British Journal of Community Justice

ISSN 1475-0279
Vol. 20(1) 78–97

RECONCEPTUALISING RESTORATIVE JUSTICE FOR ABOLITIONIST PURPOSES: PROPOSALS FOR ABOLITIONIST RESTORATIVE JUSTICE IN AOTEAROA/NEW ZEALND

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Abstract
Writing from the settler-colonial context of Aotearoa/New Zealand, this paper grapples with the theoretical tensions between formal and informal responses to harm in a society without prisons. Although often-praised as a Māori-led or inspired response to harm, restorative justice has fundamentally failed to provide a meaningful alternative to imprisonment. As Māori scholars have argued, restorative justice has not delivered Māori self-determination, as guaranteed under Te Tiriti o Waitangi and international law. Despite these failures, this paper interrogates what insights can be gained from the limitations and promises of restorative justice for a justice system without prisons. It proposes a fundamental reconceptualisation of restorative justice under the title 'abolitionist justice'. It advances a conception of the state, formal and informal justice that responds to profound critiques of each, without doing away with either component. In this reconceptualisation of restorative justice for abolitionist purposes, it envisions a role for the state, and formal systems of justice, in underpinning human rights and in redistribution of power and resources. This abolitionist justice approach proposes an integrated system of formal and informal alternatives to prison in which there is no place for incarceration.

Keywords
Prison; Abolition; Restorative Justice; New Zealand; Abolitionist Justice; Formal Justice; Informal Justice.

Introduction

The New Zealand criminal justice system isoften hailed as an inspiration for restorative justice proponents around the world. Held up as Indigenous, Māori-led or -inspired, the outside perception of New Zealand's supposedly progressive society and criminal justice system does cohere with the on-the-ground reality of colonial injustice. New Zealand continues to have one of the highest rates of incarceration, compared to the OECD average (Ministry of Justice, 2022), and that prison population is highly racialised, with 52% of the men's prison population and 63% of the women's population being Māori, compared to 15% of the outside population (Adair, 2023). Recent attempts to reform the prison system to include more Māori practices have failed to address ongoing racial disparities within the justice system (Te Ohu Whakatika, 2019). Indeed, Māori scholars have lambasted proponents of restorative justice for their cynical misappropriation of Māori concepts, as well as their failure to support self-determination (*tino rangatiratanga*) for indigenous peoples (Tauri, 2019b). Rather than a progressive beacon, Aotearoa-based scholars, advocates and activists have better described the criminal justice system as a colonial imposition from Britain, which is broken, racist, oppressive, and ineffective (Lamusse and McIntosh, 2021).

Abolitionism refers to the long-term goal for the liberation of oppressed peoples. In the context of the justice system, penal abolitionism refers to visions of society without prisons and carceral modes of punishment. In this context, this article aims to what abolitionist justice could look like in Aotearoa. For the purposes of this article, abolitionist justice refers to the systems, and philosophical underpinnings, which respond to harm when it occurs, using a mixture of state and non-state responses, without the use of imprisonment. Abolitionist justice has mechanisms for the oversight and control of abuses of power in both state and non-state systems (Lamusse, 2023). This article draws on decades of debate about informal and restorative justice to propose an abolitionist transformation of the justice system. Within that context, the proposals in this article are based on the following foundational assumptions:

1. Transformative justice, the common contemporary abolitionist alternative to prisons, is insufficient to meet the task of abolition (Lamusse, 2022). This is because transformative justice has not responded to the ongoing critiques of informal justice since the 1980s, including the potential for transformative justice to create significant harm to its participants (Lamusse, 2023).

2. The ongoing existence of some kind of state is necessary, as a part of the transition to abolitionist justice (Lamusse, 2022). This is because the state, and its resources, will allow for a more rapid transition away from imprisonment, as well as provide checks and balances on the power of informal justice processes. [1]

[1] However, the state itself would require profound transformation. It would require a moving away from the simultaneous neoliberal non-interventionism for the wealthy and carceral intervention for the poor (Wacquant, 2009), toward a state that provides dignified income, housing, education, healthcare and other universal basic services to all.

3. The proposal of alternatives to imprisonment, such as those in this article, must be part of an abolition-and-replacement process. Without the simultaneous prohibition in the use of imprisonment, alternatives to imprisonment risk expanding the carceral net (Lamusse, 2023).

Each of these assumptions are worthy of considerable further debate. However, for the purposes of this article, they are taken as given, for the proposals contained within to have logical coherence.

This article is split into three sections. The first section briefly outlines some key critiques of restorative justice in the New Zealand context, before attempting to find its kernels of abolitionist possibility. It further outlines the complexities of how and by whom restorative justice work could be done in an abolitionist justice system. The second section outlines key proposals for restorative justice in a post-prison future, specifically relating to constitutional transformation, expansion of its use, standardisation, training, oversight, as well as its use in the absence of a victim or perpetrator of harm. However, restorative justice, on its own, will likely be insufficient in ensuring democratic oversight and human rights protections in particular. In the third section of this article, I draw together further contradictions within restorative justice praxis to propose an ongoing role for a formal justice system. This system would take elements from formal, informal, and restorative justice to propose a distinctly abolitionist justice. In this way, this article attempts to move from contradiction and critique to synthesis and proposal. Thus, these proposals contribute to an ongoing conversation about abolitionist praxis and abolitionist justice alternatives.

On Restorative Justice in Colonised New Zealand

Many abolitionists have given up on restorative justice and for good reason (Ruggiero, 2011). There have been decades of critique about restorative justice's relationship to Indigenous people, feminist praxis, its relationship to the state and its broader politics. These critiques include: the inappropriateness of restorative justice from a tikanga Māori perspective (Tauri, 1998, 2019b; Moyle and Tauri, 2016); the misappropriation of *tikanga*[2] concepts by the colonial state (Moyle and Tauri, 2016; Tauri, 2019a, 2019b); the imposition of restorative justice on indigenous people globally (Tauri, 2019a), denying their self-determination (Sayers, 2020); the explicit anti-abolitionism of some of restorative justice's key proponents (Braithwaite, 2000:336); the difficulty in making evaluative claims about the 'effectiveness' of restorative justice (Wood, 2015; Piggott and Wood, 2019; Lamusse, 2023); the potential for restorative justice to cause harm to particularly vulnerable victims (Martin, 1998; Ashworth, 2002; Eliaerts and Dumortier, 2002; Boyes-Watson, 2019; Skelton, 2019); the co-option of restorative justice by the state (Bazemore and Griffiths, 1997; Maglione, 2019; Pavlich, 2019; Stauffer and Turner, 2019); and the 'third way' politics of restorative justice that prioritises political pragmatism over principled social transformation (Maglione, 2019; Lamusse, 2023). These debates have been well-ventilated elsewhere. The point of

(Davis, 2003).

