REWITING HISTORY : TOWARDS A GENEALOGY OF
RESTORATIVE JUSTICE

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INTRODUCTION

During the mid to late 1970s, there appears to have been little awareness or information sharing between programs experimenting with the concept of mediating victim-offender conflict (Umbreit, 1995, p. 264).

The Reverend Peter Taylor, Chaplain at the Rochester Youth Custody Centre, a closed institution for approximately 350 young males…was routinely asked, “What you do is good for the offenders, but what about the victims?” After some thought…Taylor in March 1983 wrote a letter to local Victim Support Scheme staff asking if they would like to participate in a program at the facility that would bring together burglars and burglary victims….At the time, Taylor reports that he was wholly uninformed about American and Canadian victim-offender reconciliation practices, research about victim and offender perceptions of one another and even about which British authorities in London, 13 miles to the north, were available to help him (Immarigeon, 1994, p. 9).

Family group decision making was developed for use in child welfare where it has been used extensively in many different jurisdictions….The concept emerged simultaneously in New Zealand, where it is known as family group conferencing, and in Oregon, where it has been known as Family Unity (Resource
Why Research ‘Restorative Justice’?

My original interest in the field of ‘restorative justice’ came about due to a broad interest in new and innovative ways of dealing with offenders. In this sense, ‘restorative justice’ was one of many potential topics of study, including home detention, electronic monitoring, drug courts and boot camps, for example. In the early stages of acquainting myself broadly with the concept of ‘restorative justice’ in this regard, however, I quickly became sidetracked, and developed an interest in how ‘restorative justice’ had emerged as a legitimate criminal justice practice. My interest in this area evolved as a result of engaging with two themes within the ‘restorative justice’ literature: the apparently widespread political and public appeal of ‘restorative justice’.

The Political Appeal of ‘Restorative Justice’

That ‘restorative justice’ appeals across the political spectrum, receiving support from both ‘liberals’ and ‘conservatives’, is a commonly made observation in the ‘restorative justice’ field (Braithwaite & Mugford, 1994, pp. 309-310; Garkawe, 1999, p. 42; Nyp, 2004, p. 32; Pollard, 2004; Roche, 2004, p. xiii; Strang, 2000, p. 25; Wilkinson, 1997, p. 6). Roach’s (2000) comments are typical of the argument made in this regard:
Liberals on the left tend to stress restorative justice as an alternative to destructive forms of imprisonment and a means in which offenders can be healed or rehabilitated. Conservatives on the right stress restorative justice as an alternative to costly forms of imprisonment and as a means to ensure that offenders are made to account to victims and communities (p. 262).

Moreover, advocates’ claims about the political allure of ‘restorative practices’ seemed to have been confirmed by the effortless passage of ‘restorative justice’ legislation through parliaments in many jurisdictions. New South Wales’ Young Offenders Act (1997), for example, progressed through parliament with bi-partisan support (Youth Justice Advisory Committee, n.d., p. 3). Transcripts of the parliamentary debate indicate that this legislation, which formalised the use of ‘youth justice conferencing’ across the state, received support from the left-wing Greens and Democrats parties, both the major parties, and even the far-right Call to Australia party fronted by the Reverend Fred Nile (New South Wales Legislative Council, 1997a).

The literature on ‘restorative justice’ indicates that New Zealand’s quite radical ‘family group conferencing’ legislation similarly received bi-partisan support. Doolan (1990) explains: “the reforms underway in youth justice elicited little debate...[partly]...because they had widespread acceptance....The young offender aspects of the bill achieved almost total political unanimity” (pp. 80-81). In Northern Ireland also, the Criminal Justice
Review Group’s (2000) report on criminal justice, which McEvoy and Mika (2002, p. 535) claim impacted directly on the development of ‘restorative justice’ projects in a number of communities, stated that “we were struck by the widespread support for the concept of restorative justice put forward in the consultation process, not only across a wide spectrum of political opinion, but also amongst the voluntary and community groups” (p. 203).

Having only recently at that time completed an Honours thesis exploring the heated debates – prevalent in the 1970s and 1980s – over women’s participation in pornography, this notion of broad political consensus sat uneasily with me. In the fight to ban pornography, far-left radical feminists and far-right religious conservatives famously campaigned together to rid society of what both groups saw as a dangerous scourge. On the surface, therefore, political adversaries had banded together for what many considered the ‘common good’; beneath this, however, lurked a multitude of problems, divergences of opinion and ideological disparities. I began to wonder, therefore, what might be ‘lurking beneath the surface’ of the common political support for ‘restorative justice’. This seemed an even richer area for contemplation given that, as stated above, this pervasive support existed not merely at an ideological level, but had begun to be felt on the ‘ground level’ of criminal justice, via the enactment of ‘restorative justice’ legislation, for example.

Related to these claims of unanimous political support for ‘restorative practices’ was my discovery that in many locations in which such practices
had been introduced, authorisation had been provided retrospectively by existing legislation. Miers' (2001) report on the use of ‘restorative justice’ in criminal justice systems around the world indicates that in a number of jurisdictions – including Belgium, Finland, France, Germany, Poland and the Australian Capital Territory – ‘restorative justice’ has been “indirectly authorised” (Miers, 2001, p. 12) by existing laws. In Belgium, for example, ‘mediation’ between juvenile offenders and their victims is authorised by the Juvenile Justice Act of 1965 (Miers, 2001, p. 12). Similarly, in Minnesota, the implementation of ‘restorative’ programs occurred “within the discretion of existing statutes” (Pranis, 2004, p. 151). In other words, although laws in these localities do not explicitly endorse these ‘restorative practices’, they can be read retrospectively to conform to the ‘restorative justice’ ethos. In a sense, therefore, some scholars have made claims that political support for ‘restorative justice’ already existed. This furthered my interest in the emergence of ‘restorative justice’.

Public Opinion and ‘Restorative Justice’

In addition to highlighting the political appeal of ‘restorative justice’, scholars in this field frequently claim that it has great popular appeal. Public opinion research that indicates community support for ‘restorative justice’ is often recited in support of this concept (J. Roberts & Stalans, 2004; Strang, 2000, p. 31; Umbreit, 2001, pp. xxxiii-xxxvi; Walgrave, 1995, p. 242; Wright, 1989). Drawing on a range of research, Braithwaite (1996) claims, for example, that “the evidence is now strong that ordinary citizens like restorative justice” (p. 328). Indeed, the support of the public is held in high regard by some
'restorative justice' proponents. As Umbreit (2001) contends, “despite growing governmental and organizational support for restorative justice theory and practice, the question remains, Is the larger public really interested? Is there evidence of public support for the principles of restorative justice” (p. xxxiii)? Lord Justice Auld’s (2001) review of the court system in England and Wales, which recommends the implementation of a national ‘restorative justice’ strategy, also stresses that “care will also need to be taken to inform and persuade the public that it is a force for good” (p. 391). A number of respondents to a consultation about New South Wales’ ‘youth justice conferencing’ scheme similarly stressed the importance of gaining community support for this type of program (Blazejowska, 1996, p. 17).

As I became acquainted with the ‘restorative justice’ field, this repeated concern with the views of the public struck me as rather contentious. In the area of criminal justice, public opinion is frequently disregarded by academics and policymakers on the grounds that it is not informed by relevant research, and represents mere ‘law and order commonsense’ (Hogg & Brown, 1998). A significant majority of Australian citizens have, for example, indicated their support for the reintroduction of capital punishment, a view that has been consistently disregarded by those in power (Freiberg, 2003, p. 226).

Additionally, although research has indicated that members of the public tend to be less punitive when they are provided with specific - rather than hypothetical - information about offenders’ circumstances (Braithwaite & Mugford, 1994, p. 293; Freiberg, 2003, p. 228; Wright, 1989, p. 267), it
seemed anomalous that widespread popular support for ‘restorative justice’ would exist in the current, highly punitive climate. Loconte’s (1998) description of the origins of the Genesee County ‘restorative justice’ program provides a potent example of this apparent conundrum. Loconte (1998) describes the electoral platform of Douglas Call, a contender for the county sheriff’s position. Call’s platform – to halt the construction of a maximum security prison in a deeply conservative community with rising crime rates – “should have been a losing strategy” (Loconte, 1998, p. 27). Instead, Call won the election, and his platform gave rise to “the most advanced experiment in restorative justice in the [United States of America]” (Loconte, 1998, p. 27).

Claims of extensive political and public support for ‘restorative practices’ – against the backdrop of the “reappearance of ‘just deserts’” (Garland, 2001, p. 9) - thus caused me to begin to consider how ‘restorative justice’ had emerged as an acceptable way of responding to crime. Additionally, a number of accounts of the emergence of ‘restorative practices’, including those at the opening of this Introduction (see also Cunha, 1999, p. 326, footnote 232; Roche, 2004, p. xiii), stressed the “near simultaneous discovery of restorative processes in far-flung corners of the globe from wholly independent sources” (McCold & Wachtel, 2002, p. 110). This further piqued my curiosity. If these accounts are accurate – and there is little reason to believe otherwise – then this prompts us to wonder how ‘restorative justice’ came to exist as a legitimate approach to criminal justice, not in a single context, but in many.
Histories of ‘Restorative Justice’

In seeking a solution to this problem, I turned to the revered historical texts of the ‘restorative justice’ field, including Christie’s (1977) “Conflicts As Property”, Eglash’s (1975) “Beyond Restitution – Creative Restitution” and Barnett’s (1977) “Restitution: A New Paradigm of Criminal Justice”. Despite the celebrated status of these texts, and their frequent citation in the ‘restorative justice’ literature, however, I was disappointed to discover that, in one sense, they were not really about ‘restorative justice’ at all. Rather, Christie (1977) advocates the use of neighbourhood courts, Eglash (1975) promotes ‘creative restitution’, and Barnett (1977) proposes a new system of criminal justice predicated on restitution rather than retribution. Certainly, these texts might be considered as important precursors to the ‘restorative justice’ project. Johnstone (2003) argues, for example, that while Barnett’s (1977) treatise on restitution sits outside the ‘restorative justice’ field, it is nonetheless “relevant to anybody interested in restorative justice” (p. 22). The question of the emergence of ‘restorative justice’ – as a set of practices in some way distinct from neighbourhood courts or restitution – nonetheless remains unanswered by these celebrated historical texts.

I then turned to Weitekamp’s (1999) ambitiously-titled essay “The History of Restorative Justice”. Like the texts mentioned above, Weitekamp’s (1999) work is something of a revered text in the ‘restorative justice’ field, being frequently cited by even the most discerning of scholars (Bazemore & Schiff, 2001, p. 22; Braithwaite, 1999, p. 2; Braithwaite & Braithwaite, 2001, p. 25;
Weitekamp's (1999) version of events, Beccaria was “a humanitarian” (p. 90) who laid “the groundwork for advocates of restorative justice” (p. 90), Bentham “stressed the necessity of taking care of the crime victim by means of restorative justice” (p. 90), and Garofalo “pointed out the benefits of restorative justice to society as a whole” (p. 91). I found this take on history problematic on two main grounds. Firstly, these long-dead scholars – now labelled advocates of ‘restorative justice’ – lived and wrote long before the paradigm of ‘restorative justice’ had begun to be articulated. Secondly, Weitekamp’s (1999) interpretation of history seemed very much at odds with
both the history I had learned as an undergraduate student of criminology, and that I had begun to teach new students of the discipline.

While Jeremy Bentham, for example, did promote restitution to victims, as Weitekamp (1999, p. 90) claims, this constituted only a small fraction of his wide-ranging work in the field (see Geis, 1972, p. 66). Moreover, Bentham’s name is virtually synonymous with the Panopticon style of prison he designed and fervently promoted. Indeed, Geis (1972) calls the Panopticon Bentham’s most “unique” (p. 52) and “tangible” (p. 63) contribution to criminology (see also Bozovic, 1995, p. 1). A number of the other early forebears of criminology recast as ‘restorative justice’ advocates by Weitekamp (1999) – including Ferri and Garofalo – even promoted the use of capital punishment (see Mannheim, 1972).

Quite bizarrely, Weitekamp (1999, p. 90) even includes eighteenth-century philosopher James Wilson in his list of ‘restorative justice’ proponents. The James Wilson he cites, however, is not this philosopher at all, but rather James Q. Wilson, best known for his controversial ‘broken windows’ (James Wilson & Kelling, 1982) and biologically determinist (James Wilson & Herrnstein, 1985) theories, which have been denounced as racist in some quarters (Rafter, 2004, p. 758).¹

Weitekamp’s (1999) is not the only text that recasts early legal theorists as supporters of ‘restorative justice’. In my search for the celebrated historical

¹ This oversight had been corrected for this essay’s publication in Johnstone’s (2003) edited text on ‘restorative justice’. See also Weitekamp (2000, p. 99).
texts of the ‘restorative justice’ field, I was led to J. Hudson and Galaway’s (1975) edited collection *Considering The Victim: Readings in Restitution and Victim Compensation*. In this work, a number of historical figures are again portrayed as early ‘restorative justice’ proponents. Jeremy Bentham, for example, is again depicted as an advocate of providing restitution to victims of crime.

J. Hudson and Galaway (1975), like Weitekamp (1999), seem to have presented historical facts selectively in order to recast Bentham, and others, in this light. Certainly, the section of Bentham’s writings reproduced in J. Hudson and Galaway’s (1975) text illustrates his support for the concept of restitution. Mysteriously, however, a number of pages of Bentham’s work have been omitted from the body of the particular essay reprinted in J. Hudson and Galaway (1975). A reading of this omitted text (see Bowring, 1962) reveals that Bentham had far more wide-ranging views on the matter, some of which are almost at odds with the image portrayed by J. Hudson and Galaway (1975). Bentham advanced the view, for example, that victims might be placated by the deliberate infliction of punishment on offenders (see Bowring, 1962, p. 383).

‘Textbook’ Histories of ‘Restorative Justice’

Of course, the more common histories to be found in the ‘restorative justice’ field are not detailed accounts such as Weitekamp’s (1999) or J. Hudson and Galaway’s (1975), but what Garland (1994, p. 19) calls ‘textbook’ histories. Texts on ‘restorative justice’ typically begin with a short, obligatory paragraph
about its emergence before moving on to address the ‘real’ topic of the article or book (see, for example, Arzdorf-Schubbe, 2000, p. 1; Benjamin, 1999, p. 5; Carbonatto, 1995, pp. 7-8; Department of Health and Human Services Tasmania, 2001a, p. 2; New Zealand Department for Courts, 2002, p. 18).

Immarigeon (1996) opens a book chapter on ‘restorative justice’ in prisons, for example, by simply declaring:

> Just over 20 years ago, the first victim-offender reconciliation meeting was held in Kitchener, Ontario....Several years later, a victim-offender meeting was held in Elkhart....Subsequently, the concept of victim-offender reconciliation has gained widespread and worldwide acceptance (p. 463).

Clarke and Davies (1994) provide even less detail in their paper supporting the use of ‘victim offender mediation’ in Queensland, merely stating:

> For many years in Canada, England, Germany, France, Austria and the United States of America both adult and juvenile offenders have engaged in mediation with their victims and this has been used as an alternative to the criminal justice system (p. 169).

This method of accounting for the emergence of ‘restorative justice’ seemed to suggest that history was of little significance. For these authors, ‘restorative justice’ had indeed emerged – the challenge was to understand
its potential applications in current and future criminal justice contexts. Where ‘restorative justice’ is concerned, it appeared that not only historical work, but theoretical work in general, was deemed unimportant in comparison to empirical research. Prominent scholar Kathleen Daly even urged criminologists to “get up from behind the desk and do some empirical work on restorative justice” (Blagg, 1998, p. 12, footnote 3).

‘Restorative Justice’ and Self-evident ‘Success’

Officially, therefore, history was not an issue for the ‘restorative justice’ project. Indeed, it was suggested to me a number of times during the period in which I was formulating a research question, that where ‘restorative justice’ had come from, how it had emerged, and why it appeared to be ‘working’ were essentially irrelevant issues. For some, the apparent ‘success’ of ‘restorative justice’ was reason enough to continue and expand its use. Moreover, this sentiment appeared to be having an influence on the ‘ground level’ of criminal justice.

The New South Wales Department of Corrective Services Restorative Justice Unit, established in 1999 to facilitate dialogue between victims of serious crimes and ‘their’ offenders, is a case in point. The Department’s Annual Report for 1999/2000 (New South Wales Department of Corrective Services, 2000, p. 27), describes the Restorative Justice Unit (albeit under the presumably erroneous heading ‘Opportunities To Make Retribution’), and claims that a method for evaluating the program had been developed during the year. The report also states that conference participants are interviewed
following their involvement with the Unit’s program (New South Wales Department of Corrective Services, 2000, p. 27). The Department’s *Annual Report* for the following year goes on to claim that the program had been “proven to be a highly effective way of resolving offence related issues for both victims and offenders”, and that the Minister had approved the program as a permanent fixture within the Department (New South Wales Department of Corrective Services, 2001, p. 4).

This official version of events stands in contrast, however, to both the then Director of the Unit’s own version, and other Departmental documentation. In a discussion in 2002, the then Director of the program, Rhonda Booby, suggested that no data had been collected on victims who had participated in conferences, and admitted being “unsure” as to the ‘types’ of victims that typically became involved (R. Booby, personal communication, 26/6/02). Booby also stated that no research had at that stage been undertaken and that a recently designed survey instrument had been rejected by the Department’s research ethics committee (R. Booby, personal communication, 26/6/02).

The Department’s *Research Program* report for both 2001-2002 and 2002-2003 describe the status of the evaluation of the Unit as ‘current’ (New South Wales Department of Corrective Services, 2002, p. 17; 2003, p. 18). The Department’s *Research Program* report for 2003-2004 states that a preliminary report of the evaluation was to be due in October 2004 (New South Wales Department of Corrective Services, 2004, p. 18). In fact, both
the evaluation and the report stemming from it have to date not been completed, according to the Department’s Corporate Research Evaluation and Statistics Unit (D. Alcott, personal communication, 16/6/05).

The claims made in the Department’s *Annual Reports* are thus not supported by a number of other sources. This perhaps demonstrates that, as some advocates of ‘restorative justice’ claim, the ‘success’ of ‘restorative’ programs is self-evident. Thus although one *Annual Report* adopts the language of hard science, referring to the ‘proof’ of the program’s effectiveness (New South Wales Department of Corrective Services, 2001, p. 4; see also New South Wales Department of Corrective Services, n.d., p. 1), and despite a clear intention to evaluate the program (Booby, 1997, p. 23), the lack of evaluation seems to suggest that evidence of this nature is not necessary.

Significantly, this did not appear to be an isolated case. The then Assistant Co-ordinator for Queensland’s Community Conferencing Service, Larraine Houlihan, commented to me that this program – which also dealt with cases of serious offending – was similarly unlikely to be evaluated (L. Houlihan, personal communication, 6/9/02). According to L. Houlihan (personal communication, 6/9/02), this was the case due to the program’s status as a ‘demonstration site’ rather than a ‘pilot program’. Giving a program this status meant that the Department’s commitment to continuing the program was not reliant upon the results of an evaluation (L. Houlihan, personal communication, 6/9/02). Again, therefore, the need for explanations as to how ‘restorative justice’ had come about and whether or why it appeared to
be ‘working’ are disregarded in light of programs’ apparently self-evident ‘success’. This reluctance to evaluate new ‘restorative justice’ programs was also evident in many North American sites (T. Marshall & Merry, 1990, p. 15), and in the United Kingdom, where ‘restorative’ programs, which are “officially subject to piloting, are sometimes ‘rolled out’ before the evidence from the pilot project has been made available” (B. Williams, 2005, p. 17).

Of course, this is not always the case. The Youth Justice Colation of New South Wales’ (1996, pp. 13-14) comments on the then developing ‘youth justice conferencing’ scheme in that state, for example, stress the importance of ongoing monitoring and evaluation activity. Moreover, there is an immense body of evaluation research on various ‘restorative justice’ programs, much of which looks at ‘restorative practices’ for juvenile and/or property offending rather than serious crimes (Umbreit & Vos, 2000, p. 65). Typically, these evaluations address a very narrow set of criteria, including rates of recidivism and participant satisfaction following ‘restorative’ processes. Driven by administrative demands, this body of research represents what we might call ‘internal’ analyses of ‘restorative justice’. That is, these evaluations seek only to evaluate ‘restorative justice’ according to this limited framework, rather than critiquing its position in the broader criminal justice landscape. Even critical analyses, such as those utilising feminist frameworks, are primarily ‘internal’ and stop short of challenging the status quo that ‘restorative justice’ represents. While such analyses commonly challenge aspects of ‘restorative practices’ – such as their potential to perpetuate power imbalances between male offenders and female victims – they take for granted the position of
‘restorative justice’ in the criminal justice environment and do not represent a challenge to its widespread acceptance. They therefore reflect what Scraton (2002) describes as a new, politically motivated approach to research in which the “naïve and partial” (p. 33) assessment of government policy takes precedence and “in-depth qualitative research is virtually absent” (p. 33).

