Critical policy analysis, power and restorative justice

George Pavlich takes a critical look at restorative justice practices in Canada.

During the 1970s and early 1980s, numerous critics in Canada voiced discontent with existing legal practices and championed alternatives to adversarial courtroom justice. Despite differences, these critics challenged the 'professionalised' character of courtroom justice, arguing that it was unduly time-consuming, exclusive, inefficient, alienating, rigid, bureaucratic and coercive. Worse still, adversarial state justice seldom resolved – in fact it often exacerbated – the conflicts it was supposed to resolve.

From this ethos, two sorts of critique emerged. On the one hand, reform-minded critics called for administrative reforms to the then contemporary justice system, heralding the value of incorporating 'alternative dispute resolution' techniques therein (especially mediation, but also arbitration, conciliation and negotiation – see Cormier, 2002). On the other, critics explicitly sought new understandings of, and non-state institutions to secure, social justice (Matthews, 1988). Their political aspirations were allied with broader civil rights struggles, peace movements, community development initiatives and a rising 'new left'. Envisaging justice beyond law, these critics heralded mediation as a way to nurture community participation, and to revitalise civil society – the aim was to 'empower' people to regain control of their conflicts and recover what were perceived to be flailing democratic structures. By the late 1980s in Canada, both approaches had appropriated 'community mediation', or less often 'community justice', setting the tone for a later institutionalisation of what is now more usually designated as restorative justice.

This institutionalisation has trudged complex paths, but it did sharpen differences between those seeking to work within, rather than outside of, state agencies. Woolford and Ratner (2008) usefully discuss the infrequently noted transition from community to restorative justice in Canada, while Minaker and Hogeveen (2008) note how earlier divisions have recurred when deploying restorative measures within the youth justice system. Others have detailed the proliferation of restorative techniques, some pondering its capacity to transform (rather than simply 'restore') societies (Morris, 2000). One of Canada's distinctive contributions lies in a nuanced understanding of the ambiguous response that restorative justice offers to the disproportionate representation of First Nations within conventional criminal justice systems. Perhaps, too, one might single out international recognition of the Yukon Territory's sentencing circles. Justice Heino Lilles succinctly states three restorative 'premises' guiding these circles:

Firstly, that a criminal offence represents a breach of the relationship between the offender and the victim as well as the offender and the community, and secondly, that the stability of the community is dependent on healing these breaches. The third premise is that the community is better positioned to address the causes of crime, which are often rooted in the economic or social fabric of the community. These principles are consistent with how restorative justice views crime: not merely as an offence against the state but as an injury done to another person and the community that must be repaired. (Lilles, 2002)

When translated elsewhere, the contextual and cultural meanings surrounding such statements are often lost, increasing the danger of distortion. However, these premises do partly echo Zehr's (1990) well-known restorative 'principles and values'. For Zehr, restorative justice requires a fundamental shift of perspective (a Kuhnian 'paradigm shift') from the individually-centred, blame-oriented, retributive lens of criminal justice to that of an inclusive, participatory and empowering community-based justice.

At the heart of this vision, however, lies a basic and fundamental paradox: 'the impulse to be both alternative and appendage…' to state-based justice (Pavlich, 2005). That impulse is highlighted, for instance, by advocates of restorative justice who insist on pursuing a vitally different vision of justice while at the same time implementing that vision through programmes that complement, are located within, or even carried out under the auspices of, state justice agencies. Here, the perils of incorporation can threaten the founding aspiration to proffer new visions of justice.

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For policy analysts, the paradox signals a vexing conundrum: how precisely is one to evaluate programmes that explicitly claim to further restorative (rather than criminal) justice? For one thing, if analysts use canons of criminal justice to evaluate the success of restorative programmes (e.g. does a programme reduce *individual* recidivist rates?), they thereby contradict the founding restorative mission to transcend such precepts. Recognising this contradiction, several practitioners faced tough questions of whether restorative institutions could ever restrict, or replace, state justice (Morris, 2000; Matthews, 1988). This also led some community activists to heighten attempts to reclaim conflict from state agencies by claiming to 'empower' community members to resolve disputes in local, familiar settings (see Pavlich, 1996).