[2] Māori law, rules, protocols, and practices. It is a normative system of social regulation, guiding and correcting behaviour, which develops over time. For more detail, see: Mead (2006).

this article is not to relitigate these debates but, instead, is an attempt to excavate the abolitionist possibilities within these critiques.

Rooting Out Restorative Justice's Radical Possibilities

For restorative justice to play a significant role as a meaningful alternative to imprisonment, it needs to rediscover its abolitionist roots. As a theoretical framework that prioritises conciliation and conflict resolution, some strains of restorative justice are paradoxically in conflict with theories of oppression and exploitation that see conflict at the heart of domination. This tendency toward interpersonal conciliation can logically lead to a third way politics of conciliation between the exploiters and the exploited (Abel, 1982a, 1982b; Pavlich, 2019). While it may be politically pragmatic to market restorative justice to conservative parties and voters (Braithwaite, 1999:4), this short-term reformist orientation ignores the neoliberal economic policies of such parties that create further harm and violence longer term.. As far as restorative justice is willing to merely supplement the formal punitive justice system, within a social and economic system that produces oppression and exploitation, it is not a meaningful alternative to imprisonment.

However, another logical conclusion to the values of restorative justice is to demand societal transformation as a resolution to structural violence. The principle of restoration could, for example, be applied to the ongoing violence of colonisation in settler New Zealand. The values of inclusion, amends and reintegration (Van Ness, 2002; Van Ness and Strong, 2015), could also facilitate a process by which the Crown takes responsibility for the violence of colonisation and makes amends by ceding power, allowing for a constitutional transformation of Aotearoa in line with Te Tiriti o Waitangi[3]. However, as argued by several Māori scholars, it would be more appropriate to use tikanga Māori as the guiding framework to address this social harm (Mikaere, 2005, 2013; Matike Mai Aotearoa, 2016). The utilisation of Indigenous practices to address the harm of colonisation would also adhere with Braithwaite's (1999, 2000, 2003) call for the preservation of Indigenous justice practices.

In other words, if the values and principles of restorative justice, or *tikanga* Māori itself, were applied to the violence of colonisation they would facilitate the constitutional transformation of Aotearoa. This commitment to radical transformation, rather than political pragmatism, would need to be at the heart of restorative justice within a system of abolitionist justice.

Constitutional Transformation

However, for restorative justice to meet a transformative potential, it needs to become more than simply a supplement to the existing formal system. As such, an expansion in the use of an abolitionist reconceptualisation of restorative justice would require a constitutional transformation of the New Zealand justice system. This constitutional transformation could, on top of ensuring the tino rangatiratanga of Māori in the Aotearoa

[3] The founding agreement establishing relationships between the British Crown and sovereign Māori rangatira (chiefs).

context, place greater value on restorative responses to social harm than on formal legalism.

In conceptualising this constitutional transformation, there is some value in revisiting the- as yet unpursued - constitutional models for restorative justice, as proposed by Van Ness (2002) and Van Ness and Strong (2015). In their 'safety net' model, a justice system would primarily use restorative justice, but 'vestiges of the criminal justice system will also be needed as a safety net when the restorative approach cannot work' (Van Ness, 2002:16). In this model, the assumption about the preferred approach to resolving crime would change so that the expectation would be that cases are handled restoratively; contemporary criminal justice would serve as a safety net when restorative approaches cannot or do not bring about resolution. For example, if one of the parties does not want to meet, or the parties do meet but are not able to come to an agreement, the matter would then be handled by contemporary criminal justice. (Van Ness and Strong, 2015:153)

This 'safety net' could be further expanded to include rights to appeal (Braithwaite, 1999), as well as formal judicial oversight for issues of constitutional importance and human rights compliance, as discussed below. In the context of Aotearoa, this model would also need to provide for the constitutional self-determination of Māori, as well as mechanisms for resolving conflicts between *tangata whenua* (Māori) and *tangata tiriti* (non-Māori) spheres of governance.

Who Will Do The Work? Community, State and Funding

> The question would, then, remain: who should carry out restorative justice? For Braithwaite (1999:11): one wants to see most restorative justice conferencing transacted in civil society without ever going through the police station door – in Aboriginal communities, schools, extended families, churches, sporting clubs, corporations, business associations, and trade unions.

In this scenario, knowledge and practice of restorative justice would be so widespread that harm and conflict could be dealt with by civil society organisations that are most directly affected by it. Existing communities of interest would respond restoratively without any need for state intervention. To an extent, this happens today in New Zealand with schools and workplaces like Te Herenga Waka, for example, adopting 'restorative' responses to harm within their relevant community (Victoria University of Wellington, 2020).

Undeniably, in a late capitalist setting of heightened alienation, people who harm one another do not always belong to the same communities of interest. Further, harm often occurs in private, or within civil society organisations which may not be willing to address serious forms of violence. While there may be benefits to creating a society better equipped to mediate conflict at the grassroots level, a vision of justice dependent entirely on this approach may not be able to deal with much of the harm currently processed by the formal criminal justice system. As a result, a sizeable portion of social harm, in a post-prison future, would need a restorative response by an organisation or organisations whose primary purpose would be to respond to social harm and conflict.

Such an organisation, or organisations, would require substantial funding from the state. Alongside the question of funding is the question of who controls the restorative justice organisations. In a decentralised, neoliberal model, states would socialise funding and privatise provision of restorative justice 'services'. This would support the further proliferation of restorative justice non-governmental organisations and potentially even for-profit restorative justice service providers, if such an organisational model is allowed. However, such a decentralised model poses its own sets of challenges, including a funding model that would prioritise ongoing contracts and profitability above the provision of restorative justice (Stauffer and Turner, 2019:444).

