering retribution and meeting certain consequentialist goals, not in distributing benefits of restored human or community relationships or recognizing burdens flowing from self-censure. Restorative practice’s emphasis was on repair, but with little scope for releasing the benefits of public catharsis or distributing burdens of punishment. Only by generating all such flows of can a full experience of a sense of justice be delivered. An integrated model can do this.
4. **Better accommodate justice generating mechanisms**

Fourthly, it was argued in Chapter 4 that certain social behaviours provided the catalyst to generate just outcomes by activating the necessary flow of these harm-related benefits and burdens. As wide a range of generative mechanisms as possible is needed for this to happen. Each approach gave prominence to certain mechanisms which are tabulated as follows:

**Table 11. Justice Generative Mechanisms**

<table>
<thead>
<tr>
<th>Mechanisms common to legal and restorative practices:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• truth telling</td>
</tr>
<tr>
<td>• vindication</td>
</tr>
<tr>
<td>• remorse</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Mechanisms unique to each practice:</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>legal practice –</strong></td>
</tr>
<tr>
<td>• sanction through punishment</td>
</tr>
<tr>
<td><strong>restorative practice –</strong></td>
</tr>
<tr>
<td>• sanction through apology and reparation</td>
</tr>
</tbody>
</table>

Legal practice’s focus is on repairing ‘the tear in the normative fabric’ more than in addressing the personal or relational harm through apology or reparation. The integration of restorative approaches with their focus on these factors can widen this.

Satisfying these four normative tests is essential for a full justice response to wrongdoing. An integrated form of practice with a focus on adding ‘the restorative question’ into the response equation can see that all are addressed.
In order to meet these normative requirements, an integrated model must satisfy certain design criteria.\textsuperscript{231} We drew suggestions for these criteria from earlier examinations of the restorative practice of justice (in Chapters 7 and 8) and the current interface of legal and restorative responses (in Chapter 9).\textsuperscript{232}

**Design requirements for an integrated model**

Five key characteristics can be isolated from what was learned about the reality of practice gathered in earlier chapters. An integrated form of response must meet the need for:

1. a mechanism which mandates that restorative forms of response be accommodated in responses to wrongdoing;
2. a reframed sentencing rhetoric which is more closely aligned with the essential aims of justice;
3. a set of sentencing mechanisms better able to meet both punitive and restorative needs;
4. a network of community-based restorative justice providers to facilitate restorative encounters, and

\textsuperscript{231} Goodin’s (1996:39–43) ‘very preliminary cut’ at a set of desirable institutional design principles – revisability, robustness, sensitivity to motivational complexity, public defensibility and variability – are broader in nature than the design requirements suggested here.

\textsuperscript{232} Earlier models of integration include that of Braithwaite’s ‘responsive regulation’ pyramid developed initially in the context of business regulation (Ayres and Braithwaite 1992) and subsequently refined for application to the criminal justice response (1999a; 2002a). Dignan (with Cavadino) followed the original Braithwaite design to develop a ‘replacement discourse’ model as ‘part of a systemic and fully integrated reform of the regular criminal justice system’ (1994; Dignan and Cavadino 1996; Cavadino and Dignan 1997; Dignan 2002; 2003:146).
5. a clearer recognition of the part played by overt ceremonial forms of reintegration in addressing criminal wrongdoing.

What is needed to incorporate each of these requirements in an integrated model is outlined below.

1. **Mandating the accommodation of restorative responses**

   There is a need to mandate that criminal justice processes accommodate restorative approaches in an overt and explicit way. The importance of this requirement was emphasised in both the New Zealand and Canada experience where a strong restorative jurisprudence developed as a consequence.

   In both jurisdictions localised integrative approaches developed as a consequence of the legislative and judicial requirement to ‘reconcile restorative and punitive responses’. In the case of New Zealand, this was to *balance* both approaches through mainstreaming the use of restorative encounters. In the case of Canada, a variety of provincial institutional initiatives developed to satisfy the requirement to *consider* restorative means alongside punitive means in meeting sentencing obligations. By contrast in Australia, where no mandate exists there was little jurisprudential development.