‘Restorative Justice’, History and Power

The history of ‘restorative justice’ thus began to appear to me to be simultaneously – perhaps contradictorily – both taken-for-granted, and fraught with contention. The brief, perfunctory ‘textbook’ histories frequently used by authors in the field as introductions to their work seemed to suggest some consensus around the emergence of ‘restorative justice’ – at least in terms of the insignificance of the topic. At the same time, these potted histories appeared to gloss over a multitude of varied and competing accounts, rather than presenting an accepted and unified perspective.

In fact, underneath the façade of an accepted account of the origins of ‘restorative justice’, power relations were clearly in operation. J. Hudson and Galaway’s (1975) and Weitekamp’s (1999) attempts to ‘rewrite’ history favourably to the ‘restorative justice’ project, recasting criminology’s early figures as advocates of ‘restorative practices’, are a good example. Their accounts suggest – albeit inadvertently – the power of history, and the importance of producing an accepted version of events. My conceptualisation of the history of ‘restorative justice’ in this way - as a contested area replete with power struggles - was reinforced during informal conversations with contacts I had made in the field. In particular, one
prominent individual repeatedly accused another expert, with whom he had previously worked in developing ‘restorative justice’ initiatives, of ‘rewriting history’.

**The Research Question**

The research question that this thesis seeks to address is, therefore: How has ‘restorative justice’ emerged as an acceptable approach to dealing with criminal behaviour? Given its pervasive political and assumed public appeal, ‘restorative justice’ appears to ‘make sense’ to many individuals and organisations, both within the criminal justice apparatus, and from externally. This thesis considers how ‘restorative justice’ has come to ‘make sense’ to so many.

**Defining ‘Restorative Justice’**

Firstly, however, it is necessary to outline how the term ‘restorative justice’ will be used throughout this thesis. The task of defining ‘restorative justice’ has long been considered a problematic and controversial one in the ‘restorative justice’ field (McLaughlin, Fergusson, Hughes, & Westmarland, 2003, p. 9). Despite numerous attempts (see, for example, Arzdorf-Schubbe, 2000, p. 1; Benjamin, 1999, p. 4; Daly, 2000, pp. 167-168; M. Griffiths, 2001, p. 137; G. Hill, 2002, p. 6; Pollard, as cited in Lord Justice Auld, 2001, p. 388; McCold, 1998, pp. 19-20; Sherman, 2003, pp. 10-11; Van Ness, Morris, & Maxwell, 2001, pp. 5-6; Zehr, 2002, pp. 36-38), it has been widely acknowledged by scholars in the area that ‘restorative justice’ is a difficult concept to define (Dignan, 2005, p. 2; McCold, 1997, p. ii; 1998, p. 19; Pavlich, 2002, p. 1; Strang, 2000, p. 22).

This lack of consensus stems partly from the multiple ways in which ‘restorative justice’ is conceptualised (Johnstone, 2003, p. 14). In the literature, scholars variously consider ‘restorative justice’ as an alternative paradigm of justice (Umbreit, 1995, p. 266; Zehr, 1990), a theory (Umbreit, 2001, p. xx; Umbreit & Vos, 2000, p. 63) or philosophy (G. Hill, 2002, p. 6; New Zealand Department for Courts, 2002, p. 10; Stevenson, 2001, p. 1; Wachtel, 1999, p. 3; Zehr, 2002, p. 42), a set of ideas (Von Hirsch, Ashworth, & Shearing, 2003, p. 21), practices (Daly, 2000, p. 170; Strang, 2000, p. 22) or principles (Braithwaite, 2003a; La Prairie, 1999, p. 141; Zehr, 2002, pp. 19-41), and/or a goal or intended outcome (Llewellyn & Howse, 1998,
Evaluation section, para 2). Many, however, happily adopt T. Marshall’s (1996) definition of ‘restorative justice’ – that it 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” (p. 37).

This definition “has come closest to general acceptance” (Strang, 2000, p. 23); indeed, it has become so widely accepted in the field that it is often cited without reference to its author, as though it were a type of proverb or adage rather than an idea directly attributable to a sole author. T. Marshall’s (1996) definition appears without citation both in a slightly reworked form (Braithwaite, 2004b, p. 38; Home Office, 2003, p. 4; Johnstone, 2003, p. 3; Luke & Lind, 2002, p. 1; Marslew, 2001, p. 2; Morris & Young, 2000, p. 15; Parkinson & Roche, 2004, p. 506; Restorative Justice Network, 2004, p. 23; Roche, 2002, p. 516; Zehr, 2002, p. 37) and verbatim (Chmelynski, 2005, para 2; Home Office, 2002b, p. 124; New Zealand Ministry of Justice, 2003a, Further Information About Restorative Justice Processes section, para 1). T. Marshall’s (1996) definition is so commonly accepted that citing it has become a familiar way of commencing a piece of work on ‘restorative justice’. Perhaps this is how you, the reader, might have expected this discussion on ‘restorative justice’ to begin.

It is important to recognise, however, that despite the multitude of attempts at demarcating the parameters of ‘restorative justice’, or identifying its ‘heart’ (Benjamin, 1999, p. 2), or the “common element” (Kurki, 2003, p. 293) or
“core-ideas” (Daems, 2004, p. 139) that unite all ‘restorative practices’, numerous practices that fall outside these definitions are nonetheless deemed ‘restorative’ and are bestowed the ‘restorative justice’ label. Practices that are not voluntary for offenders (Daly & Immarigeon, 1998, p. 26; Miers, 2001, pp. 32-33; Pranis, 2004, p. 143; Walgrave, 1995, p. 243), do not require an admission of guilt (Miers, 2001, pp. 32-33; Strang, 2000, p. 24), do not involve victims (Maxwell & Morris, 1994, p. 25; New South Wales Attorney-General’s Department, 2002, p. 34; Stubbs, 2004, pp. 4-5), offenders (Walker, 2004), facilitators (Jaeger, 1983; Sten Madsen & Andersson, 2004; Swift, 1994), or even the ‘coming together’ of parties (New South Wales Department of Corrective Services Restorative Justice Unit, 2002a, 2003b; Pranis, 2004, p. 145; T. Roberts, 1995, pp. 96-97; Walker, 2004), for example, have been deemed examples of ‘restorative justice’. Walker’s (2004) report on ‘restorative justice without offender participation’ – a program which “gives victims an opportunity to tell their stories in a small group setting” (Walker, 2004, p. 4) - was endorsed and distributed through the International Institute For Restorative Practices, for example. In this manner, programs and practices which would – according to some, at least – fall outside of the ‘restorative justice’ ‘rubric’ are granted, or grant themselves, the status of ‘restorative justice’ processes.

This lack of consensus amongst ‘restorative justice’ proponents led Paul McCold (1998) to attempt, by way of a Delphi process, to “develop a consensual definition of restorative justice” (p. 19). The Delphi process involved asking 29 selected ‘experts’ in the field to respond to a list of
sometimes deliberately provocative propositions about ‘restorative justice’, which McCold (1998, p. 24) had constructed based on a review of the literature. After nearly two years (O’Connell, n.d., p. 21), it became apparent that “there was no movement towards a consensus, and that the Delphi process had failed in that regard” (McCold, 1998, p. 24). As a result, the Working Party On Restorative Justice – on whose behalf the quest for an agreed definition was initiated – simply adopted T. Marshall’s (1996) definition as their working definition (McCold, 1998, p. 20).

**Defining ‘Restorative Justice’ as a Site of Power Struggle**

Problems concerning the definition of ‘restorative justice’ have not, however, been limited to attempts at constructing a consensual understanding of the term. Rather, the definition of ‘restorative justice’ could be viewed as a site of contestation and power struggle. Firstly, for a number of authors in the field, the term ‘restorative justice’ does not reflect the stated aims of proponents (Braithwaite, 1996, p. 325; K. Cook & Powell, 2003, p. 287; Delgado, 2000, p. 764; Marslew, 2001, p. 2; Sarre, 1999c, p. 2, footnote 3). According to Blagg (1998), “the concept of restoration refers to the remaking of the status quo....[however the].... status quo may be an aspect of the problem we want to transform” (p. 6). As a result, some advocates prefer other terms such as ‘transformative justice’ (Steels & Goulding, 1999), or ‘cooperative justice’ (Marslew, 2001, p. 2), which highlight that the aim of ‘restorative practices’ should not be to return parties to a potentially unsatisfactory status quo, but to work towards a better future.
Secondly, some contestation exists among advocates as to which practices the label ‘restorative justice’ should rightfully be applied to (Sarnoff, 2001, p. 33). Some are adamant, for example, that contrary to the views of others (Benjamin, 1999), ‘restorative justice’ is not ‘mediation’ (New Zealand Department for Courts, n.d., p. 5; Zehr, 2002, p. 8). More pointedly, perhaps, some advocates argue that ‘mediation’ is not ‘restorative justice’ (Greentree, 2005; O’Connell, 1994a, p. 2), and as such, utilise a “negative definition” (Miller & Blackler, 2000, p. 78) to actively exclude a variety of processes from claiming the ‘restorative justice’ identity.

A third example of the power struggles that occur in relation to the use of the label ‘restorative justice’ can be found in Daly and Immarigeon’s (1998) work. Discussing the original coining of the term, Daly and Immarigeon (1998, p. 23) claim that it emerged in the writings of a range of authors, such as Howard Zehr, during the 1980s and 1990s. Although they acknowledge in an endnote that the coining of the term is usually attributed to Albert Eglash (1975)², they effectively de-legitimate Eglash’s role by declaring that “Eglash saw himself as offender-oriented” (Daly & Immarigeon, 1998, p. 39, note 8). As Daly and Immarigeon (1998), like many other advocates, consider the involvement of crime victims as critical to the current-day ‘restorative justice’ project, they reassign the credit for coining the term to authors following Eglash, whose ideals are more closely aligned to their own.

² Pages 35-40 contain a more detailed discussion of the origins of the term ‘restorative justice’.
Intriguingly, Van Ness (1993) takes quite a different approach to that adopted by Daly and Immarigeon (1998). Van Ness (1993) ascribes the coining of the term ‘restorative justice’ to Eglash, and summarises Eglash’s views as follows:

He suggested that there are three types of criminal justice: retributive justice based on punishment, distributive justice based on therapeutic treatment of offenders, and restorative justice based on restitution. Both the punishment and the treatment model, he noted...deny victim participation in the justice process....Restorative justice...actively involves victims and offenders in the process of reparation and rehabilitation (p. 258, footnote 28).

This version of events directly contrasts with Daly and Immarigeon’s (1998) accusation that Eglash was offender-oriented. Indeed, Eglash’s work is represented by Van Ness (1993) as very concerned with the plight of victims. In Daly and Immarigeon’s (1998) favour, however, Eglash (1975) himself admits that he is “offender oriented” (p. 99):

From the start, I’ve been thinking and writing about ways to help offenders, about justice and rehabilitation for offenders. I work with and interview offenders. I seldom think about the victim, how to help him [sic] with his financial, medical, emotional, and social problems. I have never visited any
victims, never interviewed any, never wondered what questions
I would want to ask, never thought to include any victim
interviews…in this paper (p. 99).

Ultimately, for Eglash (1975), “restorative justice…is concerned primarily with
offenders. Any benefit to victims is a bonus, gravy, but not the meat and
potatoes of the process” (p. 99).

Thus while Daly and Immarigeon (1998) ‘rewrite history’ by de-emphasising
Eglash’s (1975) role in defining ‘restorative justice’, Van Ness (1993) does so
by retrospectively representing Eglash’s (1975) work as more ‘enlightened’
and in accordance with current thinking about crime victims than it appears to
have been.

These power struggles are important to recognise, given that currently,
‘restorative justice’ occupies a position as something of an international ‘buzz
word’ or ‘hot topic’. International conferences and special editions of
academic journals, for example, have been created to look specifically at the
subject of ‘restorative justice’. More pointedly, perhaps, the allocation of
research grants and government funding is likely to be influenced by this
current interest in the potential of ‘restorative justice’. There are therefore
potentially negative consequences for those programs excluded from the
field or characterised as external to the ‘restorative justice’ project.
The term ‘restorative justice’ therefore has a certain currency; given the rhetoric of its ‘promise’, “it is not surprising that some people are keen to associate their initiatives with the ‘restorative’ cachet” (Ashworth, 2003, p. 165). The process of defining what may or may not be included within its parameters might be viewed as less of a technical one – in which practices are included or excluded according to an agreed set of criteria – and more of a political one, in which programs vie for the legitimacy that comes with the ‘restorative justice’ identity.

Use of the Term ‘Restorative Justice’ in this Thesis

‘Restorative justice’ is thus a problematic term with no universally accepted definition (Ashworth, 2002, p. 578; Van Ness, 2003, p. 166); the quest to define its parameters has involved a great deal of struggle and contestation. Additionally – as will be demonstrated within the body of this thesis – from a Foucauldian perspective, ‘restorative justice’ can be viewed as lacking a fixed ‘essence’ or ‘core’. In this sense, use of the term ‘restorative justice’ to describe a wide range of diverse values, programs and practices might be viewed as a political strategy. As Garland (1990a) has argued, allocating a label to a particular entity “can often make it seem more substantial or more unified than it actually is” (p. 1). This raises a considerable problem for this thesis – how can one write a genealogy of a phenomenon that has no fixed boundaries and no ‘essence’? How does one go about “denying any substance to…[their object of inquiry]…while simultaneously reconstructing its intellectual history” (Sutcliffe, 2003, p. 226, note 3)? In light of this problem, this thesis will focus on those practices that claim – or are granted -
the ‘restorative justice’ label, an approach similar to that taken by Pavlích (2005b).

As Hacking (1995) has argued, furthermore, referring to a particular phenomenon in abbreviated form acts to render it legitimate: “there is nothing like an acronym to make something permanent, unquestioned” (p. 17). This has begun to occur in the ‘restorative justice’ field, with some scholars now referring to ‘restorative justice’ simply as ‘RJ’ (Curtis-Fawley, 2002; Daly & Stubbs, 2005; Pollard, 2004). While this is perhaps understandable in academic conference settings, given the time limitations placed on speakers, a number of authors (Ashworth, 2003; Bottoms, 2003; Daly, 2004; Daly & Stubbs, 2006; Sherman, 2003; Von Hirsch et al., 2003) have used this abbreviation in academic writings also. Additionally, many authors use other abbreviations including ‘FGC’ (‘family group conference’), ‘FGDM’ (‘family group decision making’), ‘VOM’ (‘victim offender mediation’), ‘VOMP’ (‘victim offender mediation program/project’) and ‘VORP’ (‘victim offender reconciliation program/project’). This, I would suggest, also works to legitimise and unite ‘restorative practices’, and to render ‘restorative justice’ a more tangible and uncontested area than it may perhaps be.

Using the term ‘restorative justice’ as though it were unproblematic thus seems inappropriate for a thesis that aims to problematise and destabilise the taken-for-granted nature of this phenomenon. As such, the term ‘restorative justice’ and associated terms such as ‘family group conferencing’ and ‘victim offender mediation’ will be used in inverted commas throughout in
order to remind the reader of the contested and contestable nature of this terminology - that ‘restorative justice’ represents a loose, shifting and unstable assemblage of diverse processes, practices, ideologies and theoretical positions. This follows Sutcliffe (2003), whose genealogical work considered this strategy “not a fad but a necessary device to keep my problematisation of this category constantly in the reader’s gaze” (p. 6).

Outline of the Thesis

This thesis considers how ‘restorative justice’ has emerged as a legitimate response to crime. It presents the beginnings of a genealogical analysis of ‘restorative justice’ as it applies to criminal justice contexts. It comprises a ‘backwards-looking’ component, in which accepted historical accounts of ‘restorative justice’ are problematised, and a ‘forwards-looking’ component, in which a partial history of discourse of ‘restorative justice’ is presented.

Chapter One comprises the core ‘backwards-looking’ section of the thesis. Drawing on a wide range of both authoritative histories and ‘textbook’ histories of ‘restorative justice’, it analyses and critiques three main explanations for the emergence of ‘restorative practices’ into the criminal justice landscape. Chapter One aims to challenge the taken-for-granted and powerful nature of these dominant discourses about the emergence of ‘restorative justice’, and in doing so, open up a space for alternative histories. This problematisation thus opens spaces for the explorations in Chapters Three, Four and Five.
Chapter Two introduces the research methodology used in this thesis. It discusses briefly the range of criticisms Foucault made of traditional history writing, and then systematically introduces the elements of a Foucauldian genealogy. This Chapter also considers in detail the two primary research methods used in the thesis: archival research and interviews, and aims to demonstrate the suitability of the approaches chosen. Finally, Chapter Two discusses the purpose of genealogical research, the limitations of the methodology, and the limitations of the thesis as a whole.

The ‘forwards-looking’ section of this history of discourse begins in Chapter Three. Chapters Three and Four consider in detail groups of discourses that act as ‘conditions of possibility’ of ‘restorative justice’. Chapter Three argues that the ascendancy of ‘restorative justice’ has been enabled partly because of the widespread acceptance of a range of discourses that Rose (1996a) describes as belonging to the ‘psy’ apparatus. These discourses are discussed in depth, and are posited as potential ‘conditions of emergence’ of ‘restorative justice’. Chapter Three also considers some possible implications of the identification of these discursive conditions on the field of ‘restorative justice’ and the criminal justice landscape more broadly.

Chapter Four continues the ‘forwards-looking’ section of the thesis by considering another set of ‘game openings’. This time a range of competing discourses around the notion of parental responsibility are discussed and proposed as possible ‘conditions of emergence’ of ‘restorative justice’ for
juveniles. Again, some potential implications of this recognition of discourses are discussed.

Chapter Five operates as an analytics of government of ‘restorative justice’. It critically examines the multiple relationships between ‘truth’, discourse and subjectivity in relation to ‘restorative justice’, and considers the ways in which ‘restorative justice’ can work to position its subjects as ‘active bodies’. In this context, the discourse of ‘empowerment’ is considered, as it underpins both the sets of discourses examined in Chapters Three and Four. ‘Empowerment’, it is argued, operates to replace traditional welfarist mentalities, and in doing so, allows the State to ‘govern at a distance’ through the will of its subjects.

I conclude that these silenced discourses might be read as an incomplete and partial history of discourse of ‘restorative justice’. That is, ‘restorative justice’ ‘makes sense’ as an approach to criminal justice partly because of the credence of these discourses, upon which it relies, to some extent, for discursive legitimacy. These diverse and divergent discourses cast the ‘restorative justice’ project not as the unified and stable ‘movement’ as which it is usually portrayed, but as a fragmented and shifting phenomenon, comprised of a loose and heterogeneous assemblage of practices with variegated historical antecedents. Additionally, I conclude that some concerns raised by various scholars in the field – particularly in relation to the potential of ‘restorative practices’ to impact negatively on already
marginalised and disadvantaged populations – are validated by this genealogy.
CHAPTER ONE: PROBLEMATISING ACCOUNTS OF THE EMERGENCE OF ‘RESTORATIVE JUSTICE’

1.1 The Rise and Rise of ‘Restorative Justice’³

During the last quarter-century, ‘restorative justice’ has emerged in numerous localities around the globe as a new approach to criminal justice. The last 10-15 years in particular have witnessed the rapid proliferation of ‘restorative practices’. Inventories of ‘restorative justice’ programs such as Miers’ (2001) *An International Review of Restorative Justice*, Umbreit, Schug, Greenwood, Fercello and Umbreit’s (1997) *Directory of Victim Offender Mediation Programs in the US*, Gehm’s (1986) *National VORP Directory*, and Strang’s (2001a) *Restorative Justice Programs in Australia*, demonstrate the widespread implementation of such practices around the world. Miers (2001) describes ‘restorative justice’ programs in Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Ireland, Italy, Netherlands, New Zealand, Norway, Poland, Russia, Slovenia, Spain, Sweden and the United States of America. ‘Restorative practices’ have also been implemented in South Africa (O’Connell, 1994a, 1994b), Papua New Guinea (Dinnen, 1997), and in the Pacific region (Dinnen, Jowitt, & Newton Cain, 2003). According to Van Ness (as cited in Porter, 2005, p. 1), more than eighty countries now utilise ‘restorative justice’ as a response to crime. Even supranational bodies such as the Council of Europe (1999), the European

³ This heading has been chosen deliberately to contrast with Braithwaite’s (2002) opening heading in *Restorative Justice & Responsive Regulation*, which reads “The Fall and Rise of Restorative Justice” (p. 3). Here, Braithwaite (2002, pp. 3-8) is referring to the well rehearsed notion that although “restorative justice has been the dominant model of criminal justice throughout most of human history for perhaps all the world’s peoples” (p. 5), it came into decline following the Norman Conquest of Europe. This aspect of the story of the coming into being of ‘restorative justice’ will be discussed in more detail on pp. 197-198 of this thesis.
Union (2001) and the United Nations Economic and Social Council (1999; 2002) have encouraged the increased use of ‘restorative practices’ throughout their member states.