Rather than outsourcing justice, the state could create numerous restorative justice programmes that are locally specific and embedded within set geographical areas. The primary benefit of such an approach would be to ensure a degree of democratic oversight that is harder to achieve in outsourced 'services'. Regardless, such a devolved form of restorative justice would require the 'safety net' of formal legalism, as discussed in the third section of this article. In what immediately follows, however, are proposals for how the kind of restorative justice described above could be reconceptualised for abolitionist purposes.

Seven Proposals for the Role of Restorative Justice in Abolitionist justice

In this section, I make the proposals about the potential role restorative justice could play in a post-prison future in Aotearoa. These proposals involve substantial reconceptualisation of restorative justice praxis for restorative justice to have utility to abolitionist justice. They draw on analysis of the limitations and contradictions of restorative justice I have provided elsewhere (Lamusse, 2023).

First, and foremost, *restorative justice must place constitutional transformation at the core of its political advocacy and analysis within Aotearoa*. For nearly three decades, Māori scholars have offered restorative justice scholars generous critique with minimal meaningful response (Tauri and Morris, 1997; Tauri, 1998, 1998, 2019b, 2019a; Moyle and Tauri, 2016). While restorative justice proponents may selectively co-opt elements of tikanga Māori for 'marketing' purposes (Tauri, 2019b), a meaningful engagement with tikanga would be unsettling and lead to a different praxis.

As I have argued elsewhere alongside Māori scholars, prison abolition, and to whatever extent restorative justice is a part of that political project, must include constitutional transformation in its programme (Lamusse et al., 2016; Lamusse, and McIntosh, 2021). To meet the Crown's obligations under Te Tiriti o Waitangi[4], the tino rangatiratanga of tangata whenua needs to apply to justice. Repairing the harms of colonisation and making amends between its perpetrators and survivors should, as per Matike Mai, include a ceding of power by the Crown to Māori (Matike Mai Aotearoa, 2016).

In a justice system or systems where Māori self-determination in relation to justice has been achieved, there could still be a considerable role for restorative justice for and by

[4] Crucially, these obligations include the upholding of *tino rangatiratanga*, or sovereignty, of Māori.

tangata tiriti – the non-Māori treaty partners. Tino rangatiratanga would give Māori the power to decide whether and to what degree they want to engage with tangata tiriti-based restorative justice, as well as (re-)establishing their own mechanisms of justice. Rather, in a post-prison, decolonised Aotearoa, it could be a vital role in justice *for tangata* tiriti*,* while tangata *whenua* determine for themselves what justice looks like.

Second, *restorative justice should be for everyone, from the schoolyard or workplace bully to perpetrators of extreme harm.* In many jurisdictions, restorative justice is limited to 'non-violent' or 'low-level' harm. Terry (2019:149) notes that, in 'theory, restorative justice should be applicable to all types of crimes, from vandalism to sexual assault to genocide.' Indeed, there is some evidence to suggest that restorative justice is most effective in cases of violence, although caution is needed about empirical measurement of reoffending (Wood, 2015; Piggott and Wood, 2019; Lamusse, 2023). In addition, if restorative justice only applies in 'minor' instances of harm, it risks becoming a tool for net-widening (Braithwaite, 1999; Maglione, 2019; Goodman, 2021). Many of these cases would, in the absence of restorative justice, have had no formal intervention. As a result, restorative justice could increase the number of people receiving intervention for minor instances of harm and could, consequently, sweep more people into the formal system if they fail to meet the obligations of informal processes.

Splitting restorative justice off as something that is only used in 'less serious' cases also signals that restorative justice itself is 'less serious' and that the only response to 'serious' harm is 'serious' punishment. If the claims of restorative justice proponents are to be taken seriously, the values of restorative justice need to be present in all aspects of the tangata tiriti-sphere justice system and applied to all forms of harm, including crimes of the powerful and powerless, 'hate' crimes, and other types of complex harm., However, restorative justice would need to be carefully adapted to be able to achieve safe and restorative outcomes for victims of some categories of harm, such as child sexual abuse (CSA). Terry (2019:153) argues, 'Despite the observed benefits of restorative justice programmes for both offenders and survivors of CSA, it is necessary to proceed with caution when considering implementing them on a wider basis. CSA causes a unique set of harms, and restorative justice programmes cannot be uniformly implemented in response to all CSA offences.'

Indeed, while considerable care and further research is needed in cases such as these, restorative justice has the potential to provide just and healing outcomes in these cases (Neeley, 2021). Such an expansion of restorative justice could, also, address the ongoing concern from some feminist criminologists that abolition does not take violence against women seriously enough (Schwartz and DeKeseredy, 1991). Indeed, feminist scholars and activists have been at the forefront of developing non-carceral conceptualisations and responses to patriarchal violence (Knopp, 1994; Law, 2014; Richie, 2015; Ilea, 2018; Kim, 2018).

Third, given the complexity of harm that restorative justice can be required to address, as well as the potential for abuse of power by facilitators, parties or the 'community' (Eliaerts

and Dumortier, 2002; Skelton, 2019), *restorative justice needs to develop jurisdiction-specific and human rights-compliant standards of practice.* For Skelton (2019:37), there "are at least three reasons why such standards are useful – to ensure good practice and thereby protect the integrity of the process, to learn from the practice of others and provide material for training and for programme design, and to promote some similarity in process and outcomes. "

However, Pfander (2020:175) counter-argues that 'standardisation may curb the possibility of future innovation and disincentivize creativity in the search for reparative outcomes'. There is a need, here, to balance the potential of restorative justice to provide 'innovation' and 'creativity' with the potential for informal mechanism of justice to foster innovative mechanisms for cruelty and oppression (Abrahams, 2002; Feenan, 2002; Fergusson and Muncie, 2009).