2. **Reframing the sentencing rhetoric**

   There is a need to reframe sentencing prescriptions in a way that more closely aligns with the normative requirements set in this thesis. This will better highlight the capacity of restorative approaches to meet each of such aims.
Localised attempts to do so show that simply reforming legislative provisions to read more ‘restoratively’ remain insufficient. A better approach is to make the legislative requirements prescriptive. In New Zealand, its general sentencing restatements have been reinforced with specific provisions (for instance, as appearing in s.10 of its Sentencing Act 2005 (NZ) extracted in full in Chapter 9) which require courts to take account of the outcomes of restorative conferences. As a consequence its general sentencing purposes as noted in s.7 include the following (emphasis added):

(a) to hold the offender accountable for harm done to the victim and the community by the offending; or

(b) to promote in the offender a sense of responsibility for and an acknowledgment of that harm; or

(c) to provide for the interests of the victim of the offence....

These requirements have been addressed in ways that encourages restorative responses. In R v Sami\(^{233}\) for instance the New Zealand District Court specifically matched each of these factors to what was achieved through ‘a conference with a direct face-to-face meeting with the victim’. The court said of the offender:

> 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... (para 26, emphasis added).

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\(^{233}\) R v Sami was an attempted purse snatching case heard 14 October 2005 (McElrea J) and subsequently reported as (2006) DCR 128.
Such a prescriptive reframing of sentencing jurisprudence moves the use of restorative approaches to the mainstream.

3. Establishing multifunctional sentencing mechanisms

There is a need to create sentencing mechanisms that allow punitive and restorative approaches to co-exist. Such devices are particularly necessary in cases of serious wrongdoing where restorative approaches will otherwise be dismissed as inadequate.

A prominent localised attempt to do so was the introduction of conditional sentences in the Canadian Criminal Code discussed in Chapter 9. Conditional sentences are specifically designed where a ‘term of imprisonment’ is warranted so that it can be ‘served in the community’ but subject to strict conditions.\(^\text{234}\) This has allowed a punitive sentence to be satisfied in a form that accommodates restorative objectives. Conditional sentences can be limiting, particularly when they try to perform essentially conflicting functions. In the leading Canadian case of Proulx discussed in detail in Chapter 9 ‘restorative purposes’ were seen (paras. 109-112) as largely confined to addressing consequential aims, such as ‘restitution’, ‘community service’ and ‘treatment’ and given little scope to address retributive aims. This will remain a difficulty with sentencing devices as long as ‘restorative objectives cannot dominate…[and indeed] cannot be given equal weight’(Healy 2000:II.1). The UK’s alternative of ‘conditional cautioning’ and ‘community (probation) supervision’ provisions in its Criminal Justice Act 2003 (UK) are also largely limited to facilitating rehabilitation of the offender and reparation

\(^{234}\) It is the notion of ‘served in the community’ that is the key distinction between conditional sentences and ‘suspended sentences’ more commonplace in the Australian and New Zealand jurisdictions. For example the ACT Crimes (Sentencing) Act s.12(2) provides that a court ‘may make an order suspending all or part of the sentence of imprisonment’ imposed.
for the offence without giving scope for the restorative addressing of retributive aims (UK Home Office 2003; Sherman and Strang 2007).

In order to be more effective sentencing mechanisms will need to allow for a clearer balancing between restorative and punitive means if they are to address all of the sentencing aims.

4. Developing community restorative practice networks

There is a need to develop a network of community-based restorative practices to provide necessary conferencing and support services to facilitate encounters and to carry out subsequent outcome monitoring.

Localised attempts at institutionalising such networks include the countrywide program in New Zealand and the province-wide program in Nova Scotia. As we saw in Chapter 7, New Zealand’s network now carries out restorative interventions for both juvenile and adult offenders (NZ Ministry of Justice: Crime Prevention Unit 2008). The Nova Scotia network supports its juvenile program using regional non-profit agencies coupled with volunteers (Clairmont 2005a:5). A somewhat similar community based agency network provides conferencing facilities in Victoria (Maxwell and Hayes 2006:143).