Academic interest in ‘restorative justice’ is currently at a remarkably high level (Roche, 2003a, p. 638). ‘Restorative justice’ bibliographies by Allard (2002), Bouhours and Daly (2004), McCold (1997), Trevethan and Bell (2002), Umbreit, Coates and Vos (2003) and Wright (2001) illustrate the widespread scholarly appeal of this topic. Although O’Malley (2000) rightfully cautions us not to confound the intellectual interest in various penal measures with their impact on the “ground level of justice” (p. 155), the impact of ‘restorative justice’ on the ‘ground level’ is considerable. The introduction of a substantial quantity of legislation, for example, can attest to the newfound popularity of ‘restorative justice’ measures. Legislation covering the implementation and practise of ‘restorative justice’ has been pioneered in a range of jurisdictions in Europe, North America and Australasia. A large amount of policy has also been developed by community organisations, church groups and other non-government agencies to regulate the operation of ‘restorative justice’ in a diverse array of locations.

Across various jurisdictions, ‘restorative practices’ have been adopted for use – albeit haphazardly - at nearly every stage of the criminal justice system: from diverting first-time or minor juvenile offenders from the courts, to being used as a sentencing option for adult offenders, to dealing with crimes of violence such as sexual assault and sexual abuse (Daly, 2002a; Gutman,

Thus although ‘restorative justice’ remains external to the dominant criminal justice system in many jurisdictions (Garland, 2001, p. 169; Roche, 2003a, p. 638) – in some localities having “no more than a toehold in practice” (O'Malley, 2000, p. 155) – there is no denying its rapid proliferation in recent years. This sudden expansion has prompted Freiberg (2002) to joke that ‘restorative justice’ has become so prevalent that when human beings land on Mars, there will be a ‘restorative’ circle there to greet us (Professor Freiberg section, para 4), and Braithwaite (1996) to dub ‘restorative justice’ “the slogan of a global social movement” (p. 323). While this may be somewhat of an overstatement, particularly given the haphazard and uneven implementation of ‘restorative practices’ across various jurisdictions, it is safe to suggest, as Johnstone (2002) has done, that ‘restorative justice’ “is beginning to make significant inroads into criminal justice policy and practice” (p. ix).
Of course, the influence of the ‘restorative’ paradigm has not been limited to the realm of criminal justice. ‘Restorative’ practices, values and/or programs are currently being utilised in a wide range of contexts, from child protection settings, to schools and workplaces, to industrial and tenancy disputes. Indeed, there is a seemingly inexhaustible range of potential applications of ‘restorative justice’, including both familiar contexts, such as ‘restorative’ policing, and the somewhat bizarre, such as Hopwood and O’Connell’s (2005) quest to implement ‘restorative practices’ in contexts of veterinary complaints procedures. Additionally, it has been suggested as an appropriate response to large-scale national conflicts such as apartheid in South Africa (Humphrey, 2005; Tutu, 2000), genocide in Rwanda (World Vision, 2001), harm to indigenous communities in Canada (Pranis, 2001), and paramilitary violence in Northern Ireland (McEvoy & Mika, 2001; Mika & McEvoy, 2001). Pranis (2001) goes so far as to argue that ‘restorative justice’ might be a suitable response to the ‘September 11’ terrorist attacks on the United States of America.

1.1.1 Tracing the Use of the Term ‘Restorative Justice’

This shift in approaches in the criminal justice sphere prompts us to question how it is that ‘restorative justice’ has emerged: what is it that has brought about this change? A number of authors have attempted to trace the origin of the term ‘restorative justice’ in an effort to pinpoint the emergence of this phenomenon. As stated already, the term is usually attributed to psychologist Albert Eglash’s (1975) article “Beyond Restitution – Creative Restitution” (Bazemore & Washington, 1995, p. 63, endnote 3; Chatterjee & Elliott, 2003,
For thousands of years retributive justice and its techniques of punishment for crime; for decades, distributive justice and its technique of therapeutic treatment for crime – these are the alternatives to restorative justice and its techniques of restitution (p. 91).

In fact, use of the term ‘restorative justice’ can be traced to even earlier writings than this. In an earlier article, “Creative Restitution: Its Roots in Psychology, Religion and Law”, Eglash (1959, pp. 116, 119, note 29) acknowledges his debt to the work of both Schrey, Walz and Whitehouse (1955) and Silver (1928). Indeed, the first use of the term ‘restorative justice’ in Eglash’s (1959) work is in a quote from Schrey et al. (1955), who say:

This aligning of justice and love is something which it is the peculiar task of Christian believers to promote, and in doing so they need to see beyond the secular conception of justice in its threefold form of distributive, commutative, and retributive justice. Distributive justice can never take us beyond the norm of reparation; commutative justice can provide only due compensation; retributive justice has no means of repairing damage save by punishment and expiation. Justice has also a
restorative element. Restorative justice alone can do what law
as such can never do: it can heal the fundamental wound from
which all mankind suffers and which turns the best human
justice constantly into injustice, the wound of sin. Restorative
justice, as it is revealed in the Bible, alone has positive power
for overcoming sin (as cited in Eglash, 1959, p. 116).

Here, Schrey et al. (1955) are in turn drawing on the work of author Walther
Schönfeld. It appears that the idea of a ‘fourth dimension’ to justice –
‘restorative justice’ – belongs to Schönfeld, although as his book is in
German, it is unclear who coined the term.

Nonetheless, it is interesting to note that use of the term ‘restorative justice’
can be traced back much further than present-day ‘restorative justice’
scholars believe. Certainly, this calls into question Daly and Immarigeon’s
(1998, p. 23) claim that the term ‘restorative justice’ was non-existent during
the 1970s, when ‘restorative practices’ were beginning to surface. Moreover,
it is important to note that Schrey et al.’s (1955) early use of the term equates
‘restorative justice’ with Biblical justice.

Interestingly, only a year earlier, Eglash (1958a) rejected the term
‘restoration’ in his article “Creative Restitution: A Broader Meaning For An
Old Term”. Here, Eglash (1958a, p. 621) states that although critics have
recommended he use terms such as ‘restoration’ or ‘redemption’ to describe
the process of reparation to crime victims he advocates, his own preference
is to retain the term ‘restitution’ to differentiate this process from the narrower concept of offenders making mandatory financial payments. Regrettably, Eglash (1958a) gives no indication as to who might have suggested use of the term ‘restoration’ to him. His work suggests, however, that he did not coin the term himself, but adopted it at a later date.

More intriguing still is the fact that Eglash (1958b) himself had used the term ‘restorative’ in another article, “Creative Restitution: Some Suggestions for Prison Rehabilitation Programs”, published that same year. In this article, Eglash (1958b) lists as one of the characteristics of an act of restitution that “the relationship between offense and restitution is reparative, restorative” (p. 20).

Less frequently, scholars attribute the coining of the term ‘restorative justice’ to Barnes and Teeters (1959) (McCold, 1998) or Barnett (1977) (T. Marshall, 1998, p. 3; O'Connell, n.d., p. 18). McCold (1998) claims that Barnes and Teeters (1959) text *New Horizons In Criminology* “mentioned the paradigm of restorative justice in 1959” (p. 26, footnote 1). Barnes and Teeters (1959), however, neither use the term ‘restorative justice’ nor discuss a paradigm of justice that would be considered by current authors to be ‘restorative justice’. Instead, Barnes and Teeters (1959, pp. 592-594) advocate a system of restitution based partly on the notion that crimes should not be thought of as having been committed against the state, but should be considered in regards to their impact on individual victims. In this sense, Barnes and Teeters’ (1959) argument parallels those of many ‘restorative justice’
proponents. Beyond this, however, it appears that their role in identifying the ‘restorative justice’ paradigm is very limited.

Barnett’s (1977) article “Restitution: A New Paradigm of Criminal Justice” similarly champions a new system of criminal justice based on restitution rather than retribution. Like Barnes and Teeters (1959) and many supporters of ‘restorative justice’, Barnett (1977) proposes a “common sense view of crime” (p. 288) which posits crime “as an offense by one individual against the rights of another” (p. 287). Intriguingly, however, Barnett (1977) also fails to make use of the term ‘restorative justice’ in this article, in contrast to advocates’ claims. Instead, Barnett (1977) draws on Eglash’s (1958a) early article (discussed above), in which Eglash (1958a, p. 621) rejects suggestions that he adopt the term ‘restoration’ to describe his proposed process of ‘creative restitution’. Barnett (1977) apparently ignores Eglash’s (1958a, p. 621) wishes, describing ‘creative restitution’ in the following terms: “it is reparative, restorative, and may actually leave the situation better than it was before the crime” (p. 293).

Barnett (1977) does, however, support John Greacen’s (1975) calls for a system of arbitration between offenders and victims, which he claims could act as “a sort of healthy substitute for plea bargaining” (p. 290). Greacen’s (1975) work appears to support what might resemble ‘restorative practices’ more so than Barnett’s (1977) celebrated work. Greacen (1975) details the use of “victim-offender confrontation session[s]” (p. 53) in Tucson, Arizona, which involve “bringing the victim and offender together with a facilitator.”
Each relates his [sic] side of the story to the other. They negotiate the terms or understandings that will become the basis of the victim’s diversion arrangement” (p. 53). Moreover, Greacen (1975), unlike Barnett (1977), describes arbitration in similar terms to those often utilised by supporters of ‘restorative justice’. Its benefits, he claims, include: the development of creative dispositions for most criminal cases; offenders becoming more aware of, and accepting responsibility for, the consequences of their actions, and; increased satisfaction for victims (Greacen, 1975, p. 53). Additionally, although Barnett (1977) does not use the term ‘restorative justice’ in this widely-cited article, he does touch on it in a later article, in which he asks, “should a remedy be restorative and reparative or should it be destructive?” (Barnett, 1980, p. 125), and discusses the restoration of crime victims (Barnett, 1980, p. 130).

1.1.2 Tracing ‘Restorative Justice’ in Practise

Most ‘restorative justice’ scholars acknowledge, however, that in many instances ‘restorative’ practices emerged either prior to, or independently of, the widespread use of the term, and that often, the expression ‘restorative justice’ has been applied to various programs and procedures retrospectively (Daly, 2000, p. 168; McCold, 1997, p. i). Doolan (2005) admits, for example, that in regards to New Zealand’s ‘family group conferencing’ scheme, “those of us who were involved in the policy development process leading up to the new law had never heard of restorative justice” (p. 1).
and Umbreit (1995) claims that attempts at bringing young offenders face-to-face with their victims can be “traced back to the 1960s when a small number of probation departments began to see the value of such a confrontation” (pp. 264-265). Wright (1977, pp. 25-27) similarly lists a number of early ‘victim offender mediation’-type programs, Blew and Rosenblum (1979) describe a ‘family group conferencing’-style project operational during the 1970s, and Galaway and Hudson (1972) consider ‘victim offender interaction with restitution’ as early as 1972. Schwendinger, Schwendinger and Lynch (2002) even discuss a Ph.D. thesis by James Brady, which they claim “described the centuries-long evolution of restorative ‘popular justice’ in China” (p. 45).

1.1.3 Problematising Historical Accounts of ‘Restorative Justice’

What can be determined from this ongoing debate over the emergence of ‘restorative justice’, of course, is that establishing a precise historical moment in which the birth of ‘restorative justice’ took place is a virtual impossibility. As Daly (1998) has commented, the search for this exact moment is rather futile, since “as soon as one nominates a ‘start point,’ others will find even earlier ones” (p. 3).

As already discussed, a range of potted histories have been posited in the ‘restorative justice’ literature that attempt to account for the emergence of ‘restorative justice’. Often, these accounts of the birth of ‘restorative practices’ are somewhat contradictory; ‘restorative justice’ is seemingly predicated on a wide range of religious, philosophical, political and social

The remainder of this Chapter seeks to critically discuss the dominant explanations for the birth of ‘restorative justice’ utilised in the body of literature on this topic. Drawing on both a range of authoritative histories of ‘restorative justice’ (Bazemore & Schiff, 2001; Carey, 2000; Leung, 1999; T. Marshall, 1996; Weitekamp, 1999), as well as ‘textbook’ histories, this Chapter will address in particular three of the most common explanations for the emergence of ‘restorative justice’: the notion that ‘restorative justice’ has emerged in response to a failing criminal justice system; that ‘restorative justice’ has grown out of victims’ rights initiatives, and; that ‘restorative practices’ are in fact not really ‘new’, since they were utilised for many centuries by indigenous populations around the world prior to colonisation.

These dominant histories are powerful – in many ways, they operate to render ‘restorative justice’ a legitimate and progressive approach to controlling crime. Accordingly, in addition to outlining these explanations for the emergence of ‘restorative justice’, this Chapter aims to destabilise the taken-for-granted nature of these histories, and question their status as ‘restorative justice’ ‘truths’. This problematisation of conventional histories, it is hoped, will contribute towards opening up a space for alternative accounts. Finally, this Chapter briefly considers some explanations leading criminologists have given of the rise of ‘restorative justice’. These are assessed as to their bearing on the contents of this thesis.
1.2 The Failings of Contemporary Penal Systems

The best thing restorative justice has going for it is our awareness of the terrible failure of the prison system (Acorn, 2004, p. 164).

Perhaps the most frequently cited explanation for the emergence of ‘restorative justice’ is that ‘restorative practices’ are a response to the failure of contemporary Western criminal justice systems. Prominent advocate Howard Zehr (2002), for example, claims that, “there is...a growing acknowledgement of this system’s limits and failures. Victims, offenders, and community members often feel that justice does not adequately meet their needs....Restorative justice is an attempt to address some of these needs and limitations” (p. 3). Similarly, McLaughlin et al. (2003) state that:

It is no coincidence that restorative justice has come to the fore globally at a time when – across a variety of jurisdictions – acknowledgement of the systemic shortcomings and failures of the dominant model of crime control is extensive and a sense of injustice widespread (p. 1).

For a number of ‘restorative justice’ proponents, the failings of the current criminal justice system and the inherent superiority of ‘restorative justice’ as an alternative, is an argument made with an almost evangelical fervour. Consedine (1995, pp. 15-78), for example, premises his highly regarded text *Restorative Justice: Healing the Effects of Crime* with more than 50 pages of
discussion on the shortcomings of the prison system. In this discussion, Consedine (1995) espouses frequently made and widely accepted claims about incarceration, such as that prisons do not deter criminals, and act as recruitment grounds or ‘universities of crime’.

Clearly, there is, as advocates of ‘restorative justice’ argue, widespread agreement that current systems of criminal justice are, at best, fairly ineffectual, and at worst, abject failures. The failings of this system have been well argued and documented (see, for example, Denborough, 1996; Mathiesen, 1990; Tomasic & Dobinson, 1979; Whitton, 1994). Common criticisms include the system’s inability to prevent crime, rehabilitate offenders and assist victims. In Braithwaite’s (1996) widely cited words, “few sets of institutional arrangements created in the West since the industrial revolution have been as large a failure as the criminal justice system” (p. 319). Making an even bolder claim, Dinnen (1997) argues that this is not limited to the West, as Braithwaite argues, but that “the crisis of criminal justice is clearly a global one” (p. 254).

Johnstone (2003) takes a more moderate view, claiming that ‘restorative justice’ advocates “present us with a one-sided picture of the values that underpin conventional criminal justice” (p. 5), and arguing that despite its shortcomings, the contemporary approach to criminal justice does perform some essential functions with reasonable success:
It provides most of us, regardless of our means, with some degree of protection from predatory and harmful behaviour, without making us pay the price of oppressive conformity. Moreover, it meets some of our criteria of fairness to some extent, and gives some degree of recognition and protection to the rights of those accused of crime. It even provides some offenders with some protection from vengeful victims and angry members of the public. Further, under certain conditions, it can help disseminate efficiently progressive ideas of what is right and what is wrong [italics in original] (Johnstone, 2002, p. 7; see also O'Connell, n.d., pp. 11-12).

In much of the ‘restorative justice’ literature, nonetheless, it is taken as a given that the emergence of ‘restorative justice’ is a natural consequence of a failed criminal justice system (see, for example, R. Cohen, 2001, p. 209). Even the New Zealand Department for Courts (n.d.) states that its acceptance of ‘restorative justice’ “stems from dissatisfaction and disillusionment with the criminal justice system’s response to crime” (p. 18). In fact, ‘restorative justice’ is quite frequently portrayed by some leading advocates as though it is the obvious response to, and the sole possible outcome of, the ineffective administration of criminal justice. This claim is often accepted as a kind of taken-for-granted ‘truth’ and is rarely considered in any detail by ‘restorative justice’ scholars. After all, who could oppose a model of criminal justice that claims to address all the shortcomings of the current system? It is simply ‘common sense’ that ‘restorative justice’, which
purports to involve communities, hold offenders accountable and provide restitution to victims - all the while saving taxpayers' money - is a superior way of ‘doing justice’. By describing the origins of ‘restorative practices’ in these terms, some proponents portray ‘restorative justice’ as an intrinsically progressive and credible criminal justice innovation.

I will argue in this section that the relationship between ‘restorative justice’ and the perceived failings of the traditional criminal justice system is more nuanced than these accounts allow. I will firstly aim to demonstrate that the notion of a failed penal system is not a recent one, and will detail the way in which it has been used historically to justify the implementation of a wide range of criminal justice practices. This, it is argued, calls into question the cause-and-effect relationship between a failing criminal justice system and the emergence of ‘restorative justice’, showing instead that an ineffective system merely creates a space for new criminal justice procedures generally. In this context, ‘restorative justice’ is a contingent effect of the system rather than an inevitable consequence of it. Additionally, this section will argue that the notion of this cause-and-effect relationship is weakened by evidence of infrequent attempts by ‘restorative’ programs to address identified problems within the criminal justice system.

1.2.1 Contextualising the Failings of Criminal Justice

Given...what has come to be regarded as the almost total bankruptcy of our current correctional approaches, one can
understand the popular appeal of reviving restitution (Klein, 1978, p. 386).

The one thing about our criminal justice system today that seems to be agreed by all is that in practice it is not working....The existing theoretical bases of punishment [retribution, deterrence and reformation] seem bankrupt....But I am here today to proclaim the good news that a better – a much better – model of justice is at hand....[that]....can be described as restorative justice [italics in original] (McElrea, 1994, p. 34).

Disenchantment with the Western adversarial model of criminal justice is by no means a new phenomenon. To provide just one example, Pratt’s (1992, p. 11) history of the New Zealand penal system suggests that disillusionment with criminal justice in that country has existed almost since its colonisation by Great Britain in 1840, resulting in the ongoing production of official reports, enquiries and commissions detailing the inadequacies of the judicial system. Following Hunt and Wickham (1994), furthermore, all attempts at controlling crime might be viewed as intrinsically inadequate. Hunt and Wickham (1994, p. 79) argue that all attempts to govern necessarily involve some degree of incompleteness or failure: “governance always involves the cycle ‘attempt to control – incompleteness (failure) – attempt to control – incompleteness (failure)’” (pp. 82-83). From this perspective, we might consider the criminal justice system as a necessarily imperfect system, which
is always in a state of flux. In this sense, all attempts to control crime are bound to fail, to a greater or lesser extent; attempts to govern do not endure in spite of their failure, but because of it (Hunt & Wickham, 1994, p. 80). As a result, a constant stream of new initiatives – new attempts to manage crime – are steadily being introduced in an attempt to improve on existing methods of crime control. For Foucault (1977), attempts to improve the prison system, for example, are an intrinsic part of that system; as Dittenhoffer and Ericson (1983) eloquently put it, “reform is part of the very program of the penal apparatus” (p. 320). Seen in this context, ‘restorative justice’ might be viewed as one potential outcome of a system that is in a constant state of ‘improvement’, rather than as a necessary result of a failing system of penalty. In this sense, therefore, ‘restorative justice’ might be viewed as representing a continuity with the existing system, rather than a departure from it, as it is often portrayed.