In a 2002 debate in the British Journal of Criminology, Ashworth (2002) sees a strong role for the state in controlling the criminal justice system, creating consistency, impartiality, and proportionality. At a minimum, 'local decision making should be constrained by general standards of procedural and substantive justice' (Ashworth, 2002:583). On the other side, while Braithwaite (2002:564) supports some state-led standard-setting, it 'all depends on what the standards are and how they are implemented.' Braithwaite (2002:574–575) advocates for minimal state intervention, preferring for restorative justice standards to come from the bottom up, as local practitioners and stakeholders establish local standards, which are developed into state standards.

While I share Ashworth's preference for state involvement in standard-setting, this is not in pursuit of 'proportionality' or 'equality of outcomes'. Instead, I see a role for the state in setting limits on the oppressiveness of a process or outcome, rather than trying to achieve uniform outcomes, regardless of the desires of the most directly affected parties. In this, the state could provide what Harvey (2002:18) describes as a 'progressive defence' rule of law, where rule of law is conceived as formal limits on abuse of power by both state and non-state actors. In an expanded restorative system, there would still be a role for 'impersonal rules in protecting the weak against the strong' (Harvey, 2002:18–19).

Consequently, some standardisation and regulation are needed to limit punitiveness and human rights abuses, while also not precisely prescribing how restorative justice should occur in all cases. Restorative justice's more ambivalent relationship to the state, on this issue, is beneficial for the abolitionist project. As all forms of justice have the capacity to harm its participants, having the state as a safety net for the protection of human rights is essential for building abolitionist justice (Lamusse, 2022).

Alongside these state-regulated limits, some standards should also be established to protect the interests of particularly vulnerable participants, such as young people accused of causing harm or victims of intimate partner violence. These standards could include having training for trauma-informed practice (Neeley, 2021). However, excessive state-led standardisation could also lead to a procedurally rigid and overly legal restorative justice

system. Consequently, a balance would be needed between protecting the interests of vulnerable parties without overly prescribing what restorative justice should look like.

Fourth, given the considerable power that facilitators hold, as well as their potential to harm participants, I propose that in a 'safety net' model of restorative justice in a post-prison future, restorative justice practitioners need formal, emancipatory training. Restorative justice advocates Umbreit and Zehr (1996:28), argue that 'restorative justice 'coordinators/facilitators should be trained in mediation and conflict resolution skills [and] should be trained in understanding the experience and needs of crime victims and offenders.' This training, in-itself, would require some standardisation to ensure that facilitators have the skills they need to hold space in a manner that is safe for all parties. Wright and Masters (2002:57) argue that, in order to ensure a victim-centred process, facilitators should, for example, 'be trained not even to think that victims ought to forgive or put aside their anger, let alone express such thoughts to the victim.' For Wright and Masters (2002:57) the 'first place for any effort to avoid such undesirable practices is clearly in training'.

However, Pfander (2020:175) argues extensive 'training schemes may inadvertently disqualify local innovators who have spearheaded restorative initiatives but may not have access to or interest in Westernized accreditation requirements'. Indeed, there is a contradiction between the need to protect vulnerable participants and the possibility of restorative justice to creatively respond to harm (Braithwaite, 2002). Accreditation poses further challenges because of the possibility that Indigenous or other experienced practitioners may not be willing or able to access the formal, standardised training (Braithwaite, 2002).

In the Aotearoa context, a decolonised justice system would empower Māori to determine how to train practitioners according to the laws and values of *te* ao Māori (the Māori world). In a setting of constitutionally transformed, abolitionist justice, this would mean that the existence of a tangata tiriti-led training system for restorative justice practitioners would not prevent tikanga-based practitioners from doing their autonomous work.

Additionally, restorative justice practitioners wield considerable power (Maglione, 2019; Skelton, 2019). In a post-prison future, that power could be exerted over a greater number of people and could be used to profoundly shape the lives of participants in restorative justice processes. If restorative justice is the primary response to complex harm such as intimate partner violence, the facilitators of these processes need to be adequately trained and accredited (Neeley, 2021). However, that degree of training should not be necessary in all cases. For example, teachers using informal conflict resolution or mediation skills to address bullying may not need formal accreditations, but may, nonetheless, appreciate training. As a result, restorative justice facilitation training should not be one size fits all, but specific to its social role and context.

Fifth, in a post-prison future where restorative justice would play a much larger role, *there needs to be greater oversight of restorative justice processes and outcomes.* Weitekamp (2002:331) argues that restorative justice proponents 'should invent some form of quality control for restorative justice programmes'. This sentiment is shared with Van Ness and

Strong (2015:173), who see the need for 'monitoring' of restorative justice 'to identify problems that result in less justice for some, and then to remedy and even transform those structures.' These oversight structures could be codified legal oversight, as preferred by Weitekamp (2002), from bodies such as the Office of the Ombudsman or informal, decentralised oversight. Wright and Masters (2002:57) suggest the latter form of oversight, including: facilitation in pairs; enabling intervention if one of the facilitators makes an error; peer-evaluation; and participant 'satisfaction surveys'.

While informal oversight may be appropriate in simple cases, with lower stakes, in complex cases where one or more of the parties is vulnerable to coercion or abuse, formal oversight would be required. If restorative justice replaces formal justice processes, any agreement stemming from the process would also need to be appealable to a formal court (Braithwaite, 1999; Skelton, 2019). In addition, the investigative and oversight bodies, such as the Ombudsman, Children's Commissioner or the Health and Disability Commissioner, could play a more formal role. Although this oversight would be fallible, and any system of justice can cause injustice, such oversight could help to minimise the abuse of vulnerable parties and maintain human rights standards.

Sixth, *restorative justice should be further developed so that victims are able to take part, even in the absence of a perpetrator*. Although some such programmes currently exist, restorative justice (Umbreit et al., 2007; Van Camp and Wemmers, 2013), without the presence of the perpetrator of harm undermines the principles of inclusion and encounter at the heart of restorative justice (Van Ness and Strong, 2015). Indeed, some restorative justice proponents would argue that the absence of either a victim or a perpetrator would mean the subsequent justice process is not 'fully' restorative justice (McCold and Wachtel, 2002:116; Van Ness and Strong, 2015:166). However, from an abolitionist feminist perspective, every victim deserves recognition of the harm done to them, as well as any possible reconciliation of harm and compensation (Morris, 1995:75–78). While reconciliation may be difficult without a perpetrator, acknowledgement of harm and compensation may still be possible (Van Ness and Strong, 2015:161).