The existence of a network of community-based restorative practices is crucial to ready accessibility of restorative encounters where many of the retributive, restorative and consequential specifics highlighted in Table 8 can be addressed by restorative means.
5. **Providing overt reintegrative milestones**

There is a need for the importance of reintegration to be overtly recognised as a core component of responses to wrongdoing, ideally by some sort of ‘reintegrative ceremony’. These explicit milestones need to provide more than simply ‘ceremonial value…[that makes one] feel that something is being done…whether the result is right or wrong’ (emphasis in original, Llewellyn 1940:610). What is needed instead is a more meaningful interaction that re-convinces people ‘that legal institutions [can be] genuine purveyors of justice’ in their responses to wrongdoing (Luban 1996:160).

Localised attempts to provide such interactions were particularly prominent in indigenous restorative practices. In New Zealand, the Te Whanau Awhina program reported in Chapter 7 uses its indigenous community connection to add ceremonial emphasis to reintegration by holding the encounter on the marae (traditional Maori meeting place), with a panel of local marae members and with the offender accompanied by his or her whanau (extended family). The power of such an encounter to emphasise reintegration was illustrated in a report of one such conference:

> The voiced opinion from the people of Puatahi and Haranui maraes present is that such [punitive] approaches do not meet the needs of their people. They believe that the traditional ways of shaming, punishing and restoring their young people are a better way to deal with this situation (1995:18-19).

Similarly in Canada, conventional justice practices have been adapted to add the power of indigenous ceremonial elements which emphasise reintegration. In the *Gladue*

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(Aboriginal Persons) Court such atmosphere is created emphasising reintegration through the promotion of Aboriginal values of ceremony and ritual. When the court diverts offenders to its Community Council Program all its graduates are recognised with an ‘honouring ceremony…with all successful completion people coming together to celebrate at a community gathering together with prosecutors, judges and attorneys’ (McCombs 2007).

This ceremonial recognition need not only be indigenously based. Becroft (2005) reports successful ‘ceremonies’ in New Zealand Family Group Conferences where reintegration is marked in many diverse ways such as ‘an apology in song’, an offender ‘cooking a dinner for victims and their families’ or ‘creating a CD of music which expresses their apology’. More specialised Domestic Violence Courts and Drug Courts similarly recognise the importance of ceremony with offenders applauded and congratulated by the bench on completion of program commitments.236

In the same way conventional justice practices in Australia have been adapted when dealing with Aboriginal offenders to add Koori and other indigenous elements in the form of sentencing circles which emphasise reintegration.

These are five institutional design requirements drawn directly from the review of practice. Many localised examples suggest all of these requirements are feasible. Each specification will contribute to widening the scope for restorative approaches to work

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236 The Canberra Times 28 May 2009 reported incidental remarks of the ACT Supreme Court (Refshauge J) in the case of Bastow (in relation to a defendant who had successfully completed onerous deferred sentence conditions imposed for an aggravated robbery charge) to the effect that ‘if this were America and we were in one of those problem-solving courts, I’d come down and give you a hug right now’. The formal sentencing remarks reflect this congratulatory tone R v Bastow (27 May 2009).
within any integrated form of response. We now outline what such a model of integration would look like if designed around answering the ‘restorative question’.

**The ‘restorative question’ model**

A minimalist model

It has been argued that the best way to meet the normative standards is through integrated practice. A number of design requirements have been set. A model of integration should display the hallmarks of ‘democratic experimentalism’ where existing institutions are allocated a more proactive role in ‘monitoring the delivery of services’, rather than simply confined to ‘meting out justice’ in isolation from the context of wrongdoing (Dorf and Sabel 1998:938; Dorf 2003).

Rather than using a ‘triaging mechanism’ to act as a trigger to assign incidents of wrongdoing to either a legal or a restorative pathway, we use instead an integrative design with a selection mechanism that requires institutions to ask the ‘restorative question’ each time they respond to wrongdoing (in much the same way that they now routinely ask the ‘rehabilitation question’ in such responses).

Asking the ‘restorative question’ requires justice institutions to make two specific inquires:

1. Firstly, ‘Is there a restorative aspect to address in this wrongdoing? That is, have persons affected by the wrongdoing (including the offender) suffered harm as a consequence and is this harm capable of being restored?’
In most responses to wrongdoing the clear answer is ‘Yes’.