Neo-Marxist critics argued, however, that community activism of this kind was at best misdirected, at worst pernicious: either way, it helped to legitimise state control at a time in history when the bourgeois state was experiencing unprecedented legitimacy crises. Indeed, they argued, community justice effectively expanded state control by 'softer' means, and insidiously did so under the rhetorical pretext of reclaiming justice from the state. The debate here was at times elusive, and lamentably set up a crude 'for or against' mentality, largely on the basis of whether restorative justice expanded or reduced state control. Clearly, a basic problem in the debate was this: is it really possible to define 'the state' in precise enough terms to decide whether a reduction or expansion of its control network had occurred? And then, what would be the value of such an analysis beyond the intricacies of theoretical orthodoxy?

In attempts to avoid this blind alley, another approach sought to conceptualise the dangers – without dismissing out of hand the potential contributions of – restorative justice. Instead of analysing restorative justice in terms of state control, this approach considered community justice, mediation, and restorative justice as emerging forms of power in fragmented justice terrains (Matthews, 1988; Pavlich, 1996). Referring to Foucault, it focused on the complex and shifting power relations that nurtured, deployed and shaped restorative justice institutions. Rather than a 'good-bad' sort of evaluation, this approach called upon critical policy analysts to chart the complex politics of restorative justice, noting the perils and possibilities of a restorative 'counter-power' paradoxically portrayed as a 'complement' to the powers of state justice.

This vantage enabled a different way to understand restorative justice; namely, as the emergence of a new sort of power which Foucault (2008) referred to as 'biopower'. This power has a long lineage, but in modernity is tied to, even though situated against, the juridical power that underlies criminal justice. That is, biopower targets living subjects, deploying pastoral, governmental and normalising power techniques that are different from, but operate in complex (and context-specific) relations with, sovereign-law models of criminal justice (Pavlich 1996, 2005). Naming and charting these new forms of power enables critical policy analysis to focus on the subtle contours of restorative justice's power relations; but it also allows one to explore points of resistance that shape such contours. This sort of analysis is less concerned with the state retraction-expansion question than with charting, and naming the dangers of, the power complexes that render 'restorative justice' both meaningful and practicable to governors. Such charts could be used to examine how 'informal' justice might promote what Woolford and Ratner (2008) refer to as 'counterpublics'; i.e., arenas that foster democratic ways for people to confront the subtle co-optations of a 'governmentalised state' and its articulated visions of justice. However complex, this sort of analysis promises to regenerate anew the founding, but oft muted, aspirations of a democratically inclined, communal justice. ■

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References

Cormier, R. B. (2002), *Restorative Justice: Directions and Principles – Developments in Canada*, Ottawa: Solicitor General Canada (User report 2002-02).

Foucault, M. (2008), *The Birth of Biopolitics: Lectures at the Collège de France, 1978-79*, New York: Palgrave Macmillan.

Lilles, H. (2002), 'Restorative justice continuum', *3rd International Conference on Conferencing and Circles*, 9 August, Whitehorse, Yukon. www.fp.enter.net/restorativepractices/mn02_lilles.pdf (accessed 10 November 2008).

Matthews, R. (1988), *Informal Justice?* London: Sage Publications.

Minaker, J. C. and Hogeveen, B. R. (2008), *Youth, Crime, and Society: Issues of Power and Justice*, Toronto: Pearson Prentice Hall.

Morris, R. (2000), *Stories of Transformative Justice*, Toronto: Canadian Scholars' Press.

Pavlich, G. C. (1996), *Justice Fragmented: Mediating Community Disputes Under Postmodern Conditions*, London: Routledge.

Pavlich, G. C. (2005), *Governing Paradoxes of Restorative Justice*, London: GlassHouse Press.

Woolford, A. J. and Ratner, R. (2008), *Informal Reckonings: Conflict Resolution in Mediation, Restorative Justice and Reparations*, New York: Routledge-Cavendish.

Zehr, H. (1990), *Changing Lenses: A New Focus for Crime and Justice*, Scottdale, PA: Herald Press.