Indeed, some jurisdictions have developed 'surrogate offender' programmes, where victims can have a facilitated face-to-face encounter with a person who caused similar harm to what they experienced (Umbreit et al., 2007; Van Camp and Wemmers, 2013). These encounters can allow a victim to ask questions, address lingering fears of re-victimisation and, potentially, heal from the shame and trauma of the victimisation. Where restorative justice, in the absence of a perpetrator, is not suitable for (certain kinds of) victims, other formal mechanisms of recognition, support and compensation may also be appropriate.

Seventh, *restorative justice should be developed so that perpetrators are able to take part, even in the absence of a victim* (Goodman, 2021). Pfander (2020:182) argues that, because pre-sentencing restorative justice in New Zealand requires consensual victim participation, "it is very possible that the number of cases that are appropriate for victim participation and have victims willing to participate has a natural plateau, which may mean that the

mechanism cannot grow into a primary justice response without substantial cultural changes in how victims view their role in the justice process."

Indeed, the requirement for victim involvement in restorative justice processes fundamentally limits the potential scope of restorative justice to respond to social harm. If restorative justice is to be a meaningful alternative to the formal system, it needs to be able to respond to these kinds of cases.

Victim-absent restorative justice programmes currently operate throughout the world. Pfander (2020:177), for example, notes how Vermont uses 'restorative justice panels' where a person 'convicted of a minor offence meets with a board of community volunteers to discuss the incident and negotiate a reparative agreement'. While Pfander is critical of multiple elements of the panels, including their limited use for 'minor offences' and their potential for net-widening, they, nonetheless, suggest a model that could be expanded for abolitionist purposes.

In particular, they are perpetrator-centric, as victim 'participation is not required, and the panel board is largely concerned with shifting the perspective of the offender' (Pfander, 2020:177). The implication of the existence of such panels is that restorative or informal justice can be developed to respond to instances of harm where an immediate victim is unwilling to participate. It could facilitate the expansion of restorative justice to replace the formal system's role in cases of harm where the perpetrator acknowledges responsibility, but no victim is willing to take part in a restorative justice process.

Some caution, however, is needed here. Restorative justice proponents argue that the benefits of a restorative encounter are best experienced when all the most directly impacted parties are present (Van Ness and Strong, 2015). This is supported by evaluative research, which finds that both victims and perpetrators report higher levels of satisfaction with a restorative process, when victims, perpetrators and their communities of interest are all present (McCold and Wachtel, 2002). As a result, in most cases, it would be preferable to have all parties present at a restorative justice process.

Such panels could also wield considerable power over the participants (Pfander, 2020). Whereas restorative justice is structured to encourage agreement between parties, restorative panels could facilitate a more hierarchical decision-making structure. If Aotearoa were to adopt similar panels, the decision-making power of the panels would need to be limited and have independent oversight, to monitor and prevent abuse of power. As a result, the Vermont Model should not be simply adopted unchanged. Rather, it serves as an example that restorative justice can occur in the absence of a victim.

The Formal System In a Post-Prison Future

The preceding analysis proposes seven reconceptualisations or expansions of restorative justice, for it to respond to the needs of an abolitionist justice system without prisons. However, this reformulation of restorative justice is not sufficient, on its own, to address the limitations of informal justice in general, and restorative justice in particular. Restorative justice, even reimagined, is not able to fully replace the formal justice system.

As I have argued, in a post-prison future that primarily adopts restorative responses to social harm, a 'safety net' of formal justice is required that complements restorative justice. In what follows, I propose the potential role of the formal system in a post-prison future.

First, in what is the most difficult abolitionist proposal*, there will be a role for some kind of investigative body that carries out fact-finding in cases where the perpetrator or the circumstances of the harm are unknown.* As restorative justice currently exists as a supplement to the formal system, police are central in either referring cases to restorative justice directly or to a Court. For Cunneen (Cunneen, 2003:183), the 'centrality of the police to the process is especially problematic given concerns about the inappropriate exercise of police discretion, the dominance of police or other professionals over other conference participants and the lack of police accountability'. Indeed, while this article is not primarily concerned with police abolition, many of the same critiques levelled at the prison system can be applied to the police (Vitale, 2017).

However, if restorative justice were to be the primary mechanism of justice, it would also be dependent on the police or another organisation for the purposes of investigation. As currently conceptualised, investigation is 'completely outside the focus of restorative justice theory and practices' (Hartmann, 2019:130). While a mechanism for restorative investigation may yet be created, it is difficult to imagine how restorative mechanisms could be used to gather the facts of a case. Consequently, without 'regulations concerning investigations, restorative justice cannot completely replace the criminal justice system' (Hartmann, 2019:130). In order for restorative justice to be the primary justice mechanism in a post-prison future, there would still need to be an investigative body that would assist in bringing perpetrators of harm into the restorative system. This leads some prison abolitionists to argue that police will always be necessary (Buttle, 2017).

That conclusion is premature. Rather, understanding the profound limitations of police, their role in reproducing oppression, and the futility of much of their work (Vitale, 2017), I would be hesitant to propose any role for the police in a post-prison justice system. This proposal for some kind of investigative body, instead, leaves open the need to create a new or radically transformed investigatory justice institution[5]. It would most likely need to be a formal institution or institutions because of the considerable power it could hold, and the need for rigorous oversight and limitations on investigative powers, in order to uphold rights standards. While there will always be a role for informal investigation, including investigative journalism and scholarship, new or expanded formal bodies, with significant funding, may also be needed to compel compliance from powerful state or

[5] In New Zealand, there are currently alternative investigatory bodies, such as WorkSafe or Te Kāhui Tātari Ture/Criminal Cases Review Commission. Although greater research is needed here, these kinds of formal institutions may offer insight into how to create a less oppressive criminal investigation institution.

other actors. The benefit of formalising investigatory powers is its potential to provide formal, legal limits to that power and provide better oversight for abuse of power.