We suggest a set of principles by which to gauge whether a particular incident of wrongdoing has produced personal or normative harm capable of repair.

2. Secondly, ‘Can restorative approaches address (all or some of) the essential aims of justice required to respond to this particular incident of wrongdoing?’

Again, the clear answer as argued in this thesis is ‘Yes’.

We provide a means of determining the responsive capacity of relevant restorative means.

Answering these two inquiries is simplified if the response remains within existing institutional structures. There are a number of ways this can be done. McElrea (2007:108) suggested using a network of ‘Community Resolution Centres’ where courts relinquish their primary ‘gate keeping’ role, so that determinations of ‘response tracks’ are made ‘by those [likely to] take part in the particular conference’, that is the persons affected (McElrea 2007:109). Sherman and Strang (2007) propose something similar in their ‘Restorative Justice Board’ designed to ‘prime the pump’ for restorative referrals so as to ‘take RJ from the drawing board to its widespread construction’ (2007:8). This approach which calls for an external mechanism to answer the restorative question is not adopted here.

A better starting point is Sander’s (1976) traditional ‘Dispute Resolution Centre’ model where the determinative functions remain court-based. In Sander’s model, disputes are

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237McElrea (2005:20) cites as an example of this model in practice the Community Justice Houses in Columbia. These Community Justice Houses began as a pilot in this Central American country in the mid 1990s and by mid 2005 had expanded to more than 30 centres (Pearson 2004). Though their primary purpose has been to ‘get basic justice services out into the community’ by providing access to informal justice institutions for poor communities whose own ‘informal conflict resolution alternatives …tend to be violent’; a lot of its processes were seen as ‘being restorative justice without [necessarily being] called that’ (Pearson 2004 :unnumbered).
allocated to different dispute resolution streams based on certain criteria (in his model the nature of the dispute, the relationship between disputants, the amount in dispute and cost and timeliness considerations) (1976:72-9). This is an approach Preston (2007) also advocated in his model for reform of the NSW Land and Environment Court.\textsuperscript{238}

The benefit of retention of the function (and obligation) to make the inquiries within the existing institutional structure is that it permits minimalist change.\textsuperscript{239} The modifications that result are small:

1. a requirement to address the first aspect of the restorative question by asking ‘Has harm been caused?’ is introduced
2. a set of criteria can be easily developed to apply to incidents of wrongdoing to assist courts in making these determinations, and
3. courts can address the second aspect of considering the scope of restorative responses to address the essential aims with some internal assistance.

We touch upon the effect of each of these three changes briefly in the context of a discussion on design features below.

**Institutionalising the design features**

The process of making these determinations occurs within the existing institutional setting. The Collingwood Neighbourhood Justice Centre discussed in Chapter 7

\textsuperscript{238} Once again this proposal has not been introduced but as Preston is the chief judge of that court it remains a possibility.

\textsuperscript{239} Assertions that only the most minimalist change in sentencing practice is likely to be entertained by the judiciary is borne out by a search of the NSW Sentencing Bench Book (which is the judge’s ‘bible’ on sentencing) which discloses no current reference whatsoever to ‘restorative justice’.

http://jirs.judcom.nsw.gov.au/menus/prin.php accessed 19 May 2009. This is a potent reminder of Judge McElrea’s comments that ‘lawyers (including judges), prosecutors, government advisers and others [will be] slow to give up their old court-based, adversarial mindsets (McElrea 2007:102).
provides a good example of how this can be done. The NJC court performs decision-making and referral functions in tandem with other justice services within a single institutional structure (Jordens 2008). Institutionalising the need to answer the restorative question parallels a similar integrated track.

1. Considering whether harm has been caused

Requiring courts to consider whether harm has been caused may involve some departure from their traditional curial functions. But courts would still retain their neutral oversight function but adapt their practice to acknowledge the need to consider restorative aspects to wrongdoing. Once this determination was made (assuming criminal responsibility has also been determined) decisions could be made as to the restorative aspects that need to be addressed.