A failed penal system has therefore been cited historically in order to justify and explain a whole range of new criminal justice initiatives. During the 1960s, for example, the ‘decarceration’ or ‘deinstitutionalisation’ movement and the various new methods of controlling offenders that were introduced alongside it, were seen to be a direct consequence of widespread disillusionment with traditional criminal justice systems (Chan, 1992, p. 1). According to Chan (1992), the message of those who advocated decarcerative measures was clear: “prisons don’t work. They don’t deter criminals. They don’t prevent crime. In fact they produce worse and more

Pavlich (2002) offers a comparable sentiment when he discusses the notion of justice as ‘promise’: “its promise is infinite – it never arrives. Its power lies in the enticing lure variously held out through the promises of what might be, what might become” (p. 13).
violent criminals” (p. 1). Similarly, in their text *The Failure of Imprisonment*, Tomasic and Dobinson (1979, pp. 103-130) promote a range of alternatives to traditional incarceration, including work release programs, halfway houses, open prisons, suspended sentences, periodic detention, community service orders and fines, as well as restitution and diversionary programs, demonstrating that many of the sanctions currently utilised in criminal justice were once conceived of as alternatives to a failing system that focused excessively on imprisonment.

If we consider the juxtaposed words of Klein (1978) and McElrea (1994) at the opening of this section, it further becomes clear that a failing criminal justice system operates to create spaces for new crime control initiatives in general, rather than any one particular model. Here, Klein (1978, p. 386) and McElrea (1994, p. 34) both dismiss the current system of criminal justice as ‘bankrupt’, before using this as a basis to introduce two different initiatives designed to overcome this – for Klein (1978, p. 386), restitution, and for McElrea (1994, p. 34), ‘restorative justice’.

Furthermore, it is important to recognise that even recently, a whole range of new criminal justice initiatives – from boot camps to drug courts – have been introduced in an attempt to address the shortcomings of the existing system of crime control; ‘restorative justice’ is merely one of these initiatives.
1.2.2 Failings of Rehabilitative Justice and the Rise of Punitive Sanctions

Significantly, a failing penal system is more often cited as the impetus for increasingly * punitive * criminal justice measures. The perceived ineffectiveness of the rehabilitative approach to criminality, dominant during the 1960s and 1970s, resulted in calls for a return to the punitive, ‘just deserts’ model of justice (O'Malley, 2000, p. 159). In this context, measures such as the return of the chain gang, boot camps, electronic monitoring, mandatory sentencing, ‘three strikes’ legislation, and the increased use of imprisonment have been implemented in various Western criminal justice systems (Garland, 2000, pp. 349-350). Cunneen (1997) locates ‘restorative justice’ within this context, pointing out that in relation to juvenile justice in Australia, ‘restorative conferencing’ is “merely one strategy within a complex of approaches designed to gain compliance and ensure the regulation of young people” (p. 294). Over the same period that ‘restorative justice’ initiatives have been introduced for juveniles, for example, penalties have increased for serious juvenile offenders, a greater number of cases have begun to be heard in the higher courts instead of the children’s courts, and indeterminate sentencing has been introduced to deal with repeat offenders (Cunneen, 1997, p. 294). In this context of increasingly punitive responses to crime (Garland, 1996, p. 445; 2000), the emergence of ‘restorative justice’ is described by some scholars as something of an anomaly (Bazemore & Schiff, 2001, p. 34; Bottoms, 2003, p. 100; Pranis, 2004, p. 139; Roche, 2003a, p. 631).
1.2.3 Making ‘Restorative Justice’ Possible

Lack of confidence in the criminal justice system has – both historically and more recently – been credited as the impetus for a diverse range of criminal justice initiatives, of which ‘restorative practices’ constitute only a fraction. Moreover, as the above section demonstrates, a failed penal system has been cited as the impetus for both ‘restorative justice’ and what many consider its polar opposite – retribution for retribution’s sake. This demonstrates that in place of a direct cause-and-effect association between the failure of Western penal systems and the birth of ‘restorative practices’, a more nuanced relationship between the two might be considered.

Rather than insisting on the existence of a causal relationship, it seems more plausible to suggest that widespread disenchantment with the penal system opens up a space for new initiatives such as ‘restorative justice’ to be considered. Goodes (1995), for example, accounts for the shifts between ‘justice’ and ‘welfare’ approaches to juvenile justice over the last few decades in the following terms:

Concerns that young people were stigmatised as criminals led to the quest for less formal processes in the 1960’s and 1970’s. Subsequently, concerns that young offenders were being denied due process or ‘getting off too lightly’ facilitated a return to models of responsibility and deterrence (p. 3).
What this illustrates is that many changes to criminal justice systems are implemented in the hope that they will solve a problem or address an issue that is a feature of the existing model. In this way, an imperfect judicial system is constantly open to the possibility of more efficient methods of crime control. As McLaughlin et al. (2003) point out:

It is undoubtedly the case that the pressure on criminal justice policy-makers to be seen to be ‘doing something’ to reverse the spiral of decline in public confidence in the criminal justice system, reduce the propensity of offenders to reoffend and increase victim satisfaction has forced the government to explore the possibilities of innovative practices (p. 9).

Although here, McLaughlin et al. (2003) are attempting to explain the emergence of ‘restorative justice’ in the manner being contested in this Chapter, their words inadvertently demonstrate the contingent nature of ‘restorative justice’. McLaughlin et al.’s (2003) words do not, in fact, account for the existence of ‘restorative justice’ in any concrete sense. Rather, they merely illustrate the connection between an ineffective criminal justice system and the search for new alternatives, of which ‘restorative justice’ happens to be one. This is further demonstrated by O’Connell (n.d.) who – again, probably inadvertently – illustrates the contingent nature of ‘restorative justice’:
It has been observed (without exception) that discussion of potential application of restorative conferences, accompanied with the usual anecdotal stories, raises interest and excitement regardless of jurisdiction. This is because of the failure of existing approaches, and the sense of hope which is generated for those looking for better ways (p. 98, footnote 45).

Widespread acknowledgement of an inadequate penal system thus makes ‘restorative justice’ a possibility rather than an inevitability. Although many advocates of ‘restorative justice’ advance a direct cause-and-effect relationship between the two, the emergence of ‘restorative justice’ is a contingency of the failings of traditional criminal justice. It is, contrary to claims that it is “no coincidence” (McLaughlin et al., 2003, p. 1) or “not surprising” (Chatterjee & Elliott, 2003, p. 347) that ‘restorative justice’ has emerged at a time when the failures of criminal justice are being felt most acutely, somewhat of a ‘coincidence’ or chance occurrence that ‘restorative justice’ came into being in the particular historical moment in which it arose.

It should be noted that for a smaller number of proponents, ‘restorative justice’ is conceptualised as a response to the dominant paradigm of retribution, rather than the shortcomings of the criminal justice system generally: “[t]he crisis in the criminal justice system is in fact a crisis of the paradigm of punishment” (Barnett, 1977, p. 284). This is countered, however, by a lack of consensus as to whether ‘restorative justice’ could or should involve a rejection of the paradigm of punishment (Barton, 1999; Daly, 1999;
Zedner, 1994). Even scholars who evangelised ‘restorative justice’ as an approach to justice defined by its opposition to retribution later conceded defeat in this regard (see Zehr, 2002, pp. 13, 58-59).

1.2.4 ‘Restorative Justice’ as a Remedy for the Failings of Criminal Justice

Finally, it is plausible that if ‘restorative justice’ had, in fact, come about “as a remedy for all the imperfections of the traditional criminal justice system” (Strang, 2000, p. 31), it would systematically attempt to address the problems it identifies in this failing system. If advocates identify ‘restorative justice’ as a response to a system that fails to involve victims, provide alternatives to incarceration, or achieve consistency in sentencing, for example, then by this very logic, ‘restorative justice’ should involve a deliberate attempt to overcome these problems. This, however, is not always the case. Using these three identified areas of shortcoming as examples, the remainder of this section seeks to further my argument for a more informed account of the relationship between disenchantment with contemporary criminal justice and the emergence of ‘restorative practices’.

1.2.5 ‘Restorative Justice’ and Crime Victims

Let us consider firstly the plight of crime victims in the criminal justice system in this regard. The limited opportunity for victims to participate in the legal system is one shortcoming frequently cited by ‘restorative justice’ scholars. Zehr (1990) calls this the “ultimate tragedy”: “those who have most directly suffered are not to be part of the resolution of the offense. In fact...victims
are not even part of our understanding of the problem” (p. 32). Indeed, this notion is widely accorded the status of an indisputable ‘truth’ in the ‘restorative justice’ field. Even the United Nations Economic and Social Council’s (1999) recommendations in regards to ‘mediation’ processes in criminal justice are premised on “the need to enhance active personal participation in criminal proceedings of the victim…and…the legitimate interest of victims to have a stronger voice in dealing with the consequences of their victimisation” (paras 3-4).

Despite these claims, however, the marginalisation of crime victims by the justice system is often not directly addressed by the practical application of ‘restorative justice’. In their early evaluation of ‘family group conferencing’ in New Zealand, for example, Maxwell and Morris (1993, p. 75) found that victims attended less than half of the ‘conferences’ conducted (see also Renouf, Robb, & Wells, 1990, p. 32). More significantly, one third of victims who did not attend even claimed that they were not invited to attend ‘their’ ‘conference’ (Maxwell & Morris, 1993, p. 79). For many of these victims, participation in a ‘family group conference’ was impossible due to the ‘conference’ being held at an unsuitable time and/or location (Maxwell & Morris, 1993, p. 79; Renouf et al., 1990, p. 32). More recent research has indicated that low levels of victim participation have also occurred in Britain. Newburn et al. (2001, p. vii) found that following the introduction of ‘youth offender panels’ into Britain’s juvenile justice system, victims attended less than 7% of panels, and Hoyle (as cited in Daly, 2004, p. 504) reports that only 14% of victims attended Thames Valley’s ‘restorative sessions’ (see also
Audit Commission for Local Authorities and the National Health Service in England and Wales, 2004, p. 27 on low levels of victim participation in ‘referral orders’). Similarly, the South Australian ‘restorative justice’ scheme for juveniles is reported to have less than 50% victim attendance (Blazejowska, 1996, p. 19). While this apparent lack of concern for victims could quite possibly be the result of fiscal and/or temporal pressures on ‘conference’ organisers, it also indicates that victims were not considered to be an integral component of a ‘family group conference’. Rather, it appears that the attendance of the offender, and the offender’s family and supporters, was held in much higher regard. Although in many localities, the role of victims is being given greater consideration – as evidenced by amendments to New Zealand’s ‘restorative justice’ legislation, for example\(^5\) – this shows that historically, ‘restorative justice’ initiatives did not always attempt to address victims’ concerns with traditional criminal justice procedures.

The celebrated Wagga Wagga juvenile ‘conferencing’ program is another potent example of the way in which victims’ concerns – despite being advanced as the impetus for ‘restorative justice’, even by the program’s instigator Terry O’Connell himself (as cited in D. O’Brien, n.d., p. 13; O’Connell, n.d., p. 21) – are barely addressed. Consider, for instance, O’Connell’s (as cited in Morton, 1999) description of the first ‘conference’ he facilitated, which involved four youths who had stolen a motorbike and caused $1000 damage. He says:

\(^5\) See also New Zealand Department for Courts (n.d., pp. 2-3) on New Zealand’s more recent court-referred ‘restorative justice’ program for adults. Here, it is clear that sensitivity to victims’ needs has been given far greater credence. New Zealand’s Victims’ Rights Act (2002) similarly includes provisions for meetings between victims and offenders to take place where both parties consent to the meeting.
I got the four offenders and their families into a room with a whiteboard and asked them some simple questions: what had they thought about when they stole the bike, what had they thought about since, who had been affected by the crime and why? Then I brought the owner of the bike into the room. That was the last thing they were expecting (p. 12).

Elsewhere, it is revealed that although this process was quite a ‘success’, with the young offenders and the victim discussing their mutual passion for motorbikes as they left the police station (Moore & Forsythe, 1995, p. 18; O’Connell, 1998, Initial Wagga Wagga Experience section, para 3; n.d., p. 35), the victim originally “took some persuading” (Moore & Forsythe, 1995, p. 18), and participated only “reluctantly” (O’Connell, n.d., p. 35). It appears from this description of the ‘conference’ that the purpose of the victim’s participation was to shock or scare the youths into leading law-abiding lives in the future, rather than to personally benefit the victim as such.

Subsequent to this first ‘conference’, many of the early ‘conferences’ conducted as part of the Wagga Wagga scheme were facilitated in cases of ‘victimless crimes’ such as adolescent marijuana use (Moore & O’Connell, 1994; O’Connell, 1992a). The use of ‘restorative’ procedures to address ‘victimless crimes’ is, furthermore, by no means limited to the Wagga Wagga scheme. Maxwell and Morris (1993, p. 118), for instance, found that during the period researched by them, 13% of ‘conferences’ convened in New
Zealand had no identifiable victim. There is also evidence to suggest that the scheme that ultimately replaced the Wagga Wagga program in New South Wales utilises conferences in instances of ‘victimless crimes’ (Youth Justice Coalition of New South Wales, 2002, p. vii). Further, Arzdorf-Schubbe (2000) cites an evaluation of ‘community conferences’ in Minneapolis, which focused largely on ‘victimless crimes’ ‘such as drug possession and dealing, graffiti, and soliciting prostitution’ (p. 5), and claims that ‘restorative community conferences’ are typically held in cases such as these6 (see also Delgado, 2000, p. 111 on the Central City Neighborhood Partnership in Minneapolis).

Indeed, Roche (2003a, p. 638) recounts that a ‘restorative justice’ program he visited in the United States of America was devoted almost entirely to the issue of public urination. Additionally, a substantial number of early programs, including the celebrated ‘VORP’ program, focused on ‘corporate victims’ rather than individual, personal victims (Dignan, 1992, p. 458; Dittenhoffer & Ericson, 1983, p. 328; T. Marshall & Merry, 1990, p. 93). This, in addition to the above examples, demonstrates that – although some programs are victim-centred, and were even initiated by victims’ groups (Immarigeon, 1993, p. 5; 1996, p. 467) – ‘restorative justice’ procedures do not routinely seek to overcome the lack of victim participation in criminal justice which advocates frequently identify as an inadequacy of the system that ‘restorative justice’ emerged in response to.

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6 A number of commentators, including McElrea (1994, p. 48) and Stewart (1996, p. 75) have made explicit their support for ‘conferences’ which focus on ‘victimless crimes’, despite the fact that Braithwaite’s (1989) theory of ‘reintegrative shaming’ is premised on the notion of ‘predatory crimes’ – that is, that the community must collectively agree on the wrongful nature of offences in order for ‘shaming’ processes to be effective. This is unlikely to always be the case where ‘victimless crimes’ such as smoking marijuana and soliciting prostitution are concerned. See also Delgado’s (2000, p. 762) remarks on the problematic nature of applying ‘victim offender mediation’ to ‘victimless crimes’.
In fact, it appears that usually, offenders are taken as the ‘starting point’ for ‘restorative’ processes. By this, I mean that criteria used to determine a particular case’s suitability for a ‘restorative’ process, rather than a traditional criminal justice process, focus on the offender and/or the offence. ‘Restorative justice’ programs might operate to divert from the formal system certain categories of offenders, such as first-time offenders or those belonging to a particular age group, for example (see Dignan, 1992, p. 454). Daly and Hayes’ (2001, p. 5) report on ‘restorative conferencing’ in Australian jurisdictions, for example, indicates that in the Northern Territory, conferencing is one of several programs used to divert young offenders facing mandatory detention, and in Victoria, ‘conferencing’ is a suitable option for young people who have previously been in trouble with the law. Similarly, Wemmers and Cyr’s (2004, p. 264) study of a ‘mediation’ program in Montreal indicates that in this program, cases are selected on the basis of the seriousness of the offence, and the offender’s record (see also New Zealand Department for Courts, n.d., p. 4). Victims are therefore not the ‘starting point’ or focus of these initiatives. Rather, victims will be contacted only where ‘their’ offender fulfils certain criteria unrelated to the victim. This is made very clear by Booby’s (1997) proposal of a ‘restorative justice’ scheme to be operated by the New South Wales Department of Corrective Services. In this proposal, we are told that in determining the suitability of an offence for a ‘conference’, the following steps would be necessary: “(a) interview and assess the offender; (b) obtain the offender’s written agreement to participate in the conference; (c) interview and assess the victim; (d) obtain the victim’s agreement to participate in the conference” (Booby, 1997, p. 28). If
'restorative justice' procedures were designed primarily to assist victims, however, one would assume that assessment criteria for participation would focus on the victim rather than the offender (see Reeves, 1989, p. 48).

This is further evidenced by a number of debates currently taking place in the 'restorative justice' field, such as whether 'restorative practices' are appropriate for serious crimes (Gustafson & Smidstra, 1989; McLaughlin et al., 2003, p. 12; Umbreit, 1989; 1999, pp. 223-224; Umbreit & Vos, 2000, pp. 65-67), and whether 'restorative justice' is suitable for adult offenders (Braithwaite & Mugford, 1994, p. 296; New South Wales Attorney-General's Department, 2001; Umbreit & Bradshaw, 1997). Without considering the content of these debates, their very existence appears to demonstrate the offender-centredness, historically speaking, of the 'restorative justice' project. It seems reasonable to suggest that had 'restorative justice' emerged primarily to assist victims of crime, characteristics of the offence and/or offender would be far less pivotal than they are usually deemed to be.

Furthermore, in many 'restorative' programs, victims may be represented by a friend, relative or member of a victim lobby rather than taking part themselves. This is the case, for example, under New Zealand’s Children, Young Persons and their Families Act (1989). Offenders, however, cannot send a representative to participate in a 'restorative' process on their behalf. Indeed, it would seem absurd to even suggest this. In this sense also, therefore, 'restorative justice' appears primarily concerned with offenders rather than victims.
There are a range of other indications that, historically speaking, ‘restorative practices’ were designed to reform offenders rather than assist victims. Titles of various Acts that have introduced ‘restorative’ measures, such as New South Wales’ Young Offenders Act (1997), Queensland’s Juvenile Justice Act (1992) and New Zealand’s Children, Young People and their Families Act (1989) demonstrate that these procedures were implemented in the context of developing ways of dealing with young offenders rather than helping victims. Furthermore, despite the claims of some advocates (see, for example, Cunha, 1999, p. 286; Karstedt, 2002, p. 302; Moore & Forsythe, 1995, p. 15), Braithwaite’s (1989) celebrated theoretical text Crime, Shame and Reintegration is heavily offender-oriented; the process of ‘reintegrative shaming’ he promotes has little to do with crime victims. As S. Garkawe (personal communication, 31/10/03) notes, the index of Braithwaite’s (1989) book includes very few references to victims of crime. A number of highly-regarded figures in the ‘restorative justice’ field similarly display disregard for victims in their early work (see, for example, Barnett, 1977; Eglash, 1975; Galaway & Hudson, 1972). The names given to some ‘restorative practices’ also indicate a focus on the offender. ‘Family group conferencing’ and ‘circle sentencing’, for example, refer to the family group and sentencing process of the offender. In name at least, therefore, the victim is rendered peripheral in these ‘restorative’ processes. This, of course, is not the case in other ‘restorative practices’ such as ‘victim offender mediation’ or ‘victim offender reconciliation’.
This is not to suggest that victims do not or cannot become involved in, and benefit as a result of, ‘restorative practices’. Nor is it to suggest that policymakers always overlooked victims in the development of ‘restorative justice’ processes. The role of victims’ rights movements in the emergence of ‘restorative justice’, and the complex and contingent nature of the relationship between these phenomena, will be discussed in detail in section 1.3. Nonetheless, it appears that despite the arguments of many ‘restorative justice’ supporters – that ‘restorative practices’ emerged in response to a failure to involve victims in criminal justice processes – the introduction of a range of ‘restorative’ measures did not always actively seek to overcome this identified shortcoming. This is thus one fault of the criminal justice system that, despite proponents’ claims, is not consistently addressed by ‘restorative justice’ initiatives.

Furthermore, this discussion begins to suggest a distinction between ‘restorative practices’ such as ‘family group conferencing’ and those that explicitly involve victims, such as ‘victim offender mediation’, and hint at the divergent practices subsumed under the ‘restorative justice’ label. This demarcation will be considered in more detail throughout this thesis.