Second, the formal system would continue to play a role in cases where guilt is contested. Indeed, restorative justice cannot occur, for the most part, unless the person who caused harm acknowledges the harm they have caused. Restorative justice processes are primarily designed to address and reconcile harm, not argue about whether or not it occurred (Braithwaite, 1999; Van Ness, 2002; Van Ness and Strong, 2015). Formalism is needed here in order to protect the accused from false accusations, the use of spurious evidence and, ultimately, being held responsible for a harm they did not commit (Skelton, 2019). While the consequences of miscarriages of justice would be less severe in a post-prison system, a future justice system would, nonetheless, require protections for people who contest their guilt. I, therefore, agree with Braithwaite (1999:102) that there 'are good arguments for courts over restorative justice processes in cases where guilt is in dispute.'

Third, as proposed by Van Ness and Strong's safety net model, the formal system must operate as a check and balance on the restorative system. For Van Ness (2002:17) this 'would entail oversight of the entire process to ensure effective coordination between the formal and informal, community and justice, system.' The check and balance should include, as Braithwaite (1999:103) argues, the 'right to appeal in court an unconscionable conference agreement they have signed, to have lawyers with them at all stages of restorative justice processes if that is their wish, and that they be proactively advised of these rights.'

The current structure of restorative justice in the adult justice system in New Zealand requires judicial sign off on conference agreements, which undermines the self-determination of the parties (Goodman, 2021). In the safety net model, agreements would not require judicial consent, but parties should be empowered to appeal the agreement. This could help to prevent or cease agreements that undermine human rights or that are manifestly unjust.

Fourth, the formal system should be used in any cases which require coercion or incapacitation. Societies cannot depend on the organic compliance of all people with the values and rules of a given society, including its processes for dealing with harm. For some abolitionists, the presence of any coercion or domination is reason enough to reject restorative justice as a justice alternative, due to a moral opposition to punishment and coercion (Ruggiero, 2011). Maglione (Maglione, 2019:28) fundamentally rejects this form of coercion, arguing that 'Restorative justice should provide spaces free from the ethical coercion to conform to idealised models of "law abiding citizens".' Indeed, this perspective implies that any form of social control of socially rejected behaviour should be avoided. This kind of radical non-intervention is, however, predicated on the idea that societies have no right to collectively and democratically self-govern (Walgrave, 2002). Walgrave (2002:82) poses a counter-argument to this libertarian non-interventionism, arguing that "we cannot just depend on ethical attitudes and principles to guide a collectivity. We need coercive rules for when these principles are not spontaneously implemented, certainly in existing fragmented and individualistic societies." Walgrave expresses here a fundamental

tension between the tendency toward devolution, decentralisation and informalism and the tendency toward centralisation and formalisation within justice. On the one hand, we cannot assume that we will one day live in a society free from social harm and that all people will 'spontaneously' live harmoniously. If we accept the inevitability of harm, we should also accept the inevitability that some people will refuse to accept responsibility for harm they have caused. In the current formal justice system, justice processes occur, regardless of whether the harm-doer accepts responsibility and, in such cases, often against the will of the harm-doer.

A system of justice that requires completely voluntary participation, however, simply would not be able to address harm that was caused by someone who refused to take responsibility or to engage with a justice process. In those circumstances, it may not be possible to truly address the harm. As a result, requiring the consent of all people who have harmed others to take part in a restorative process prevents restorative justice from responding to those cases where consent is not granted. If restorative justice is going to be the primary justice mechanism in a post-prison society, there will need to be processes in place to respond where a perpetrator of harm refuses to face accountability.

Similarly, in a small number of cases where a person poses an immediate threat to themselves or others, they may need to be temporarily confined (Morris, 1995). This confinement would not need to occur in a prison and would not be for the purposes of punishment. Because the deprivation of liberty or coercion to participate in a justice process requires a considerable wielding of power, it should be done in a formal setting. That formal setting would need to have strict limits on the state's capacity to coerce and detain, as well as ensure that the defendant had legal representation as a defence against state power. A much deeper analysis of this role of the formal justice system should be undertaken in future research.

Conclusion

This article draws together key contradictions and critiques of restorative justice to reimagine it in a world without prisons. Taken together, these proposals see a post-prison future where restorative justice is the primary mechanism for doing justice. Restorative justice processes could occur in schools, workplaces, as well as at restorative justice centres throughout Aotearoa. Restorative justice would be available in almost all instances where a perpetrator has admitted their guilt, including instances of serious harm. The increased scope of restorative justice would require specialised training and oversight of practitioners working in particularly complex cases.

There would also be an ongoing role for a formal justice system. This system would function as a safety net against the excesses of local restorative justice, as well as protect the rights of the minority of accused who do not plead guilty. The existence of the formal system does not, however, require the existence of imprisonment. Instead, these formal powers could be used to attempt to achieve justice, where restorative justice could not work. Similarly, the power to detain a person for their own or others' safety should occur rarely and always in a formal, transparent setting. While some degree of formalism is

necessary to meet the scale of a post-industrial society, it should play a minor role in comparison to restorative justice.

However, as outlined in the introduction, these proposals should be read in the context of an abolition-and-replacement model. Without a broader restructuring of the criminal injustice system, constitutional arrangements, and prohibition in the use of imprisonment, the above proposals risk expanding the nets of colonial carceral control.
This article also examines the procedural and constitutional components of abolitionist justice. For prisons to be abolished, and for Aotearoa to be a safer, fairer, and more just country, broader economic and social transformation would be required. Nonetheless, these proposals, taken together, suggest a potential way forward for restorative justice in an abolitionist future. Without a concrete vision for abolitionist justice, abolitionists risk languishing in critique, nihilism, or hyper-localised solutions.

References

Abel, R. L. (1982a) 'Introduction.' In Abel, R. L. (ed.) The Politics of informal justice: The American Experience. New York: Academic Press (Studies on law and social control), pp. 1–13.

Abel, R. L. (1982b) 'The contradictions of informal justice.' In Abel, R. L. (ed.) The Politics of informal justice: The American Experience. New York: Academic Press (Studies on law and social control), pp. 167–320.