2. Criteria to determine the extent of harm

A set of criteria can be developed to assist courts in these determinations. Questions based on the nature of the wrongdoing, the extent of harm suffered and likelihood that such harm can be repaired provide the starting point for such decisions.

Such questions can be more conveniently framed as a set of ‘restorative question criteria’:
Table 12. Criteria for determining restorative aspects

<table>
<thead>
<tr>
<th>Restorative Question Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>A court <em>must:</em></td>
</tr>
<tr>
<td>1. consider whether the wrongdoing involves personal violation of some kind</td>
</tr>
<tr>
<td>2. consider the feelings and needs of victims about the offender and wrongdoing</td>
</tr>
<tr>
<td>3. consider the victim’s views about the form of response</td>
</tr>
<tr>
<td>4. consider potential benefits from engaging a restorative form of response</td>
</tr>
<tr>
<td>5. consider the likelihood that any sanction imposed would have a community element</td>
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<tr>
<td>6. consider the potential crime prevention benefits of an acceptance of responsibility. 240</td>
</tr>
</tbody>
</table>

3. **Considering the scope to address the essential aims restoratively**

The second determination is whether the response is best dealt with in whole or in part by restorative means. This is not a determination that courts can make alone. In broad terms courts either seek to deliver the restorative objectives themselves or preferably the

240 A clear example of the superior offence prevention effects of strategies which focus on acceptance of responsibility is that of the *Invitation to Responsibility* program for family violence at the Mary Street Clinic in South Australia (Jenkins 1990).
delivery can be referred to external providers so as to conduct a form of restorative encounter.

We have seen a number of suggested ways to do this. The method used in the Neighbourhood Justice Centre court provides one useful template. There the external ‘assistance’ is specifically directed to selecting suitable welfare and justice referrals but its method has wider application. Its courtroom personnel include a ‘justice centre caseworker’ who actively participates in proceedings and makes referral determinations (Jordens 2008; Lim and Bassett 2008). In an integrated model courts could be similarly ‘assisted’ in making determinations as to the capacity of restorative approaches to address aspects of the wrongdoing. A ‘restorative justice advisor’ with knowledge and skills about the availability and suitability of various forms of restorative response could fill this role. This advisor could also act as a champion for restorative approaches more generally educating judges and others as to the capacity of restorative approaches to address the essential aims. The role of such advisers could extend to similarly championing the restorative question inquiry in the broader community and more specifically with police, prosecutorial and correctional gatekeepers.

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241 In New Zealand’s adult restorative scheme the selection is made by the court though suitability for restorative encounter is brought to the attention of judges by ‘restorative justice co-ordinators’ who have access to prosecution files and indicate a potential suitability for restorative intervention by ‘tagging or stamping court papers “RJ”’ (NZ Ministry of Justice 2005:para 3.2). Likewise in some Canadian programs, such as the Ottawa Collaborative Justice Project staff play a significant role in the decision to refer (Mann 2007).

242 The referrals can be to community corrections, aboriginal justice, alcohol and drug case officers, crime and violence prevention, legal aid, financial counselling, victim support, mental health, emergency relief, accommodation services and family violence support (Lim and Bassett 2008).

243 Problem solving or ‘problem-oriented’ (Freiberg 2001a) courts already provide examples of successful modification to judicial practice in introducing therapeutic jurisprudence principles to legal practice (Wexler, Winick et al. 2000). See the concerns Dorf (2006) raises about the ‘accountability deficit’ of such courts.
Addressing the restorative question

Providing the two parts of the restorative question are properly addressed, a restorative response can be met in two ways. Either approach can satisfy the second part of the restorative question requirement of ensuring that all possible aspects of the essential retributive, restorative and consequential aims are met restoratively.