1.2.6 ‘Restorative Justice’ and Alternatives to Prison

The implementation of ‘restorative justice’ programs is frequently rationalised on the notion that incarcerating offenders is, at best, counterproductive. In
addition to Consedine’s (1995, pp. 15-78) dissertation against the use of imprisonment, many authors in this field make claims of this nature (see, for example, Goodyer, 2003, pp. 182-183; La Prairie, 1999, p. 141).

Arguments such as these are forceful; the failings of imprisonment are well documented and have been felt both by personnel within the criminal justice apparatus, and the public. The introduction of ‘restorative justice’ – a seemingly more effective and satisfactory approach to justice – in place of prison thus appears to simply ‘make sense’. It is important to bear in mind, however, that in most cases, ‘restorative practices’ do not represent alternatives to incarceration. Although a number of programs have been established with this aim (see, for example, Dignan & Marsh, 2003, p. 107; Dittenhoffer & Ericson, 1983; Home Office, 1986, p. 3; McInnes, 1996, para 58; Wynne, 1996, p. 446), it by no means represents the primary impetus for the development of ‘restorative’ processes. As discussed in more detail below, the impact of ‘restorative justice’ has been felt most acutely in the realm of juvenile justice, and/or as a diversionary measure in cases of minor and/or non-violent crime. Moreover, even where providing an alternative to prison is the chief aim of a particular ‘restorative justice’ program, this goal is not always met. Dittenhoffer and Ericson’s (1983) report on two ‘victim offender reconciliation’ programs in Canada found, for example, that although providing an alternative to incarceration was the principal aim of at least one of these programs, this aim was not being reached. In fact, Dittenhoffer and Ericson (1983) found that the programs were increasing rather than decreasing the net of social control, and that in a number of instances,
meetings between victims and offenders resulted in a sentence of imprisonment for the offender. While there are usually upper limits placed on the amount and type of punishment that ‘restorative’ procedures can result in, terms of imprisonment can be imposed by participants in some ‘restorative’ procedures (Dittenhoffer & Ericson, 1983, p. 330; Morris, 2002, p. 599; Morris & Young, 2000, p. 16), perhaps most often in ‘circle sentencing’, where offences of a more serious or personal nature can be considered (Lilles, 2002, The Circle Sentencing Process section, para 2). New Zealand’s court-referred ‘restorative justice’ pilot for adults also permits this outcome, with 13.7% of offenders being sentenced to imprisonment as a result of a ‘restorative’ procedure (Crime and Justice Research Centre Victoria University of Wellington & Triggs, 2005, p. 3). Furthermore, ‘restorative justice’ can also be applied to some offenders in addition to a gaol term (Brochu, 2005, pp. 83-84).

While the failings of the prison make a persuasive backdrop to arguments for the implementation of ‘restorative justice’ programs, therefore, in practise, ‘restorative justice’ has largely escaped application to the types of offences that might have resulted in its utilisation as an alternative to prison. In a sense, therefore, the offending population for whom ‘restorative justice’ is rationalised, and the offending population upon whom ‘restorative justice’ is practised appear to be quite separate.

1.2.7 ‘Restorative Justice’ and Inconsistency in Sentencing
Another shortcoming of the traditional criminal justice system that is cited by ‘restorative justice’ advocates as a reason for the emergence of ‘restorative justice’, but not addressed by ‘restorative justice’ in practise, is inconsistency in sentencing. A number of proponents of ‘restorative justice’ criticise the existing criminal justice system on the grounds that sentencing outcomes appear haphazard. Zehr (1990, pp. 64-65), for example, claims that a lack of uniformity in sentencing has been highlighted by studies in which a number of judges are given particular cases to consider, and asked what their sentence would be. “The range in outcomes”, Zehr (1990) claims, “is breathtaking” (p. 65). In a similar fashion, McElrea (1993) claims that:

It is…inherently unfair to criticize family group conference procedures on the grounds that sometimes they impose outcomes more onerous than the court would have imposed…what is overlooked is that sentencing is not an exact science and there can be considerable disparity between the sentences imposed by different judges in similar cases; we do not therefore say that judges should not be involved in sentencing (p. 4).

What this indicates, of course, is that once more, a problem identified by proponents of ‘restorative justice’ is not deliberately addressed by many ‘restorative justice’ programs. Thus, while it would seem reasonable to consider that ‘restorative justice’ programs would be aimed at rectifying the problems which ‘restorative justice’ is claimed to have emerged in response
to, this is not always the case. This, together with the other points outlined above, demonstrates that the taken-for-granted assumption that ‘restorative justice’ has emerged in response to widespread disenchantment with current criminal justice practices is somewhat problematic.

Of course, the question of whether or not ‘restorative justice’ should endeavour to address these shortcomings may be asked. In the ‘restorative justice’ literature, this issue is rather contentious. In light of the many criticisms aimed at ‘restorative justice’, high-profile advocate Allison Morris (2002) has declared:

I do not believe that restorative justice should have to meet standards that conventional criminal justice systems are seldom asked to meet, or that restorative justice should be criticized for not solving an issue that has plagued conventional justice systems for years. We have to contrast what restorative justice has achieved and may still achieve with what conventional justice systems have to offer (p. 601).

Morris’ (2002, p. 601) contention that ‘restorative’ procedures should not be criticised for failing to address problems that conventional criminal justice practices have been unable to solve, is also proffered by other advocates of ‘restorative justice’ (see, for example, Goodyer, 2003, pp. 188-189). It is not uncommon for such advocates, when faced with criticisms of ‘restorative justice’, to respond by emphasising that traditional criminal justice practices
have been equally unsuccessful on a given issue. Consider the above passage by McElrea (1993, p. 4) as an example. Here, the same proponent of ‘restorative justice’ who recites the many shortcomings of conventional criminal justice, declares the ‘good news’ of the capacity of ‘restorative practices’ to overcome these (McElrea, 1994, pp. 33-34), and claims that ‘restorative justice’ “turns the old model on its head” (McElrea, 1993, p. 3), readily resorts to pointing out the ills of the court system when ‘restorative justice’ is criticised on the same grounds. Although McElrea (1993; 1994) has promoted ‘restorative justice’ on the grounds that it emerged in response to a failing criminal justice system, when ‘restorative justice’ is criticised for failing to overcome an identified problem with conventional criminal justice – in this case, inconsistency in sentencing – McElrea’s response is simply to declare that traditional criminal justice systems have likewise been unable to overcome this problem. Consider also Braithwaite’s (1995a, p. 7) comments on levels of satisfaction amongst participants in the New Zealand ‘family group conferencing’ scheme. Drawing on Morris and Maxwell’s early data, Braithwaite (1995a) describes the high levels of satisfaction for police, Youth Justice Co-ordinators, parents, and juvenile offenders, before acknowledging that victim satisfaction was much lower in comparison. “Of course”, Braithwaite (1995a) adds, “one might interpret this as a good result compared with victim satisfaction with traditional courts” (p. 7). Similarly, responding to criticisms of inconsistency of outcomes within ‘restorative justice’ programs, Morris and Young (2000) argue that even in the traditional court process, “judges do not always deal with like cases alike” (p. 21). Despite admitting that “this is hardly an adequate response” (p. 21), Morris
and Young (2000) later revert to the same style of argumentation, declaring, “criticisms about restorative justice ‘using’ victims also ignores the fact that conventional justice uses victims for its own (the State’s) interests without offering any corresponding benefits” (p. 22) (see Maxwell & Morris, 1996, p. 90 for a further example).

The problem with this type of comparative analysis – “where one form of justice seeks its legitimacy from…the other’s failure” (Findlay, 2000, p. 187) - is that since conventional criminal justice procedures are not being marketed as an alternative to another method of crime control, there is less need for these procedures to prove their superiority. As many proponents of ‘restorative justice’ themselves have been at pains to demonstrate, traditional methods of ‘doing justice’ are utter failures. By the same token therefore, ‘restorative justice’ – which is held to be a response to this failed system – is in a position where evidence of its capacity to address the limitations of conventional criminal justice procedures is, perhaps, required. If ‘restorative justice’ has, as advocates claim, come about in response to the shortcomings of criminal justice, perhaps it should, by this very logic, involve a sustained effort to address these shortcomings. Perhaps the question that needs to be asked in relation to the failings of the contemporary justice system is: can or does ‘restorative justice’ aim to address identified shortcomings in the traditional criminal justice system? For example, if the current system generates inconsistencies in sentencing, and this is considered a significant problem, can ‘restorative justice’ address this issue, and how might it do this?
The relationship between failings of the dominant paradigm of criminal justice and the emergence of ‘restorative justice’ is thus more nuanced than many advocates imply. This section has sought to argue that, rather than ‘causing’ the birth of ‘restorative practices’, a criminal justice system in a constant state of ‘improvement’ enables the emergence of a diverse range of ‘promising’ initiatives designed to minimise its shortcomings. This has been the case historically, and continues to be the case in the present. ‘Restorative justice’ might thus be viewed as a contingent effect of attempts to govern an imperfect system. The direct link between a failed criminal justice system and the emergence of ‘restorative practices’ was further problematised by the demonstration of only haphazard attempts by ‘restorative justice’ programs to address identified problems within the criminal justice system, such as the exclusion of crime victims, the need for alternatives to incarceration and lack of uniformity in sentencing.

1.3 Victims’ Rights Movements

Another very common explanation for the emergence of ‘restorative justice’ that we are offered in the literature is that ‘restorative justice’ has emerged due to a newfound concern with victims’ rights issues. Clarke and Davies (1994), for example, argue that “the increasing use of victim offender mediation programmes in Australia and throughout the world can be seen as…a shift in focus in the late 1980s and early 1990s to the rights of victims and the study of victimology” (p. 169). Likewise, Pranis (as cited in O’Connell, n.d.) suggests that ‘restorative justice’ has developed partly due
to the “dramatic growth in concern about meeting victims’ needs and interests” (p. 21), and Zehr (2002) states that “the theory and practice of restorative justice have emerged from and been profoundly shaped by an effort to take...[the]...needs of victims seriously” (p. 15) (see also Llewellyn & Howse, 1998, Origins of Restorative Justice section, para 4).

Like the claim discussed in the previous section, this notion is rarely critically discussed in the ‘restorative justice’ literature, and appears to have been granted the status of a ‘truth’ about the emergence of ‘restorative practices’. Although Johnstone (2002, pp. 81-83) and Doolan (2005, p. 2) raise some doubts about the centrality of victims to the ‘restorative justice’ campaign, only Garkawe (1999) offers a detailed critique of this assumption from a historical perspective. The remainder of this section aims to add to Garkawe’s (1999) critique of the frequently recited claim that ‘restorative justice’ emerged in response to the needs of victims. Like the previous section of this Chapter, this discussion does not seek to suggest that there is no connection between victims’ movements and the emergence of ‘restorative justice’, but to problematise this claim, and demonstrate that this relationship is far more complex and contingent than is often implied by ‘restorative justice’ proponents. I will make a number of arguments in this regard. Firstly, this section aims to show that the emergence of ‘restorative justice’ is more closely connected to the needs, or perceived needs, of victims of serious and/or violent crimes, rather than victims of minor offences, at whom ‘restorative practices’ are usually targeted. Secondly, I will aim to demonstrate the heterogeneity of victims’ rights movements, and to
challenge the claim that any one approach – such as ‘restorative justice’ – could address the concerns of all victims of crime. Following this is a discussion of the limited political authority of victims and victims’ groups. Finally, this section will argue that the emergence of victims’ rights movements was itself a result of a number of contingent historical events.

1.3.1 Victims and Involvement in the Criminal Justice System

The push for increased rights for victims of crime, the development of victims’ groups and the raising of awareness regarding the neglect of victims by criminal justice processes have largely occurred due to the actions of – or on behalf of - victims of serious and/or violent crimes. As Weed (as cited in Fattah, 1998, p. 6) points out, victim advocacy has tended to focus mainly on offences such as homicide, sexual assault, domestic violence, child abduction and child sex abuse. Well known victims’ groups situated in New South Wales, such as Homicide Victims Support Group, Ebony House, Enough Is Enough and various branches of Victims Of Crime Assistance League have, for example, been activated by high-profile crime victims, including the parents of murder victims Anita Cobby, Ebony Simpson, Michael Marslew and Grant Cameron. This is undoubtedly the case in many jurisdictions – victims’ groups such as the United States of America’s Parents of Murdered Children and New Zealand’s Sensible Sentencing Trust have similar origins, for example. It is therefore from victims (or surviving family members of victims) of serious crimes such as murder, manslaughter, driving offences occasioning death, armed robbery, sexual offences and serious assaults that we most often learn about the plight of victims of crime. In
recent years, the publication of a number of books by friends and family members of crime victims (see, for example, Balding, 1995; Sheppard, 1991), as well as a number of edited collections containing the stories of crime victims (see, for example, Giuliano, 1998; Hammett, 2000; Neiderbach, 1986; and Zehr, 2001) have, in addition to media coverage, allowed the public a degree of insight into the suffering of victims. Often, it is from these victims of violent crimes that we hear of the neglect and mistreatment of victims by the criminal justice system, and their ‘re-victimisation’ by the courts. Likewise, it is often from victims of serious crimes that the call for greater involvement in criminal justice procedures comes. An often-cited example comes from a victim of kidnapping who, before the Presidential Committee created to research the status of victims of the United States of America, cried “why didn’t anyone consult me? I was the one who was kidnapped, not the state of Virginia” (as cited in Erez, 1991, p. 2; and Strang, 2002, p. 9). Expressing this same sentiment, crime victim Dolman (2001) says of ‘his’ offender’s court case:

The charges were pressed in the name of the Queen, her Crown and dignity, and I was just a witness. I didn’t like that bullshit – this happened to me. It didn’t happen to the fucking Queen! I was always a bit pissed off about that (p. 144).

Both Giuliano’s (1998) and Hammett’s (2000) collections of crime victims’ stories, furthermore, contain numerous examples of victims of serious offences who have been outraged at the lack of opportunity for victims to
participate in the criminal justice system (see also Miles, 1995, p. 193; Strang, 2001b, p. 79). This lack of opportunities for victims to take part in criminal justice proceedings is even reflected in the names of a range of victims’ groups such as VOIC (Victims and Offenders In Conciliation) and VOCAL (Victims Of Crime Assistance League), which allude to victims’ experiences of feeling silenced. Again, however, these groups primarily consist of victims of serious, personal crimes.

Significantly, this demand for greater participation has not come primarily from victims of minor or property offences. It is not common to hear a victim of car theft, for example, demanding to be involved more fully in the criminal justice process, or to come across a book of the same nature by someone whose letterbox has been knocked over by a gang of bored youths. Furthermore, a body of research has indicated that victims of less serious offending often do not wish to become involved in the criminal justice system. Research conducted by Gardner (1990, p. 49) on crime victims in South Australia, for example, found that most wanted no involvement with the criminal justice system, or wished only to be kept informed of developments. Gardner (1990, p. 50) found that the reasons victims gave for not wanting to become involved included: being ‘too busy’; feeling that there was ‘no point’; or that the offence was too minor, and; that it is the police/authorities’ job to be involved, rather than the victim’s.

Other Australian research conducted by B. Cook, David and Grant (1999) similarly found that with the exception of sexual assault, the most frequently
cited reason for victims not reporting crime to the police was that the offences were “too trivial/unimportant” (p. 5). Research in Britain by Hoyle, Morgan and Sanders (1999) into the views of victims invited to make victim statements similarly found that victims’ reasons for choosing not to do so included wanting to forget about the offence or feeling that “the offence was not sufficiently serious” (p. 3). Even Martin Wright (1977) reports that during the developmental stages of the Bristol Victims Support Scheme, two-thirds of victims contacted (97% of whom had been the victims of theft or burglary, excluding theft from, or of, a motor vehicle), “were apparently upset only slightly or not at all by the incident” (p. 25) (see also The Howard League for Penal Reform, 1977, p. 10). More pointedly, a survey conducted by S. O’Brien (as cited in Reeves, 1989, p. 50) to ascertain victims’ interest in meeting with ‘their’ offenders found that “those who thought the offence was a minor affair could see little point in pursuing the matter” (Reeves, 1989, p. 50). Similarly, Coates and Gehm (1989) report that ‘victim offender reconciliation’ programs in the United States of America often had victims choosing not to take part because “the loss did not merit the perceived hassle of involvement” (p. 252) (see also Galaway, 1989, p. 104; T. Marshall & Merry, 1990, p. 108).

Bearing in mind that individuals’ responses to an offence are highly idiosyncratic (B. Cook et al., 1999, p. 18; Fattah, 1998, p. 6; Zedner, 2002, pp. 429-431), and that a ‘petty’ crime to one person may be experienced as a major ordeal by another, this research seems to indicate that generally speaking, victims of less serious offences may have little interest in
becoming involved in the criminal justice system. The notion that all victims of crime want increased involvement in criminal justice processes is therefore highly contestable, particularly in regards to victims of petty and/or property crimes.

It must be noted, furthermore, that for juveniles – who ‘restorative justice’ is most often applied to – the majority of crimes fall into this category. There are far fewer personal crimes such as murders and sexual assaults committed by juveniles than property crimes, such as theft and graffiti (Cunneen & White, 2002, p. 67; Newburn, 2002, p. 542; Wundersitz, 1996b, p. 128). This is the case in Australia (Cunneen & White, 2002, p. 67), the United Kingdom (Newburn, 2002, p. 542) and the United States of America (Mukherjee, 1997, p. 7).

1.3.2 Victims and ‘Restorative Justice’

‘Restorative justice’ – which supporters claim has emerged in response to victims’ calls for increased participation in the criminal justice system – deals for the most part with crimes at the minor end of the spectrum. Although this is certainly not always the case, ‘restorative justice’ programs are most often used at the “shallow end” (Garland, 2001, p. 169) of the system – that is, in cases of juvenile or minor crimes as a diversionary measure (Bottoms, 2003, p. 102, footnote 35; Brochu, 2005, p. 86; Cayley, 1998, p. 225; K. Cook & Powell, 2003, p. 280; Cunneen & White, 2002, p. 361; Daly, 2003a, p. 238; C. Griffiths & Bazemore, 1999, p. 262; Home Office, 2003, p. 30; Pavlich, 2005b, p. 1; Sarnoff, 2001, p. 36; Volpe & Strobl, 2005, p. 528). As Daly
(2003a, p. 238) states, ‘restorative conferencing’ is often thought to be more appropriate for juvenile offenders precisely because youths generally commit less serious offences than adults. Often, ‘restorative justice’ programs have been developed to deal exclusively with property offences such as theft, burglary and vandalism, as Gehm’s (1986) National VORP Directory demonstrates. Indeed, the Northern Territory’s pilot ‘conferencing’ program, which had been initiated to divert petty juveniles from the court system, even involved one ‘conference’ for three juveniles who had been charged with vandalising a letterbox (D. Fry, 1997, p. 58). Furthermore, although as stated previously, ‘restorative justice’ measures have been applied to a vast range of offences including sexual assault, domestic violence and even murder, there is certainly not universal support for their application in crimes of violence. Clarke and Davies (1994), for instance, argue that ‘restorative’ processes are “suited to less serious or non-violent types of crime. It is not considered an appropriate process for serious or violent crime....it is an implausible process where murder, rape or serious assaults are involved” (p. 169). Pranis (2004) also acknowledges that early practitioners of ‘restorative practices’ assumed that processes such as ‘victim offender mediation’ “would never be used in cases of serious violent crime” (p. 152) (see also Blazejowska, 1996, pp. 10-11; Goodyer, 2003, pp. 197-198; New Zealand Ministry of Justice, 2003b, p. 36). While this is certainly not always the case, with a number of ‘restorative justice’ proponents declaring their support for the use of ‘restorative justice’ in crimes of violence (Arzdorf-Schubbe, 2000, p. 11; Immarigeon, 1993, 1996; McLaughlin et al., 2003, p. 12; Umbreit, 1989; Umbreit et al., 1999; Umbreit, Bradshaw et al., 2003; Umbreit & Vos,
2000), this does indicate that the ‘victims’ of the victims’ rights movement, and the ‘victims’ asked to participate in ‘restorative practices’ may be entirely separate groups of individuals.

The assertion that ‘restorative practices’ have emerged in response to a growing concern for victims of crime can thus be called into question on these grounds. If ‘restorative justice’ was in fact a response to victims’ calls for increased involvement in the criminal justice system, surely ‘restorative’ measures would be targeted towards victims of violent crimes, who most frequently campaign for increased involvement in criminal justice processes. Instead, ‘restorative justice’ is most often applied in cases of less serious offending, whose victims, as the research outlined above shows, often do not wish to participate in criminal justice matters at all.