Abrahams, R. (2002) 'What's in a name? Some thoughts on the vocabulary of vigilantism and related forms of "informal criminal justice."' In Feenan, D. (ed.) Informal criminal justice. Hants: Ashgate (Advances in criminology), pp. 25–40.

Adair, J. (2023) Shining a light on women in New Zealand prisons. Office of the Inspectorate. [Online] https://inspectorate.corrections.govt.nz/news/news_items/shining_a_light_on_women_in_new_zealand_prisons.

Ashworth, A. (2002) 'Responsibilities, Rights and Restorative Justice.' British Journal of Criminology, 42(3) pp. 578–595.

Bazemore, G. and Griffiths, C. T. (1997) 'Conferences, Circles, Boards, and Mediations: The "New Wave" of Community Justice Decision-Making.' Federal Probation, 61(2) pp. 25–37.

Boyes-Watson, C. (2019) 'Looking at the past of restorative justice: Normative reflections on its future.' In Gavrielides, T. (ed.) Routledge international handbook of restorative justice. New York: Routledge, pp. 7–20.

Braithwaite, J. (1999) 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts.' Crime and Justice, 25 pp. 1–127.

Braithwaite, J. (2000) 'Restorative Justice.' In Tonry, M. (ed.) The handbook of crime & punishment. Oxford: Oxford University Press, pp. 323–344.

Braithwaite, J. (2002) 'Setting Standards for Restorative Justice.' British Journal of Criminology, 42(3) pp. 563–577.

Braithwaite, J. (2003) 'Restorative justice and a better future.' In Johnstone, G. (ed.) A restorative justice reader: texts, sources, context. Cullompton: Willan, pp. 83–97.

Buttle, J. W. (2017) 'Imagining an Aotearoa/New Zealand without Prisons.' Counterfutures: Left Thought & Practice Aotearoa, 3 pp. 99–127.

Cunneen, C. (2003) 'Thinking critically about restorative justice.' In McLaughlin, E., Fergusson, R., Hughes, G., and Westmarland, L. (eds) Restorative justice: critical

issues. London: Sage, pp. 182–194.

Davis, A. Y. (2003) Are prisons obsolete? New York: Seven Stories.

Eliaerts, C. and Dumortier, E. (2002) 'Restorative justice for children: in need of procedural safeguards and standards.' In Weitekamp, E. G. M. and Kerner, H.-J. (eds) Restorative justice: theoretical foundations. Cullompton: Willan, pp. 204–223.

Feenan, D. (2002) 'Community justice in conflict: paramilitary punishment in Northern Ireland.' In Feenan, D. (ed.) Informal criminal justice. Hants: Ashgate (Advances in criminology), pp. 41–60.

Fergusson, R. and Muncie, J. (2009) 'Conflict resolution, restoration and informal justice.' In Drake, D., Muncie, J., and Westmarland, L. (eds) Criminal justice: local and global. Cullompton: Willan.

Goodman, H. (2021) 'Anti-Carceral Futures: A comparative perspective of restorative and transformative justice practices in the United States and New Zealand.' Fordham International Law Journal, 44(5) pp. 1215–1266.

Hartmann, A. (2019) 'Victims and restorative justice: bringing theory and evidence together.' In Gavrielides, T. (ed.) Routledge international handbook of restorative justice. New York: Routledge, pp. 127–144.

Harvey, C. (2002) 'Legality, Legitimacy and the Politics of Informalism.' In Feenan, D. (ed.) Informal criminal justice. Hants: Ashgate (Advances in criminology), pp. 15–24.

Ilea, A. (2018) 'What About "the Sex Offenders"? Addressing Sexual Harm from an Abolitionist Perspective.' Critical Criminology, 26(3) pp. 357–372.

Kim, M. E. (2018) 'From carceral feminism to transformative justice: Women-of-color feminism and alternatives to incarceration.' Journal of Ethnic & Cultural Diversity in Social Work, 27(3) pp. 219–233.

Knopp, F. H. (1994) 'On radical feminism and abolition.' Peace Review, 6(2) pp. 203–208.

Lamusse, T. (2022) 'Doing Justice Without Prisons: A Framework to Build the Abolitionist Movement.' Socialism and Democracy, 35(2–3) pp. 300–322.

Lamusse, T. (2023) Abolitionist Justice: Towards an abolitionist theory of justice and the state. PhD. University of Auckland.

Lamusse, T. and McIntosh, T. (2021) 'Prison abolitionism: Philosophies, Politics, and Practices.' In Stanley, E., Monod de Froideville, S., and Bradley, T. (eds) The Aotearoa Handbook of Criminology. Auckland: Auckland University Press, pp. 289–302.

Lamusse, T., Morgan, S. and Rākete, E. (eds) (2016) Abolitionist Demands: Toward the End

of Prisons in Aotearoa. Auckland: No Pride in Prisons Press.

Law, V. (2014) Against Carceral Feminism. Jacobin Magazine. [Online] [Accessed on 2nd October 2019] https://www.jacobinmag.com/2014/10/against-carceral-feminism/.

Maglione, G. (2019) 'Pushing the theoretical boundaries of restorative justice: Non-sovereign justice in radical political and social theories.' In Gavrielides, T. (ed.) Routledge international handbook of restorative justice. New York: Routledge, pp. 21–31.

Martin, P. (1998) 'Restorative justice - a family violence perspective.' Social Policy Journal of New Zealand, 6 pp. 56–68.

Matike Mai Aotearoa (2016) He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa - the Independent Working Group on Constitutional Transformation. Auckland: Matike Mai Aotearoa.

McCold, P. and Wachtel, T. (2002) 'Restorative justice theory validation.' In Weitekamp, E. G. M. and Kerner, H.-J. (eds) Restorative justice: theoretical foundations. Cullompton: Willan, pp. 110–142.

Mead, H. M. (2006) Tikanga Maori: Living by Maori Values. Wellington: Huia.

Mikaere, A. (2005) 'The Treaty of Waitangi and Recognition of Tikanga Maori.' In Belgrave, M., Kawharu, M., and Williams, D. (eds) Waitangi Revisited. 2nd ed., Auckland: Oxford University Press, pp. 330–347.

Mikaere, A. (2013) Colonising Myths – Māori Realities: He Rukuruku Whakaaro. Wellington: Huia.