Using restorative-type sentences

A restorative-type sentence remains a court sanctioned approach where conditions are designed to meet the essential aims within a restorative framework by addressing:

- Retribution – through *denunciation* and *censure* communicated by a *sanction* involving potential restriction on liberty (such as house arrest, curfew, electronic monitoring but falling short of imprisonment), with the extent of any restrictions dependant on the severity of the wrongdoing;
- Restoration – through personal and normative harm addressed by orders for *reparation* – symbolically by *apology*, and materially by payment of *compensation* or performance of *community services*;
- Consequential objectives – through specifically meeting
  - the need for *deterrence* by censure and restrictive measures;
  - the need for *rehabilitation* by attendance at treatment and/or education programs;
  - the need for *prevention*
    - by future restrictions on the liberty of the offender (reporting, curfew and residency conditions), and
• by future target-hardening recommendations (improved static security measures and improved community and police surveillance of trouble spots in the case of property-related offences, and altered rules on the regulation of alcohol or illicit drugs in the case of violence-related offences).

Using restorative encounters

Alternatively (and preferably), a restorative encounter provides the means to directly engage the offender with the persons affected by the wrongdoing (subject to determinations of suitability and consent). Such a process addresses each of the essential aims as a direct consequence of ‘bringing together all persons affected by wrongdoing’.

The encounter process meets the essential aims by addressing:

• Retribution – through denunciation and censure communicated in the process directly, and through remorse expressed directly to the persons affected;

• Restoration – through the need for personal and normative harm explored in the conference and recognised symbolically by apology, and met materially by reparation;\(^\text{244}\)

• Consequential objectives – through specifically meeting
  • the need for deterrence by censure and by agreed restrictions on behaviour;\(^\text{245}\)

\(^{244}\) Angel’s (2009) research has indicated participation in restorative conferencing can significantly reduce PTSS (post traumatic stress symptoms), especially for female adult victims of serious crime. Gal’s (2006) work suggests restorative encounters may also better address the needs of child victims that legal approaches can.
the need for rehabilitation by agreement to participate in treatment programs;

the need for prevention\textsuperscript{246}

\begin{itemize}
\item by agreed constraints on behaviour, and
\item by the mobilisation of community and police knowledge to craft creative crime prevention measures,
\item by measures designed to provoke attitudinal change.\textsuperscript{247}
\end{itemize}

Enabling restorative approaches to address as wide a scope as possible of the specifics of the essential aims is possible using either of these two means. When a restorative-type sentence is used, the management of the responses remains with the court but \textit{imposed} conditions are now framed within a restorative context. When a restorative form of encounter is used, the management of the response is (at least for a time) returned to the persons affected, with many of the aims (particularly the difficult retributive aims of denunciation, remorse and censure) delivered \textit{through} the encounter itself. Where encounters occur, additional consequentialist aspects are similarly met by

\textsuperscript{245} Shapland’s (2008) evaluation of UK 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.

\textsuperscript{246} Restorative approaches can provide an effective vehicle for contextual crime prevention. Braithwaite (2002a:111) has argued that ‘there are many individuals with preventative capabilities who can be rendered responsible for mobilizing those capabilities through a restorative justice dialogue’, such as an ‘Uncle Harry’ who can act as a strong influential and effective restraint on potential reoccurrence of family violence. This is strong empirical evidence of this occurring. The evaluation of the adult restorative justice pilot scheme in New Zealand showed that even where the use of imprisonment dropped 28 percent as against matched samples, there was still significantly reduced reoffending (NZ Ministry of Justice 2005:para 7.5.2). This led Judge McElrea to conclude in his sentencing remarks in \textit{R v Sami} that this ‘would suggest that where the restorative process has been followed, public safety may well in fact be \textit{enhanced} by keeping the defendant out of prison’ (McElrea J 2005:para 33 emphasis in original).

\textsuperscript{247} Specifically measures designed so as to begin the transformation of organisational, school or family cultures on matters like violence and alcohol abuse.
agreed conditions accepted by the wrongdoer in the outcome agreement endorsed by the court.

Having these two such pathways available in a integrated model allows a wider scope for achieving the second more difficult aspect of the ‘restorative question’. As a consequence, restorative responses are more likely to gain an effective institutional foothold.

The normative requirements reviewed earlier are also better served in such an integrated model. The deficiencies in the two evaluative criteria previously under-met – equality and rights – are now more adequately addressed. The deficiencies in legal practice’s ‘formal equality’ can be balanced by the scope for difference which restorative practice allows. The deficiencies in rights adherence in restorative processes can be better managed through the stronger right protection focus of legal practice.  