Consider the following remark by Consedine (1995) in this regard:

The surprising thing is that victims, who so often call for more blood in traditional Western justice systems, in New Zealand [under the ‘family group conferencing’ scheme] frequently plead with the police to waive punishment and ‘give the kid another chance’ (p. 103).

It appears that here, Consedine is overlooking the fact that the victims who ‘call for more blood’ and the victims who wish to ‘waive punishment’ are most likely two separate cohorts of victims. As described above, victims of minor
crimes are unlikely to cry out for vengeance in the manner described by Consedine (1995, p. 103). Rather, it is more likely that some victims who have experienced violence might respond in this way. By the same token, it is more likely that victims of less serious crimes would consider waiving the punishment of an offender than victims of serious, violent offences. Certainly, this is likely to be the case where protection of the public is an issue. It is not surprising that those victims who participate in New Zealand’s ‘family group conferences’ are not vengeful, as many would be victims of less serious, juvenile crime. Significantly, Maxwell and Morris’ (1993, p. 79) research found that in addition to not being invited to attend ‘conferences’, and ‘conferences’ being held at inconvenient locations and times, some victims did not wish to become involved in a ‘conference’ because they were too busy or uninterested. This challenges the view that all victims want to participate in the criminal justice process, and also further demonstrates the minor nature of offences for which ‘family group conferences’ are often convened.

In a similar vein, Immarigeon (1993) argues that “victim groups have increasingly embraced victim-offender meetings as a vital aspect of meeting victim needs” (p. 5), suggesting the victim impact panels instigated by the American group Mothers Against Drunk Driving as an example. Certainly, it appears that in a relatively small number of instances, ‘restorative justice’

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7 Although ‘family group conferences’ are often held in cases involving older children with offending histories, while very minor offences are dealt with by way of police warnings (Maxwell & Morris, 1993, p. 69), the Children, Young Persons and their Families Act (1989) provides for violent offences such as manslaughter or murder to be dealt with by the youth court rather than a ‘family group conference’.
programs have been initiated by victims’ groups (Immarigeon, 1993, p. 5; 1996, p. 467). Additionally, a number of crime victims have detailed their mission to meet with an offender, despite being wholly unaware of the existence of this type of procedure (see, for example, Jaeger, 1983; Pranis, 2004, p. 152; Swift, 1994; Vogt, 2001). It is important to recognise, however, that these are victims of very serious crimes – or family members of deceased victims - and that such support for ‘restorative justice’ cannot be taken as evidence that all crime victims are supportive of ‘restorative justice’.

Here, both Consedine (1995) and Immarigeon (1993; 1996) erroneously assume that crime victims are a unified group. Strang’s (2002) work provides another example of this. In a section titled “What Do Victims Want?” (p. 8), Strang (2002) lists, among other items, that victims “want a less formal process where their views count” (p. 8). The bulk of evidence used by Strang (2002, pp. 8-10) in support of her claim, however, comes from victims of serious offences, such as sexual assault. Booth (2002, p. 66, endnote 3) makes a similarly misguided assumption when she supports her claim that victims have “protested at their lack of a role in criminal proceedings” (p. 64) with data from her own (Booth, 2001) and Rock’s (1998) research into family members of homicide victims.

Importantly, even Zehr’s (1990) ‘restorative justice’ “bible” (O’Connell, n.d., p. 18; see also Pranis, 2004, p. 152), Changing Lenses, is predicated on much the same notion. Zehr (1990) consistently portrays victims as a homogenous and essential category, by declaring, for example:
What is often overlooked is that victims of offenses which we consider less serious may experience similar reactions [to victims of serious offences]. In describing their experiences, victims of burglary often sound much like victims of rape. Victims of vandalism and car theft report many of the same reactions as victims of violent assault, though perhaps in less intense form (p. 24) (see also Zehr, 2003, p. 69).

Indeed, much of Zehr’s (1990; 2002; 2003) defence of ‘restorative justice’ appears to be based on what he sees as the needs of the ‘essential’ crime victim. Claims that “victims need opportunities to express and validate their emotions” (Zehr, 1990, p. 27), and that victims “want to be informed and…consulted and involved” (Zehr, 1990, p. 29), for example, contradict the research findings outlined above, which indicate that victims of less serious offences – those who are most often asked to participate in ‘restorative’ fora – often have little desire to become involved in the criminal justice process. Contrary to Zehr’s (1990) claims, therefore, one might consider that crime victims do not experience “nearly universal” (p. 29) reactions to victimisation, irrespective of the seriousness of the offence.

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Zehr’s (1990) focus on victims of serious crimes is also evident in his discussion of offenders. He claims that “offenders often lack a certain moral sense, defined as a preoccupation with their own needs and an [in]ability to empathize with others….this preoccupation with self actually is based in a weak self-image, perhaps in self-hate” (p. 51). This portrayal of offenders appears to describe only a small fraction of the offending population, however. As a significant proportion of crime is perpetrated by juveniles (Newburn, 2002, p. 540) and is of a minor nature (Cunneen & White, 2002, pp. 67-68; Newburn, 2002, p. 542; Wundersitz, 1996b, p. 128), it does not seem plausible to suggest that offenders can be characterised by a lack of empathy for others, or by self-hate. Indeed, much criminological research has highlighted the arbitrary nature of what is deemed to be ‘criminal’ and what is not, along with the fact that most people have committed offences at some stage in their lives (Cunneen & White, 2002, pp. 74-75; Newburn, 2002, p. 540), usually as juveniles. This suggests that, contrary to the image constructed by Zehr (1990, p. 51), we cannot think of offenders as being separate to ‘us’. The ‘type’ of offender that Zehr...
It must also be pointed out that the cost of juvenile crime is much less than that of adult offending. Losses suffered as a result of theft offences, for example, are typically less when these offences are committed by juveniles (Cunneen & White, 2002, p. 67). At the same time, juvenile offenders are also much less likely to be in a position to offer restitution to their victims (T. Marshall, 1996, p. 24). Additionally, in a number of American jurisdictions, victims can even be required to pay a fee for ‘victim offender mediation’ (Umbreit, Lightfoot, & Fier, 2001, p. 11), and in South Australia, victims are not reimbursed for any costs incurred by their attendance at a ‘family conference’ (McInnes, 1996, para 32). This further calls into question the notion that ‘restorative practices’ emerged in order to assist victims of crime.

1.3.3 Victims’ Willingness to Participate in ‘Restorative Justice’

Proponents of ‘restorative justice’ might cite research on victims who have participated in ‘restorative’ programs to counter my argument here. Indeed, a common claim in the advocacy literature is that victims are usually very willing to take part in ‘restorative’ fora. Pranis (2004), for example, claims “a qualitative study of a community circle program in a suburban community found that victims in the circle process…welcomed the opportunity to participate in the justice process” (p. 148). The typical case in this program, Pranis (2004, p. 148) tells us, was a pre-charge juvenile misdemeanour. This data would seem to indicate victims’ willingness to take part in criminal justice procedures, even in cases of very minor offending. Claims such as these,

(1990) is referring to thus appears to be the minority of serious or violent offenders. Accordingly, the ‘type’ of victim that he is referring to is presumably the victims of these more serious crimes.
however, are based on studies of victims who have already participated in such procedures, not the total cohort of victims; they are therefore not indicative of crime victims more generally (see also T. Roberts, 1995, pp. iii-v). Of course victims who have taken part in ‘restorative’ procedures report that they were happy to become involved – it would make little sense to suggest otherwise. Assessing whether victims who have already agreed to participate in a ‘restorative’ process were willing to participate is highly tautological.

Wemmers and Cyr’s (2004) study of a ‘mediation’ program for juvenile offenders in Montreal sought to avoid this bias by interviewing a sample of victims who had been asked to participate in the program, irrespective of whether they had ultimately agreed to participate. Although victims who had declined to participate were under-represented in the study – presumably, those who don’t wish to become involved in ‘restorative’ procedures don’t wish to be involved in their evaluation either – the results are relevant in regards to this discussion. Wemmers and Cyr (2004) discovered that a range of reasons were given to account for victims’ refusal to take part, including “because they did not have the time or interest to invest time in a mediation session” (p. 267). R. Hill’s (2002) similar study of non-participating victims in Thames Valley ‘restorative’ meetings produced similar results. R. Hill (2002, pp. 277-278) found that victims often declined to participate in ‘restorative’

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9 As Wynne (1996) points out, the same can be said for assessing the reconviction rates of offenders who have agreed to take part in a restorative procedure: “this may be a selected artefact as...offenders are volunteers” (p. 445) (see also G. Hill, 2002, p. 7; Johnstone, 2002, p. 22; Kurki, 2003, p. 297; Levrant, Cullen, Fulton, & Wozniak, 1999, p. 20; T. Marshall & Merry, 1990, pp. 29-30; Parkinson & Roche, 2004, p. 510).
cautions because they thought the police should deal with the problem rather than themselves. Both these studies appear to support Gardner’s (1990) finding that victims of minor offending - those most often called upon to take part in ‘restorative’ measures - often do not wish to become involved in criminal justice processes.

Miers et al.’s (2001) study of seven ‘restorative justice’ programs throughout England even found that although most participating victims reporting being “broadly favourable towards the concept” (p. ix), the most commonly cited negative aspect of their involvement was “the time taken to complete the process” (p. ix).

1.3.4 Diversity of Measures for Victims of Crime

It is important to recognise that ‘restorative justice’ exists among an extensive range of initiatives that are designed to be ‘victim friendly’. Like measures for dealing with offenders, initiatives introduced in order to help crime victims are highly diverse. Schemes ranging from victim compensation to support groups, counselling, victim impact statements and the right of allocution, and Britain’s ‘one stop shop’ (Zedner, 2002, p. 437) have been introduced across a range of jurisdictions in the name of assisting victims of crime. Karmen (as cited in Mawby & Walklate, 1994, p. 86) additionally lists the right of victims to be notified when a prisoner will be appearing before a parole board, to be notified of a negotiated plea, to be protected from the accused during pre-trial proceedings, and to have any money paid to criminals used to fund victim support services (see also Ashworth, 1993, pp. 278-279; Dignan, 1992, p.
A number of initiatives specific to certain groups of victims, such as those called as witnesses (Laster & O'Malley, 1996, p. 26), and victims of sexual assault (Zedner, 2002, p. 437) have also recently been introduced.

In many ways, therefore, to suggest that the recent growth in concern for crime victims has resulted in the development of ‘restorative justice’ programs posits victims as an essential category, and assumes that all victims want or need the same things. Clearly this is not the case; as Childres (1964) argues, “there is no basis for the assumption that victims are a class, that they have anything in common save having been criminally attacked” (p. 469).

Additionally, what we often refer to as the ‘victims’ rights movement’ or ‘victims’ movement’ is by no means a homogenous, unified entity either. Garland’s (2001, p. 215) work indicates that the push for victims’ rights has varied significantly across different localities; the United States of America, for example, has witnessed a closer association between ‘law and order’ campaigns and victims’ rights than the United Kingdom. Strang (2001b, pp. 73-76) also highlights the disparity of the victims’ rights movement, and suggests that it has two main branches: a ‘rights-focused’ branch, prominent in America, and a ‘support-focused’ branch, prominent in Europe (see also Elias, 1990; Mawby & Walklate, 1994, pp. 86-87; Strang, 2002, p. 8). Zedner (2002, p. 435) points out that even recently formed victims’ rights groups
have highly varied foci, and are “far from enjoying coherence of outlook” (p. 435).

This suggests that there is nothing inherent in the plight of victims of crime that necessitates the emergence of any particular initiative, including ‘restorative justice’. Indeed, the very suggestion that any one initiative or approach – ‘restorative’ or otherwise – can somehow universally appease crime victims seems ill-conceived when considered in this light. It therefore seems somewhat misguided to champion any one initiative as having emerged out of a concern for crime victims, given the heterogeneous nature of this group.

The growth of victims’ rights movements and an increased concern for victims therefore appears to have opened up a space for a wide range of initiatives – including, but by no means limited to – ‘restorative justice’. In this sense, the relationship between the ‘re-emergence of the victim’ and the birth of ‘restorative justice’ is far more nuanced than is often portrayed by scholars in this field.

1.3.5 Limited Political Power of Victims

It is also important to consider in this regard that as a group, crime victims have fairly limited political purchase. Although traditionally, victims’ rights groups have been associated with the conservative end of politics (Cayley, 1998, p. 218) – to the extent that some argue that victims’ activism has been “exploited or mistranslated into support for the conservative ideology” (Erez,
1991, p. 3; see also B. Hudson, 1998a, p. 240) - victims’ views on sentencing are “as varied as that of any other cross-section of the general public” (Reeves & Mulley, 2000, p. 142). As argued in the previous section, victims’ responses to a particular crime can vary drastically. Any suggestion made by victims’ groups in regard to sentencing or any other element of the criminal justice process must therefore fall within a particular framework in order to be deemed plausible or legitimate. That is to say, victims have made calls for everything from the return of capital punishment and compulsory military service (Balding, 1995) to mercy and forgiveness (Murder Victims’ Families For Reconciliation, 2003). Few of these suggestions, however, are translated into government policy. Although as Karmen (2001, p. 26) points out, victims deemed ‘legitimate’ can wield some influence in relation to criminal justice reforms, that an idea has been suggested or supported by crime victims does not guarantee its acceptance in legislation or policy. Victims’ views alone are not enough; if victims called for the reintroduction of the public torture of offenders, for instance, it is doubtful that this would be adopted in practise. Rather, in order to be deemed valid, ‘victim friendly’ initiatives must fall within acceptable sociopolitical rationalities.

Thus, even if ‘restorative justice’ had been initially championed by victims of crime (and this in itself is not as straightforward as some ‘restorative justice’ advocates suggest, as this section aims to demonstrate), this alone would not have been enough to have guaranteed its ascendancy. It is therefore problematic to claim that a newfound concern for the plight of crime victims has enabled the emergence of ‘restorative justice’ per se. Indeed, as Mawby
and Walklate (1994) demonstrate, this ‘newfound’ concern for victims began to emerge many decades prior to the array of pragmatic techniques designed to assist victims, including ‘restorative justice’. As such, it is not the emergence of a concern for crime victims, but the emergence of victims as a politically relevant category that is significant here.

As O’Malley (1996, p. 29) contends, crime victims have only more recently come to be viewed in such a way. That is, governments and policy-makers have recently come under pressure to be seen to be doing something to help victims of crime (McLaughlin et al., 2003, p. 9). Indeed, as Miers (as cited in Ashworth, 1993) points out, “concern for the interests of victims of crime constitutes an almost unassailable moral position” (p. 279). In this light, it is plausible that ‘restorative practices’ have been introduced into some jurisdictions due partly to this newfound need to be seen to be addressing victims’ needs. As Doolan (2005) claims in relation to the introduction of ‘family group conferencing’ in New Zealand, “why were victims included in this process? Simply, to enable the process to attain public credibility” (p. 2). In this sense, the political legitimacy of victims’ rights operates to make ‘restorative justice’ palatable to legislators and policy-makers, politicians and the public. In part, the legitimacy of victims’ rights groups make ‘restorative justice’ – which (cl)aims to address victims’ concerns – an acceptable method of responding to crime.

It should be stressed here that I am not aiming to minimise the impact that some victims’ groups have had, and continue to have, on criminal justice
policy and practice. Movements on behalf of rape and domestic violence victims, for example, wielded considerable political authority during the 1970s, and had a significant impact on government policy. Rather, I am suggesting that the cohort of victims at whom ‘restorative justice’ initiatives are overwhelmingly targeted are largely distinct from those groups of victims whose approval of criminal justice policy is deemed relevant. Thus while in one sense, the support of victims’ groups is fundamental to the ‘restorative justice’ enterprise (see, for example, Strang, 2001b, p. 80), members of these groups tend not to make up the ‘clients’ of ‘restorative’ programs.

1.3.6 Victims’ Rights Movements as Contingent Phenomena

It is also important to recognise that victims’ rights movements are themselves highly contingent phenomena. This section argues that the construction of crime victims as a knowable, reachable, researchable, politically pertinent, unified and organised population – and as active citizens – was not in itself an inevitability, as advocates’ narratives often suggest. Rather, the emergence of victims’ rights movements – upon which ‘restorative practices’ are partially explained and justified – is itself historically contingent.

Rock’s (1990) history of victim support initiatives in England and Wales is striking in that – in contrast to many accounts of the ‘re-discovery of the victim’ – it highlights the difficulties involved in locating victims for whom such initiatives might be enacted. Prior to the collection of crime victimisation data, victims appear in Rock’s (1990) work as an incoherent, unorganised, silent
and unknowable constituency. Rock (1990) claims, for example, that “there was no public role for the victim….Nobody had actually heard victims declare what they needed and nobody thought it useful to ask them” (pp. 52-53). Victims are further described as an “unacknowledged group, a group that was not a self-conscious community and that lacked a collective presence” (Rock, 1990, p. 59). Although a number of penal reformers were attempting to introduce a system of compensation for crime victims, this initiative was not being propelled by victims themselves, who were “mute, invisible, and unorganized….a figment of the reforming imagination” (Rock, 1990, p. 88).

Primarily, the lack of input from victims was a result of reformers’ inability to locate and/or contact members of this cohort. According to E. Williams (as cited in Rock, 1990), victims “had no constituency, no lobby, I don’t suppose any way of being reached” (p. 65). Holtom (as cited in Rock, 1990), another reformer, similarly claimed: “that was really the first sort of first shock when we discovered how difficult it was to discover a victim. Because they’re hidden, you know, in the woodwork” (p. 100). As Rock (1990) summarises, therefore, “it was no easy thing to find victims. They were so obscure that there seemed to be no obvious places in which they could be found” (p. 100).

This, of course, provides a stark contrast to the traditional depiction of the ‘birth of the victims’ rights movement’ or the ‘re-emergence of the victim’ that is more commonly accepted, particularly by ‘restorative justice’ proponents. In this version of events, victims of crime were overlooked by policy-makers and communities out of ignorance or callous disregard, until they banded
together to form a force for change. As Geis (as cited in Strang, 2001b) claims, “[victims’] condition for centuries aroused little comment or interest. Suddenly, they were ‘discovered’, and afterwards it was unclear how their obvious neglect could have so long gone without attention and remedy” (p. 71). It is perhaps Priestley’s (1970) comments, however, that stand in most striking contrast to Rock’s (1990) account of the development of victim support initiatives:

A collusion of silence, deliberate ignorance and indifference has prevailed in relation to victims for many centuries now….Social workers who have sought out all manner of suffering in our society have passed the victim by….A rich and potentially fruitful area of investigation has until now lain practically fallow (p. 2).

Accounts such as these appear somewhat romanticised when compared with Rock’s (1990). Indeed, what stands out in Rock’s (1990) version of events is the very unromantic, mundane fashion in which knowledge about crime victims came into being and became a premise from which to create policies for victims. Accordingly, it was not a dramatic and romantic uprising by, and/or on behalf of, neglected and indignant victims, but the mundane and almost accidental gathering of data on victims that, to some extent, enabled the development of policies for victims. In this sense, therefore, victims of crime appear to have been silent, rather than silenced.
As a number of authors have noted, crime victim surveys – which provided the first detailed information on victims – were not intended to produce this type of data as such. Rather, they were aimed at unveiling the ‘dark figure’ of crime which police statistics were unable to accurately portray: “it would offer a more comprehensive picture of the crime problem, and would thus be a useful contribution to the processes of setting priorities and allocating resources” (Mayhew & Hough, 1988, p. 157). In this sense, therefore, “victims were not needy supplicants but indices” (Rock, 1990, p. 319). This was the case not only in Britain, but in Canada (Rock, 1990, p. 319) and the United States of America (Mayhew & Hough, 1988, p. 156) also.

Importantly, not only were crime victim surveys not intended to further victims’ rights agendas, but were aimed partly at identifying ‘victim precipitation’ or the ‘crime-proneness’ of certain groups of people (Rock, 1990, p. 320). In one sense, therefore, victimisation surveys incorporated what might be seen as an attempt at cultivating the sort of data that could result in the responsibilisation of disadvantaged and/or marginalised groups.