Ministry of Justice (2022) Long Term Insights Briefing: Justice Sector Public Consultation - Focus on Imprisonment in Aotearoa. Ministry of Justice: Wellington.

Morris, R. (1995) Penal abolition, the practical choice: a practical manual on penal abolition. Toronto: Canadian Scholars' Press.

Moyle, P. and Tauri, J. M. (2016) 'Māori, Family Group Conferencing and the Mystifications of Restorative Justice.' Victims & Offenders, 11(1) pp. 87–106.

Neeley, J. E. (2021) 'Addressing sexual assault in criminal justice, higher education and employment: what restorative justice means for survivors and community accountability.' Kansas Journal of Law & Public Policy, 30(1) pp. 1–60.

Pavlich, G. (2019) 'Transforming powers and restorative justice.' In Gavrielides, T. (ed.) Routledge international handbook of restorative justice. New York: Routledge, pp. 462–475.

Pfander, S. M. (2020) 'Evaluating New Zealand's restorative promise: the impact of legislative design on the practice of restorative justice.' Kōtuitui: New Zealand Journal of Social Sciences Online, 15(1) pp. 170–185.

Piggott, E. and Wood, W. (2019) 'Does restorative justice reduce recidivism? Assessing evidence and claims about restorative justice and reoffending.' In Gavrielides, T. (ed.) Routledge international handbook of restorative justice. New York: Routledge, pp. 259–376.

Richie, B. (2015) 'Reimagining the Movement to End Gender Violence: Anti-racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice (Transcript).' University of Miami Race & Social Justice Law Review, 5(2) pp. 257–273.

Ruggiero, V. (2011) 'An abolitionist view of restorative justice.' International Journal of Law, Crime and Justice, 39(2) pp. 100–110.

Sayers, N. (2020) 'The Relationship Between Restorative Justice and Prison Abolition.' In George, L., Norris, A. N., Deckert, A., and Tauri, J. M. (eds) Neo-Colonial Injustice and the Mass Imprisonment of Indigenous Women. Cham: Springer International, pp. 35–52.

Schwartz, M. D. and DeKeseredy, W. S. (1991) 'Left realist criminology: Strengths, weaknesses and the feminist critique.' Crime, Law and Social Change, 15(1) pp. 51–72.

Skelton, A. (2019) 'Human rights and restorative justice.' In Gavrielides, T. (ed.) Routledge international handbook of restorative justice. New York: Routledge, pp. 32–42.

Stauffer, C. and Turner, J. (2019) 'The new generation of restorative justice.' In Gavrielides, T. (ed.) Routledge international handbook of restorative justice. New York: Routledge, pp. 442–461.

Tauri, J. M. (1998) 'Family Group Conferencing: A Case-Study of the Indigenisation of New Zealand's Justice System.' Current Issues in Criminal Justice, 10(2) pp. 168–182.

Tauri, J. M. (2019a) 'Indigenous perspectives and experiences: Maori, crime control and social harm.' In Introduction to criminological thought. 3rd ed., Auckland: Edify, pp. 183–204.

Tauri, J. M. (2019b) 'Restorative justice as a colonial project in the disempowerment of Indigenous peoples.' In Gavrielides, T. (ed.) Routledge international handbook of restorative justice. New York: Routledge, pp. 342–358.

Tauri, J. M. and Morris, A. (1997) 'Re-forming Justice: The Potential of Maori Processes.' Australian and New Zealand Journal of Criminology, 30 pp. 149–167.

Te Ohu Whakatika (2019) Hui Māori: Ināia Tonu Nei. Wellington: Ministry of Justice.
Terry, K. J. (2019) 'Restorative justice and child sexual abuse.' In Gavrielides, T. (ed.)

Routledge international handbook of restorative justice. New York: Routledge, pp. 145–158.

Umbreit, M. S., Coates, R. B. and Vos, B. (2007) 'Restorative Justice Dialogue: A Multi-Dimensional, Evidence-Based Practice Theory.' Contemporary Justice Review, 10(1) pp. 23–41.

Umbreit, M. S. and Zehr, H. (1996) 'Restorative Family Group Conferences: Differing Models and Guidelines for Practice.' Federal Probation, 60(3) pp. 24–29.

Van Camp, T. and Wemmers, J.-A. (2013) 'Victim satisfaction with restorative justice: More than simply procedural justice.' International Review of Victimology, 19(2) pp. 117–143.

Van Ness, D. W. (2002) 'The shape of things to come: a framework for thinking about a restorative justice system.' In Weitekamp, E. G. M. and Kerner, H.-J. (eds) Restorative justice: theoretical foundations. Cullompton: Willan, pp. 1–20.

Van Ness, D. W. and Strong, K. H. (2015) Restoring justice: an introduction to restorative justice. 5th ed., Waltham, MA: Anderson.

Victoria University of Wellington (2020) Restorative communities. [Online] [Accessed on 27th January 2023] https://www.wgtn.ac.nz/students/support/student-interest-and-conflict-resolution/restorative-communities.

Vitale, A. S. (2017) The end of policing. New York: Verso.

Wacquant, L. (2009) Punishing the poor: the neoliberal government of social insecurity. Durham: Duke University Press.

Walgrave, L. (2002) 'From community to dominion: in search of social values for restorative justice.' In Weitekamp, E. G. M. and Kerner, H.-J. (eds) Restorative justice: theoretical foundations. Cullompton: Willan, pp. 71–89.

Weitekamp, E. G. M. (2002) 'Restorative justice: present prospects and future directions.' In Weitekamp, E. G. M. and Kerner, H.-J. (eds) Restorative justice: theoretical foundations. Cullompton: Willan, pp. 322–338.

Wood, W. R. (2015) 'Why Restorative Justice Will Not Reduce Incarceration.' British Journal of Criminology, 55(5) pp. 883–900.

Wright, M. and Masters, G. (2002) 'Justified criticism, misunderstanding, or important steps on the road to acceptance?' In Weitekamp, E. G. M. and Kerner, H.-J. (eds) Restorative justice: theoretical foundations. Cullompton: Willan, pp. 50–70.