The ‘restoration question’ model also meets the requirement to facilitate a wider distribution of harm-related benefits. This is particularly so with the distribution of the benefits of relational repair, relief from damaging emotions, restored sense of dignity and satisfaction of victim’s needs. The approach also widens the scope for distributing harm-related burdens to include other burdens such as the pain of remorse and the direct censure of others. For those harmed, the integrated approach (particularly when a

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248 Not just through legal practice in the courts, but also through the influence of legal culture more broadly mediated through particular devices such as the availability of a Legal Hotline to youth justice lawyers for young offenders before they are subject to police caution in NSW (Bargen 2003) and the potential for external human rights audits of restorative procedures by independent Human Rights Commissions (in the ACT such audits have been confined to correctional and mental health facilities but there is no reason they could not be extended further to cover restorative processes).
restorative encounter occurs) provides relief from emotional and practical burdens through the managed expression and release of fear, hatred and shame.

The integrated model similarly meets the requirement to accommodate a wider range of justice generating mechanisms. In this model there is explicit engagement with restorative practice’s shift to apology and reparation which can temper legal practice’s over-reliance on punishment but still retain punitive sanctions where warranted.

The essential design requirements are also met in this model. Requiring courts as a compulsory step to address the restoration question meets the mandate to accommodate restorative approaches. Using a minimalist model provides the best strategy for restorative approaches to become routinised and so contribute to the development of a restorative sentencing jurisprudence. The suggested reframing of the sentencing rhetoric to align with the essential aims of justice is explicitly met through addressing this second aspect of the restorative question. The integrated model encourages the development of multifunctional sentencing mechanisms so as to give courts wider options when the restorative-type sentencing track is adopted. The need for a community-based restorative practice network is specifically encouraged because these networks are essential for both tracks of response to work most effectively. The need to explicitly recognise integrative milestones is met directly in the restorative encounter, and indirectly through its reports in open court.

**Conclusion**

The conceptual analysis in Part One of this thesis contributed to the normative theory of justice by arguing afresh that the distribution of benefits and burdens forms the core
framework of justice responses to wrongdoing. From this analysis, a prescription of
standards was developed to assess the justness of these distributions. It was asserted that
such a distribution should give people their deserts, protect their rights, treat them
equally and promote harmonious relationships between them.

These prescriptions were applied to two forms of practice and neither was found to meet
all the standards adequately. Legal practice was seldom concerned with relational
repair, restorative practice seldom with desert. Legal practice treated people equally
only in a formal sense, restorative practice provided narrower protections of rights.

These finding raised an empirical dilemma which led us to the review of justice practice
more closely. Responses to wrongdoing were seen to activate certain behaviours,
practices and principles so as to generate their just outcomes. We developed a typology
of these behaviours and applied them to assess the restorative practice of justice. We
found both a paradigmatic unity and a paradigmatic shift from legal practice.249

From the results of these inquiries the answer to the empirical dilemma was drawn. The
normative strengths of each practice were seen as capable of remedying the defects of
the other. Legal and restorative practices are nonetheless very different in size, reach
and influence. To accommodate the clear dominance of legal practice, it was determined
that a minimalist model of integration would work best. This model was based upon a
deceptively simple addition to criminal practice – a requirement to address ‘the
restorative question’ in all responses to wrongdoing.

249 Sometimes restorative practice also created a space for forgiveness, though not as often as some would
like. Archbishop Tutu’s view is that (at least for a society torn by ethnic war and violence) there can be
‘No Future without Forgiveness’ (Tutu 1999).
It has been argued that a response to wrongdoing integrated in this way can meet each of the evaluative criteria of justice more fully. A much wider set of generative mechanisms is made available. The scope now given for the integrated form of response to address the essential retributive, restorative and consequentialist aims are widened. As a consequence, restorative practice would be brought more closely into the mainstream response to criminal wrongdoing.
INTERVIEW INFORMATION

I am a researcher at the Australian National University and I am carrying out a research project to gather information about the justice of restorative justice programs. The Australian National University Human Ethics Committee, Protocol 2005/146, has approved the ethical aspects of this study.