Nonetheless, as Rock’s (1990) work shows, crime victim surveys revealed for the first time – albeit inadvertently – the extent of victimisation and the quantity of those who might form a constituency of victims: “there were four times as many crimes known to victims as there were recorded by the police” (p. 321). Knowledge about victims of crime that might be utilised to assist this group was thus something of a by-product of victimisation surveys. In one sense, therefore, the development and implementation of policies for victims
of crime was enabled by the accidental production of the knowable victim.
The routine collection of victimisation data thus unintentionally resulted in the
growth of initiatives aimed at assisting victims which reformers such as
Margery Fry (1951) had long been championing. Among these initiatives
were the first sustained attempts at formalising ‘restorative justice’-style
meetings between victims and offenders.

At one level, this may seem an obvious point to make: measures aimed at
assisting victims rely on the possibility that victims constitute a knowable
population, and can be located, contacted and consulted without difficulty.
That crime victims might be seen as something of a historical accident is,
however, important to consider in relation to the birth of ‘restorative
practices’, as it challenges discourses of inevitability favoured by some
‘restorative justice’ exponents. As argued in this section, historical accounts
of ‘restorative justice’ often suggest that various ‘restorative practices’
emerged in response to concerns for victims of crime. The historical
inevitability of ‘restorative justice’ is, however, brought into question when
one considers that the very notion of crime victims as a policy-relevant
category is itself historically contingent.

Of course, as discussed earlier in this thesis, encounters between victims
and offenders – later deemed to be ‘restorative justice’ encounters – took
place prior to the creation of victims as a distinct constituency (see, for
example, Jaeger, 1983; Rock, 1990, pp. 122-124; Swift, 1994). It is
necessary to recognise, however, that these encounters were usually
instigated by individual victims, and were not by any means intended to act as policy responses to aid an acknowledged cohort of victims. Rock’s (1990) description of a ‘victim offender conciliation’ facilitated by the United Kingdom’s then National Victims Association is a good example. This encounter, between Peter Dallas – the victim of an attempted murder – his assailant, Kevin McDermott, and a third man who McDermott had maliciously wounded as he tried to intervene, was staged and televised in 1975, three years after Dallas had approached the National Victims Association (Rock, 1990, pp. 122-124). Although the Association had hoped to facilitate conciliations between victims and offenders in this very manner (Rock, 1990, p. 123), it seems that this was only attainable once a victim came forward. In this sense, the encounter was something of a fluke despite the aspirations of the Association. Similarly, even Canada’s celebrated ‘Kitchener Experiment’ (Peachey, 1989) in no way represented an attempt by reformers to assist victims. In this instance, the victims were not consulted prior to having the young offenders approach them at home to offer reparation; this ‘experiment’ was clearly designed to reform the offenders in question, rather than assist victims as a group.

As such, the ascendancy of ‘restorative justice’ relied not only upon the production of crime victims as a recognisable cohort, but on the possibility that some victims might be called upon to play an active role in criminal justice proceedings. In contrast to measures such as victim compensation, for example, ‘restorative practices’ that emphasise the role of victims are enabled by the construction of victims as potentially active citizens who might
be encouraged and/or obliged to participate in the disposition of ‘their’ offender. Specifically, they are predicated upon the notion of crime victims as active citizens who might be asked to meet face-to-face with ‘their’ offender in order to help bring about an acceptable resolution after the commission of an offence against them.

The nexus between the ‘re-emergence of the victim’ and the origins of ‘restorative justice’ are thus far more complex and contingent than proponents usually allow. The aim of this section was to argue that in place of a one-dimensional cause-and-effect relationship between these two phenomena, we might consider the recognition of crime victims as rendering ‘restorative justice’ one possible avenue among others, designed to assist this cohort of subjects. This section sought to advance this perspective by arguing that ‘restorative justice’ is most often targeted towards those victims least likely to desire involvement in the criminal justice process, and that the multiplicity of victims and victims’ groups challenges the notion that any one approach could form a universally satisfactory response. Despite the unique political status of victims, furthermore, it was argued that victims’ views are translated into tangible policy measures only when they occur within accepted sociopolitical rationalities. Finally, this section aimed to demonstrate that the very existence of a crime victims’ movement is itself a historical contingency. As such, this section has sought to problematise the established view that the emergence of ‘restorative justice’ was powerfully influenced by victims’ rights movements. Thus although the rhetoric of assisting victims is in one sense critical to the ‘restorative justice’ domain,
historically speaking, “these initiatives did not, in the main, originate out of a strong desire from crime victims or the victims movement” (Garkawe, 1999, p. 42).

1.4 Indigenous Justice

The third very common claim in regards to the origins of ‘restorative justice’ is that ‘restorative practices’ have grown out of a variety of indigenous and/or pre-modern methods for dealing with aberrant behaviour. This claim, like the other two I have discussed here, is repeated frequently, and often unproblematically, in the ‘restorative justice’ literature. Braithwaite (1999, pp. 1-2; 2002, p. 3), for example, states that ‘restorative justice’ is a major development in criminological thinking, notwithstanding its grounding in ancient traditions, including those of the ancient Greek, Roman, Arab, Germanic and Vedic civilizations, as well as those of the Buddhist, Taoist and Confucian religious doctrines. This is undoubtedly, as Daly (2002b) argues, “an extraordinary claim” (p. 62). Consider also the following examples:

In North America, the historical underpinnings of restorative justice are found in traditional Aboriginal teachings and the teachings of the Christian faith….Using the traditional teachings….many aboriginal communities as well as judges serving these communities have established justice programs more suitable to aboriginal views and needs. Examples include circle sentencing in Canada and the Navajo Peacemaker Court in the United States. In New Zealand, Maori practices provided the foundation for the

Restorative justice is not a new concept. In fact, it is centuries old, as principles such as requiring restitution for property offenses can be found in the Code of Lipit-Ishtar in 1875 BC, the Code of Hammurabi in 1700 BC, and in the Old Testament and Hebrew Scriptures….indigenous populations in Native America, New Zealand, Australia, and Japan have long carried out restorative practices (Carey, 2000, p. 32).

The principles of restorative justice are consistent with those of many indigenous traditions, including the Native American, Hawaiian, Canadian First Nation, and Maori cultures. These principles are also consistent with values emphasized by nearly all of the world religions (Umbreit, 2001, p. xxix).

The river [of ‘restorative justice’] is also being fed by a variety of indigenous traditions and current adaptations which draw upon those traditions: family group conferences adapted from Maori traditions in New Zealand, for example, sentencing circles from aboriginal communities in the Canadian north; Navajo peacemaking courts; African customary law; of the Afghani practice of *jirga* [italics in original] (Zehr, 2002, p. 62).
The constant reiteration of this sentiment in the ‘restorative justice’ literature has resulted in it acquiring the status of a seemingly incontestable, taken-for-granted ‘truth’, which advocates refer to frequently in their accounts of the emergence of ‘restorative practices’ (Arzdorf-Schubbe, 2000, p. 1; Carey, 2000, p. 32; C. Griffiths & Bazemore, 1999, p. 262; Leung, 1999, Origins of Restorative Justice in North America section, paras 1,21; Llewellyn & Howse, 1998, Origins of Restorative Justice section, para 7; Masters, 1997, p. 240; McCold, 1997, p. i; McElrea, 1994, pp. 41-43; McLaughlin et al., 2003, p. 2; New Zealand Department for Courts, 2002, p. 15; n.d., p. 18; Roach, 2000, p. 256; Sherman, 2003, p. 11; Strang, 2000, p. 24; Umbreit, 2001, p. xxix; Umbreit, Lewis et al., 2003, p. 385; Weitekamp, 1999, p. 93; Zehr, 1990, p. 257). Even the United Nations Economic and Social Council (2002) declares unproblematically that ‘restorative practices’ “often draw upon traditional and indigenous forms of justice” (p. 4). These claims, more so than the others addressed in this Chapter, have been met with a degree of scepticism by some scholars in this area (Blagg, 1997, 1998, 2001, 2002; Bottoms, 2003; Cunneen, 1997, 2002, 2004; Daly, 1996, 2000, 2002b, 2004). These authors oppose these claims by arguing that there is much dissatisfaction amongst various indigenous communities in regards to the introduction of ‘restorative justice’ (Blagg, 1998; Cunneen, 1997; Tauri, 1999)\(^\text{10}\), and that advocates of ‘restorative’ processes have made “selective and ahistorical claims…about indigenous social control conforming with the principles of restorative justice, while conveniently ignoring others” (Cunneen, 2002, p. 43; see also Daly,

2002b; Sylvester, 2003). Indeed, some proponents’ portrayals of indigenous approaches to crime, which highlight the ‘restorative’ elements of these cultures while omitting their retributive aspects, are “now legend” (Cunneen, 2002, p. 43)\(^\text{11}\).

It would appear, however, that much more could be said in response to advocates’ claims that ‘restorative justice’ has emerged in this context. It seems, for example, that despite these claims, some ‘restorative justice’ exponents have little knowledge about indigenous populations, particularly in regards to the native peoples of Australia and New Zealand. Some years ago, high-profile advocate and practitioner Mark Umbreit (1997) erroneously claimed, for example, that ‘restorative practices’ are grounded in the traditions of a range of indigenous cultures, including the “Maori people in Australia” (p. 2). Umbreit (Umbreit, Lewis et al., 2003) was still making this argument much more recently, when he claimed that “the principles of restorative justice are particularly consistent with those of many indigenous traditions…including…Maori people in Australia and New Zealand…[and the practice of]….family group conferencing by Maori people in Australia” (p. 385). Consedine’s (1995, p. 175) glossary of Australian Aboriginal terms that relate to ‘restorative justice’ also seems misguided in this respect, given that there are numerous languages utilised by indigenous Australians (see, for example, Commonwealth Attorney-General’s Department, 2002, p. 39)\(^\text{12}\).

\(^{11}\) For an especially potent example, see Weitekamp’s (1999) “The History of Restorative Justice” and Sylvester’s (2003) damning critique.

\(^{12}\) Atkinson (1995, p. 21) also calls into question Consedine’s knowledge of Aboriginal traditions, and argues that his knowledge of indigenous Australians is much less comprehensive than his knowledge of Maori customs.
Indeed, at some level, there appears to be a lack of knowledge on the part of some proponents in regards to Australia and New Zealand more generally. At times, this is almost comical, as the following comments by Bouwman and Purdy (1997) on their Canadian ‘restorative justice’ program show: “the program is based upon the Family Group Conferencing Model developed in Waga Waga [sic], New South Wales, Australia, and Shame Reintegration Theory [sic] as set forth by John Braithwaite of New Zealand [sic]” (p. 1).

Secondly, it appears that this particular ‘origin myth’ (Daly, 2002b) or “foundational myth” (Bottoms, 2003, p. 88) obscures multiple ‘truth’ claims that are rarely disentangled. A statement such as Zehr’s (2002) that ‘restorative justice’ “owes a great deal to…a variety of cultural and religious traditions….The precedents and roots of restorative justice….are as old as human history” (pp. 11-12) – the likes of which are made consistently, and accepted as unproblematic and uncontested by supporters of ‘restorative justice’ – masks numerous diverse versions of events. Authors in this field suggest wildly different histories of ‘restorative justice’ with only subtle variations of this claim. ‘Restorative justice’ is variously portrayed, for example, as being ‘consistent with’ indigenous customs (Carey, 2000, p. 32; Umbreit, 2001, p. xxix), being ‘based on’ or ‘underpinned by’ indigenous customs (La Prairie, 1995, p. 79; Leung, 1999, Origins of Restorative Justice in North America section, para 1; Strang, 2000, p. 24), ‘arising out of’, ‘being fed by’, ‘owing a debt to’ or being ‘embedded in’ indigenous traditions (Llewellyn & Howse, 1998, Contemporary Restorative Ideas section, para 8; McElrea, 1994, p. 41; Zehr, 2002, p. 11), and/or having been ‘established by’

These subtle variations obscure powerful differences in what exactly is being claimed as the history of ‘restorative justice’. Much of the language used in relating this particular historical ‘truth’ claim is rather vague: what does it mean to say that ‘restorative justice’ is ‘fed by’ or ‘embedded in’ indigenous customs, for example? More significantly, being ‘consistent with’ indigenous customs and ‘established by’ indigenous people are two widely differing claims. To say that ‘restorative justice’ is consistent with indigenous traditions might merely imply that it does not contradict values held by indigenous peoples. (Of course, this in itself is highly contentious, as it assumes that the same values are universal amongst aboriginal populations). To say that ‘restorative justice’ programs have been established by indigenous communities perhaps represents the opposite end of this continuum of claims. This suggests that some indigenous communities have both the knowledge of, and access to, their cultural traditions in responding to wrongdoing, and the sociopolitical authority to legitimately implement such programs. These two versions of events imply quite different contexts: one in which it is acceptable for states to introduce programs that are seen to be consistent with the customs of specific indigenous communities, and another in which it is possible and acceptable for indigenous communities to implement traditional practices in a transparent and legitimated fashion.
What these accounts disguise, omit and/or marginalise, therefore, are the very real differences between ‘restorative practices’ being introduced by indigenous peoples, and ‘restorative practices’ being introduced for indigenous peoples. Additionally, they obfuscate the significant differences between acknowledging indigenous customs as part of recognising the rights of colonised populations, and plundering indigenous approaches to wrongdoing within the context of finding solutions to an ailing Western criminal justice system.

Additionally, these accounts often state that ‘restorative practices’ have ‘pre-modern’ and/or ‘indigenous’ roots, with little recognition of the entirely different social, political, and historical contexts that these imply (see Carey, 2000; Weitekamp, 1999). Weitekamp (1999), for example, discusses ‘restorative justice’ in a range of indigenous populations and early Western cultures, before declaring his support for a return to the “ancient” practices of “our ancestors” (p. 93). Calls to return to ‘our’ past approaches to criminal justice, and calls to return to indigenous customs, however, suggest varying legitimating rationalities, and different, perhaps competing, contexts.

1.4.1 Indigenous Justice and Religion

Perhaps the most striking feature of advocates’ accounts of the re-emergence of forms of indigenous ‘restorative justice’ is the frequent reference to their simultaneous compatibility with world religions. Braithwaite (1996, p. 328; Braithwaite & Braithwaite, 2001, p. 24), Leung (1999, Origins of Restorative Justice in North America section, para 1, Conclusion section,
para 1), Carey (2000, p. 32), Umbreit (2001, p. xxix; Umbreit, Lewis et al., 2003, p. 385), van Wormer (2004, p. 104), Zehr (2002, pp. 11, 62), and even the New Zealand Department for Courts (2002, p. 18), all claim either that ‘restorative justice’ is ‘consistent with’ both indigenous practices and a range of religious traditions, or that ‘restorative justice’ has ‘emerged from’ both indigenous and religious roots. Proponents’ casual grouping together of these historical claims masks their highly contentious nature. For some, these accounts would undoubtedly represent something of a contradiction in terms: how can any ‘restorative practice’ purport to have both indigenous and traditional religious antecedents? If ‘family group conferencing’, for example, was a traditional custom practised by Maori prior to the colonisation of New Zealand, can it be said to have emerged from both Maori and Christian teachings? Of course, many indigenous communities have accepted the religion of their coloniser; Christianisation was used by colonisers as a principle means of gaining control over native populations (Cunneen, 2003, p. 187; 2004, p. 345). Today in New Zealand, for example, statistics indicate that around half of Maori identify as Christians, and that many times more Maori identify as Christian or ‘Maori Christian’ than ascribe to the traditional ‘Maori religion’ (Statistics New Zealand, 2002). Although it is not possible to extrapolate from this data the amount of religious involvement or activity among Maori, or the significance of this pattern of religious affiliation, it is worth considering to what extent the perceived struggle of colonised populations for traditional ‘restorative’ approaches to justice might be the struggle of colonised populations for Christian approaches to justice. This is important to consider given the role Christianity has played in the emergence

1.4.2 Indigenous Justice, ‘Restorative Justice’ and Political Legitimacy

The ‘truth’ claim that ‘restorative justice’ processes have grown out of indigenous customs give ‘restorative practices’ a great deal of legitimacy (see Blagg, 2001, p. 230). In the current political climate, governments in ‘settler societies’ (Tauri, 1999) such as Australia, New Zealand, Canada and the United States of America need to be seen to be ‘doing something’ to address problems such as indigenous over-representation in custodial settings or, in the Australian context, indigenous deaths in custody. Claims that ‘restorative practices’ represent a return to indigenous modes of conflict resolution that can begin to address these problems and decrease the level of offending by indigenous (young) people tap into particular legitimating rationalities and make ‘restorative practices’ politically palatable. This has begun to be recognised by some critical scholars in the ‘restorative justice’ field (see, for example, McLaughlin et al., 2003, p. 2). It is important to consider also the varying legitimating rationalities associated with the diverse historical ‘truths’ obscured in advocates’ accounts of the role of indigenous customs and the emergence of ‘restorative justice’.

The relationship between indigenous justice customs and the emergence of ‘restorative justice’ appears to be much more nuanced than some proponents
imply. Rather than a unidirectional relationship - in which indigenous customs have been reintroduced in response to calls by, and/or on behalf of, indigenous populations - it is argued in the remainder of this section that in the current political climate, a space exists for the introduction of initiatives that appear to be addressing problems facing indigenous communities. In this context, ‘restorative justice’ represents one possible way of addressing these issues, rather than a singularly inevitable response.

This section therefore aims to destabilise the taken-for-grantedness of claims that ‘restorative justice’ has emerged out of indigenous justice practices on a number of grounds. Firstly, I will argue that the limited sociopolitical authority of indigenous populations hinders the potential of these groups to affect change in the manner often described by ‘restorative justice’ proponents. This will be followed by a detailed critique of the Daybreak report (Ministerial Advisory Committee, 1988), which many supporters of ‘restorative justice’ claim provided the impetus for the emergence of ‘restorative practices’ in New Zealand. This example is used to argue for a more nuanced and contextualised approach to accounting for the ‘re-emergence’ of indigenous ‘restorative justice’. Finally, this section will consider attempts to render ‘restorative practices’ ‘culturally appropriate’ for indigenous communities. These attempts, it is argued, represent the ‘indigenisation’ of the existing criminal justice apparatus, rather than the genuine recognition of indigenous traditions.

1.4.3 Limited Political Power of Indigenous Peoples
It is surprising how frequently supporters of ‘restorative justice’ portray ‘restorative justice’ as having emerged in response to demands by - and/or on behalf of - indigenous communities, without considering the sociopolitical position of many such communities, and their corresponding (in)ability to affect change in this regard.

We therefore need to consider, as was the case with victims’ groups, the limited sociopolitical authority of indigenous communities. Around the world, colonised peoples have been found to be significantly disadvantaged in social, economic and political terms, experiencing poor health and living conditions, high mortality rates, impeded access to education and employment opportunities and widespread drug and alcohol abuse (see Trees, 2004, pp. 7-10 on one Australian context). Of course, there are significant differences amongst various indigenous populations, with some having made greater advances in rectifying these problems than others. Nonetheless, indigenous cultures are usually massively over-represented in criminal justice systems; this is particularly the case in Australia (Ogilvie & Van Zyl, 2001, p. 1).

It therefore seems problematic to assume that suggestions made by indigenous communities in relation to criminal justice practices would necessarily be considered by governments. This is not to suggest, of course, that there is no link between the practices of indigenous communities around the world and the emergence of ‘restorative justice’. On the contrary, it appears that in the context of decolonisation – in which governments need to
‘do something’ to address criminal justice issues facing indigenous people, such as over-representation – a space is opened up in which novel initiatives targeting these problems are able to be considered. In this context, the implementation of ‘restorative justice’ becomes a possibility. This, however, is a far cry from the more direct, cause-and-effect argument often made by proponents of ‘restorative justice’ in this regard, and suggests instead a much more nuanced account, allowing for complexities and contingencies. In this sense, therefore, the suggestions of indigenous communities in regards to criminal justice, like those of victims’ groups, need to fall within a legitimated political rationality.

As Cunneen (2003, p. 186) argues, ‘restorative justice’ is an example of the tendency of governments to adopt aspects of indigenous culture that are compatible with broader governmental aims, while disregarding other aspects that are seen as inimical to it. For Roach (2000, pp. 274-275) and Blagg (2001, p. 227), this is further reflected by governments’ focus on criminal justice, without consideration of wider economic and social issues. The focus on criminal justice “has the potential to deflect attention that might be devoted to other aspects of self-government including land and resource claims, health care, unemployment, and poverty” (Roach, 2000, p. 275). The drive to implement ‘restorative justice’ programs in indigenous communities might therefore be viewed as a strategy that seeks to further specific governmental aims, rather than comply with the demands of these communities (see also Cunneen, 2002, p. 43).
According to O’Malley (1994), this technique of ‘governing at a distance’ – whereby “government interests teach the subjects to practise apparently ‘independently’ – but actually in accordance with policymakers’ preferences” (p. 140) – is prevalent in the governance of indigenous communities. As O’Malley (1994, p. 138) points out, such techniques are usually underpinned by good intentions on the part of policymakers, but can result in the unfair or inaccurate use, marginalisation, or skewed interpretation of indigenous traditions in accordance with existing governmental aims.