I wish to ask you a number of specific questions about your ideas and expectations of restorative justice programs. I will also give you the opportunity to make any additional comments you wish to make. I will make notes of your responses to these questions. The information you provide will be used in my thesis. Your identity will not be disclosed without your consent.

I have set out a list of provisional questions below; all of these may not be relevant to you.

**General questions: the restorative justice program in which you are involved.**

1. Can you give me a general description of how the program operates?
2. Does your program involve an explicit set of procedures or protocols?
3. Do you think your program has an explicit emphasis on justice as distinct from restoration of persons affected by wrongdoing?

I have identified a provisional list of elements that seem to me might be essential to doing justice restoratively. I want to seek your views about each of these.

4. Different sorts of justice programs have different views on the question of accountability.
By accountability I mean the offender being held to account for the consequences of their wrongdoing.

Does that come into your program?

Does your program have any particular views on accountability in achieving justice?

5. Different sorts of justice programs have different views on the question of responsibility.

By responsibility I mean the offender reaching a position of actively accepting responsibility for their wrongdoing when confronting with the consequences of their offending. Does that come into your program?

Does your program have any particular views on responsibility in achieving justice?

6. Different sorts of justice programs have different views on the question of censure.

By censure I mean to publicly denounce harmful behaviour and declare it as wrong.

Does that come into your program?

Does your program have any particular views on censure in achieving justice?

7. Different sorts of justice programs have different views on the question of remorse.

By remorse I mean the offender feeling sorry for what they had done, wishing that it had not occurred and expressing that they were sorry.

Does that come into your program?

Does your program have any particular views on remorse in achieving justice?

8. Different sorts of justice programs have different views on the question of punishment.

By punishment I mean a sanction imposed with the intention of expressing censure for harm done.
Does that come into your program?

Does your program have any particular views on *punishment* in achieving justice?

9. Different sorts of justice programs have different views on the question of *vindication* of victims.

By vindication of victims I mean taking seriously the concerns of victims in a way that helps them to feel that it is they who have been wronged if that is the case.

Does that come into your program?

Does your program have any particular views on *vindication* in achieving justice?

10. Different sorts of justice programs have different views on the question of *deterrence or prevention*.

By deterrence/prevention I mean:

- any effect of a sanction in reducing the tendency of the person punished to re-offend
- any effect of a sanction in reducing the general tendency of people to offend in this way

Does that come into your program?

Does your program have any particular views on *deterrence or prevention* in achieving justice?

11. Different sorts of justice programs have different views on the question of *proportionality*.

In the case of restorative justice programs, proportionality is taken to mean:

Censure proportionate to the wrongdoing of the case, or

Repair proportionate to the harm done.

Does that come into your program?

Does your program have any particular views on *proportionality* in achieving justice?
12. Different sorts of justice programs have different views on the question of truth telling.

By truth telling I mean providing persons affected by the wrongdoing, including the offender, with the opportunity to say his or her truth as he or she sees it.

Does that come into your program?
Does your program have any particular views on truth telling in achieving justice?

13. Different sorts of justice programs have different views on the question of reparation.

By reparation I mean the act of making amends, offering expiation, or giving satisfaction for a wrong or injury.

Does that come into your program?
Does your program have any particular views on reparation in achieving justice?

14. Different sorts of justice programs have different views on the question of apology.

By apology I mean expressing sorrow about the effect your offence has had on the victim.

Does that come into your program?
Does your program have any particular views on apology in achieving justice?

15. Different sorts of justice programs have different views on the question of forgiveness.

By forgiveness I mean the persons wronged wilfully abandoning resentment and endeavoring to respond with compassion and generosity.

Does that come into your program?
Does your program have any particular views on forgiveness in achieving justice?

In summary:
Drawing on these elements if you wish, how would you describe how justice is done in the restorative justice programs in which you are involved.

At the end of the interview: I want to summarise what I understand you to be telling me about the justice of restorative justice programs in which you are involved.

16. If I may summarise, you are telling me:
   • The justice story of your program is…

Following the interview: I want to confirm the correctness of the summary I’ve made with you. To ensure that I have got your justice story right and allow for corrections I propose to email my summary back to you following this interview.

Thank you, your views are important.

Tony Foley
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