1.4.4 Puao-Te-Ata-Tu: The Daybreak Report

Of course, according to the advocacy literature, it is not so much Australia, but New Zealand, where political pressure from indigenous people has had a major impact on the implementation of ‘restorative justice’.

The *Daybreak* Report, authored by the Ministerial Advisory Committee for the New Zealand Department of Social Welfare (Ministerial Advisory Committee, 1988), deserves special consideration here, as it is often considered to have been the impetus for the introduction of ‘restorative justice’ in New Zealand. A number of scholars have claimed that ‘family group conferencing’ emerged in New Zealand as a result of this report, which detailed Maori communities’ demands for a return to traditional justice practices (see Braithwaite, 1995a, pp. 5-6; Daly, 2000, p. 174; Doolan, 2002, p. 118; Fulcher, 1999, p. 330; Lupton & Nixon, 1999, p. 53). Pennell and Burford’s (2000) remarks are representative in this regard: “the push for change in New Zealand came after mobilization of their indigenous peoples against Pakeha (European)
expert-driven models that were seen as undermining their families and tribal groups" (p. 137).

Analysis of the *Daybreak* report, however, suggests that the notion that Maori communities ‘mobilised against Pakeha’ to pressure the New Zealand government into adopting a more culturally suitable criminal justice system appears to be a somewhat romanticised version of events. It is important to bear in mind, firstly, that the initial working party appointed to consider what changes were necessary in New Zealand’s youth justice/child welfare system was formed without Maori representation (Doolan, 1990, p. 80; Watt, n.d., The Process of Reform section, para 5). Secondly, the Ministerial Advisory Committee was commissioned by the New Zealand Department of Social Welfare to produce the *Daybreak* report, and the duty of the Committee was much broader than merely reporting on a Maori perspective of the criminal justice system. The Committee’s task involved reporting on the most appropriate means of meeting Maori needs in terms of policy, planning and service delivery in the Department of Social Welfare generally (Ministerial Advisory Committee, 1988, p. 5). As a result, a great deal of the *Daybreak* report focuses on matters unrelated to juvenile justice and/or child welfare, and instead considers the shortcomings of the Department of Social Welfare from a Maori perspective in much more general terms. The premise of the *Daybreak* report is thus less romantically- and more prosaically-oriented than ‘restorative justice’ advocates often imply. Rather than signifying a revolt of Maori communities against the Pakeha criminal justice system, the *Daybreak* report represents the end result of the work of a group of Maori individuals,
employed by the Department of Social Welfare, charged with writing a report outlining Maori concerns about the Department’s operations.

Analysis of the *Daybreak* report reveals a number of other factors that bring into question the romanticised versions of the origins of ‘family group conferences’ outlined above. Firstly, the report details an extensive history of similar reports that criticised the Department of Social Welfare on many of the same grounds that *Daybreak* does. Groups as diverse as the Human Rights Commission, the then Maori Advisory Unit and the Women’s Anti-Racist Action Group had previously submitted reports to the Department, detailing claims of its institutionalised racism (Ministerial Advisory Committee, 1988, pp. 15-16). Significantly, a number of these criticised the Department’s approaches to the care and control of children and young people, including the cultural inappropriateness of measures in relation to Maori youth, and the mistreatment of Maori youths in residential facilities (Ministerial Advisory Committee, 1988, pp. 15-16). Both Department-commissioned reports on Maori-related issues, and Maori criticisms of the Department therefore existed prior to the *Daybreak* report. Indeed, official dissatisfaction with the Department’s treatment of Maori youths and children had been registered on numerous prior occasions. Proponents’ claims that ‘family group conferencing’ emerged in New Zealand in response to the *Daybreak* report – which represented a Maori ‘uprising’ against the European criminal justice system – become problematic in light of this. As the *Daybreak* report itself indicates, this ‘uprising’ was being played out many years prior to the birth of the 1989 ‘family group conferencing’ legislation. In fact, the original *Children*

More significantly, analysis of the Daybreak report indicates that no specific recommendation is ever made by the Ministerial Advisory Committee that the Department implement a new system of ‘family group conferences’. Certainly, suggestions made by the Committee resonate with the philosophy of ‘family group conferences’ as it is currently promoted by ‘restorative justice’ advocates. The Committee recommended, for example, that the Children and Young Persons Act (1974) be amended to include greater consideration of the role of the family when dealing with Maori children, and the increased participation of Maori families in matters relating to child welfare and juvenile justice (Ministerial Advisory Committee, 1988, pp. 29-30). Later in the report, the Committee (1998, p. 30) returns to these issues, claiming that a “substantial ideological change” (p. 29) would be necessary in order to amend the Children’s and Young Persons Act (1974) to cater to Maori needs. The Committee does not, however, make any specific recommendations, preferring instead to discuss a range of principles that they suggest should shape changes to this legislation. The extended family is again deemed to be of much importance, with the report stating, “the restrengthening of hapu bonds and responsibilities, and the funding of group initiatives to facilitate the Maori goal of caring for their own children, offers, in the Committee’s view, the best hope” (p. 30).

13 ‘Hapu’ refers to the extended kin group (New Zealand Ministry of Justice, 2002).
Finally, and perhaps most significantly in terms of the claim that the *Daybreak* report provided impetus for the introduction of ‘family group conferences’ in New Zealand, is Annex 2 of the report, which focuses specifically on what the Committee believe should be done in regards to child welfare and youth justice practices. In this section, the Committee (1988) clearly stated that:

> We contend that the current Court system is capable of being modified to achieve such goals. Further, we believe that the establishment of new Courts and special Judges would be unnecessary….the Committee considers that judges ought to have demonstrated understanding of Maori cultural and tribal values, whether the case be one of care, protection or control [italics added] (p. 54).

Elsewhere in the report, the Ministerial Advisory Committee (1988, p. 34) even suggests that an earlier program, ‘Maatua Whangai’, which aimed to “reduce the flow of Maori children and young persons into the Department’s institutions” (Maori Unit, 1989, p. 2), be revisited. The ‘Maatua Whangai’ (literally ‘foster parenting’) program, launched in 1983, was to be the “preferred way of providing for all Maori children who need any form of alternative care….to substitute formal intervention by the Department in the lives of Maori youngsters, for the traditional caring networks of Maoridom” (Maori Unit, 1989, p. 2). The Ministerial Advisory Committee (1988) were
clearly in favour of a return to this program, declaring: “in our opinion, Maatua Whangai should return to its original focus of nurturing children within their family groups as the primary alternative to a child coming into care” (p. 34).

The notion that ‘family group conferencing’ emerged in New Zealand in response to an ‘uprising’ of indigenous communities keen to implement their own justice traditions, is thus not endorsed by the very report that is often cited in support of this sentiment. In fact, the report even suggests that “it would be appropriate to look at the law in USA and Canada relating to the rights of kin groups within indigenous cultures and how they deal with their young people” (Ministerial Advisory Committee, 1988, p. 30). In light of this, it is far more problematic to declare that the *Daybreak* report is responsible for the implementation of ‘family group conferencing’ in New Zealand than supporters of ‘restorative justice’ acknowledge.

This is by no means intended to deny or minimise the role played by Maori individuals and communities in challenging the existing juvenile justice system in New Zealand. Clearly, some advocates, including Maori advocates such as Pakura (2005), feel passionately about the significance of the part played by Maori in this regard. It is rather argued that this challenge to Pakeha systems was played out in a far more general sense. The *Daybreak* report “called for more culturally appropriate ways of dealing with Maori juvenile offenders” (Tauri, 1999, p. 157) rather than proposing a system of ‘family group conferencing’ as such. In Tauri’s (1999) words, therefore, New Zealand’s ‘family group conferencing’ legislation was influenced “in part by
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criticisms of the prevalence of institutional racism and culturally inappropriate practices within the New Zealand criminal justice system...and by the need to be seen to be ‘doing something constructive’ in the realm of juvenile justice” (p. 158).

1.4.5 Making ‘Restorative Justice’ Culturally Appropriate

A number of authors in the ‘restorative justice’ field have contributed to debate about the ‘cultural appropriateness’ of ‘restorative practices’. Typically, discussions have focused on the inappropriateness or inadequacy of ‘restorative’ procedures for indigenous populations (Blagg, 1998; Cunneen, 1997, 2004; Pratt, 1996b; Tauri, 1999; Tauri & Morris, 2003) or on ways to make ‘restorative practices’ more culturally appropriate for indigenous peoples (Wundersitz, 1996a, pp. 116-118). For many critics, ‘restorative justice’ initiatives represent governmental attempts to ‘indigenise’ existing non-indigenous systems, rather than truly recognising native customs (Blagg, 1997, 1998; Cunneen, 1997, 2002; Tauri, 1999).

This debate raises important issues for the ‘restorative justice’ project; inadvertently, it also destabilises the historical claim that ‘restorative justice’ has emerged from and/or for indigenous communities. While attempts to make criminal justice reforms culturally appropriate may be laudable, they indicate that the over-riding focus is on ‘indigenising’ existing criminal justice measures rather than genuinely adopting indigenous customs. Consider in this regard the following remarks made by New South Wales’ then Minister for Community Services, Ron Dyer. Describing the progress of the emerging
'youth justice conferencing' scheme in New South Wales in 1997, Dyer instructed the parliament that two experts from New Zealand had been brought to New South Wales to assist in the implementation of the program:

As well as speaking with juvenile justice officers, both men talked with a range of Aboriginal groups about the benefits of youth justice conferencing. They will also help the Department of Juvenile Justice to develop plans for youth justice conferencing to take into account the cultural needs of Aboriginal young people and their families (New South Wales Legislative Council, 1997b, p. 294).

In a similar scenario, the then New South Wales Premier Bob Carr, in detailing to parliament the introduction of a ‘circle sentencing’ program in the town of Nowra, stated: “the program originated within the Indian community in Canada 10 years ago. The New South Wales Aboriginal Advisory Council recommended we try it here. The Aboriginal people of Nowra welcome the opportunity (New South Wales Legislative Assembly, 2001, p. 17618)". D. Fry’s (1997) report of the Northern Territory’s pilot ‘conferencing’ scheme also reveals that one location for the pilot, Yuendumu, was chosen as it had a strong Aboriginal Council which was “receptive to the initiative” (p. 19).

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14 Carr’s comments are a potent example of the “Orientalist appropriation” (Blagg, 1997, p. 487) of indigenous cultures by some ‘restorative justice’ supporters, in which an essentialist view of these cultures is maintained, and it is assumed that what will be appropriate for one indigenous population will be appropriate for all (see also Blagg, 2001, p. 230; Cunneen, 2004, p. 346).
In the above examples, it is clear that while attempts are being made to ‘do something’ to rectify problems faced by indigenous Australians in the criminal justice system, this is taking place without reference to any consideration of adopting indigenous traditions. While it is commendable that indigenous groups have been consulted about these initiatives, it appears that these examples represent instances of an ‘indigenisation’ of non-indigenous criminal justice processes rather than the recognition of indigenous customs. In addition to raising a range of issues in relation to the implementation of ‘restorative justice’ in indigenous communities, discussion of the cultural (in)appropriateness of ‘restorative’ processes problematise the celebrated claim that such practices represent time-honoured native traditions.

Significantly, many of these attempts to make criminal justice practices culturally appropriate for indigenous people have been heavily criticised, or rejected outright, by members of indigenous communities (Pratt, 1996b, p. 152). Tauri (1999, p. 164) claims, for example, that during the decade since ‘family group conferencing’ had been implemented in New Zealand, there had been no significant decrease in Maori dissatisfaction with the criminal justice system (see also Morris & Maxwell, 1993, p. 87). Indeed, at the conclusion of a three-day *hui*\(^{15}\) held to evaluate the Maori relationship with the justice system, “many were calling once again for Maori to establish their own systems of justice and to deal with their own offenders in ways they define as appropriate” (Tauri, 1999, p. 164).

\(^{15}\) A ‘hui’ refers to a meeting (Biles & Vernon, 1992, p. xiii).
This section has aimed to challenge proponents’ established accounts of the emergence of ‘restorative justice’, which posit a close relationship between this phenomenon and various indigenous justice practices. It has sought to do so by highlighting the restricted political capacity of indigenous peoples, and, using the revered *Daybreak* report as an example, to position ‘restorative justice’ among attempts to ‘indigenise’ criminal justice apparatuses.

### 1.5 Some Criminological Explanations

In addition to these ‘internal histories’ – that is, those histories that have been written by advocates from within the ‘restorative justice’ field – a number of highly regarded criminologists have briefly touched on some possible explanations for the birth of ‘restorative practices’. In their respective commentaries on changes within the criminal justice sphere, scholars such as Garland (2001), O’Malley (1996; 1999) and Pratt (2000) have contemplated various shifts in social, political and theoretical terrains that may partially account for the emergence of ‘restorative justice’. The remainder of this section outlines each of these explanations, and aims to assess their usefulness in terms of this study.

#### 1.5.1 The Re-emergence of ‘Emotive’ and ‘Expressive’ Justice

Both Pratt (2000) and Garland (2000; 2001) argue that what might be termed “expressive justice” (Garland, 2000, p. 350; 2001, p. 8) or “emotive and ostentatious punishment” (Pratt, 2000, p. 417) are increasingly a feature of the contemporary criminal justice landscape. Although Pratt (2000) acknowledges that a counter-trend is also apparent, whereby criminal justice
is governed via efficient and systemic administrative-bureaucratic rationalities, he argues that “a resurgent trend in penal outlets providing for, often approving of, emotional release” (p. 420) is discernible. Pratt’s (2000, p. 419) work suggests that ‘restorative practices’ may represent one element of this shift; he describes the considerable proliferation of ‘restorative’ programs throughout the Western world, and concludes that emotive expression, such as “the tears and embraces of the Family Group Conference” (p. 433) is beginning to have an impact upon the dominant “formal, inscrutable, cold and detached processes of justice” (p. 433).

For Garland (2000, pp. 349-350; 2001, pp. 8-9), the return of ‘expressive justice’ has manifested itself mainly in terms of increasingly punitive measures, such as the re-emergence of the chain gang or the convict’s striped uniform. Nonetheless, he argues that there has been an increased theoretical emphasis within criminology upon the “symbolic, expressive, and communicative aspects of penal sanctioning” (p. 9). Although many of Garland’s (2001, pp. 8-20) other “indices of change” (p. 6) highlight the anomalous nature of ‘restorative justice’, it is potentially consistent with the return of “expressive justice” (p. 8), as Pratt’s (2000) work also suggests.

This thesis takes the view that ‘restorative justice’ does indeed represent, in part at least, a return to ‘emotive’ or ‘expressive’ processes of criminal justice. As will be discussed in greater detail in Chapter Three, the emphasis on the expression of emotion in ‘restorative justice’ procedures demonstrates an important discontinuity with methods of ‘alternative dispute resolution’,
which, unlike ‘restorative practices’, were designed to be less emotional than traditional court processes (Harding, 1982, p. 23). This part of the thesis thus adds to Garland’s (2001) and Pratt’s (2000) brief comments on the relationship between the expressive aspects of penalty and ‘restorative justice’. In a sense, therefore, this genealogy of ‘restorative justice’ supports, and builds on, the claims of these authors.

1.5.2 Neo-Liberalism, ‘Post-Social’ Criminologies and ‘Restorative Justice’

O’Malley (1999) argues that restitution “and its sometimes allied and sometimes inconsistent partner, reintegration” (p. 180) have been linked to a number of shifts in the contemporary management of crime, and perhaps most notably to the rise of neo-liberal penalty. Indeed, according to O’Malley (1999, p. 183), a number of authors have claimed that the ascendance of neo-liberalism can account for the diverse range of developments that have recently taken place within the criminal justice field. The principles of neo-liberalism – including the responsibilisation of individuals, families and communities, for example – can thus be seen to account, at least in part, for the introduction of ‘restorative’ processes:

Restitution reflects the ethic of individual responsibility, envisages the victim as the customer of justice, promotes quasi-contractual market-like relations, and takes the state out of governance....Reintegration is linked to the neo-liberal reaffirmation not only of individual responsibility, but of the
family and community – and in so doing it also expresses in law the faith of neo-liberals in the institutions of ‘private society’ over those of government [italics in original] (O'Malley, 1999, p. 184)\textsuperscript{16}.

As O'Malley (1999, p. 180) argues, therefore, the increased prominence of restitution is congruent with the recent shift towards adopting neo-liberal rationalities of governance, which aim to limit the involvement of the state in social life, and thus to responsibilise individuals as much as possible.

Elsewhere, O'Malley (1996) suggests that the appearance of ‘restorative justice’ may be related to the rise of what he calls ‘post-social criminologies’. By this, he means criminological rationalities that view individuals as independent and self-ruling, rather than as reliant on the state:

Such post-social political rationalities constitute their subjects not as members of an overarching social whole, shaped by social conditions and to be governed through social interventions, but as autonomous individuals, responsible for their own fate, invested with personal agency and thus with personal responsibility for their actions (pp. 27-28).

\textsuperscript{16} O'Malley’s (1999, p. 185) own view is more nuanced than this. He questions the wisdom of using the concept of neo-liberalism to account for the diverse range of recently introduced penal measures, from boot camps to enterprising prisoner schemes to reintegration: “how can all of these be neo-liberal” (p. 185)? Stressing the plurality of political rationalities subsumed under the ‘neo-liberal’ label, O’Malley (1999) concludes that what usually passes for neo-liberalism “may better be understood in terms of the…notion of the New Right” (p. 185).
Under these ‘post-social’ criminologies, O'Malley (1996, pp. 29-30) argues, victims are constructed as individually deserving, rather than as abstract members of ‘the population’. In Garland’s (2001) words, “specific victims are to have a voice – making victim impact statements, being consulted about punishment and decisions about release, being notified about the offender’s subsequent movements” (p. 12). As such, offenders are increasingly held accountable directly to ‘their’ victim, through, for example, paying direct compensation to the victim, rather than a fine to the state (O'Malley, 1996, p. 30). O'Malley (1996) sees some forms of ‘restorative justice’ as compatible with this shift:

The recent embracing of variations on the themes of informal justice – especially those involving victim-offender reconciliation, and family conferences – generates a similar refocusing. While considerable emphasis may be placed on reintegration, in virtually all relevant models, the salience of the offender’s direct and personal responsibility to the victims is paramount, and the issue of compensation normally directly negotiated (p. 30).

O'Malley’s (1996; 1999) analyses, like Pratt’s (2000) and Garland’s (2001) are to some extent supported by this thesis. I argue in Chapter Four, for example, that the responsibilisation of parents in ‘restorative justice’ procedures reflects the neo-liberal strategy of ‘governing at a distance’, and in Chapter Five that the discourse of ‘empowerment’ operates to produce
self-governing subjects. Here, the role of the state is increasingly limited as communities, families and individuals take on the role of managing crime. In Chapter Three, furthermore, I argue that ‘restorative justice’ constructs crime as a result of individual psychology rather than structural disadvantage. ‘Restorative justice’ is consistent in this respect with O’Malley’s (1996) ‘post-social criminologies’, epitomised in Rose’s (1996c) notion of the ‘death of the social’.

O’Malley’s (1996) analysis is limited, however, by its tendency to falsely unify divergent ‘restorative practices’. His argument that the offender’s obligation to an individual victim is paramount in ‘restorative practices’ overlooks that many ‘restorative’ processes operate in the absence of a victim. Furthermore, it overlooks ‘restorative practices’ that utilise ‘surrogate’ victims, operate in instances of victimless crime, and/or engage victims of non-personal crimes such as graffiti. Thus while this thesis also builds on O’Malley’s (1996) analysis, it departs from it in this respect. Rather than attempting to explain ‘restorative practices’ by reference to one all-encompassing concept like ‘neo-liberalism’, furthermore, this thesis aims to highlight the divergence and diversity of the origins of ‘restorative justice’ approaches.

1.6 Conclusion

In addition to considering these ‘external’ explanations for the rise of ‘restorative justice’, this Chapter has aimed to outline for the reader three of the most established accounts of its emergence. Undoubtedly, there are
others; the three covered here, however, represent those that present ‘restorative justice’ as an intrinsically progressive enterprise. By situating the birth of ‘restorative practices’ within the search for more enlightened approaches to criminal justice, to crime victims, and to the recognition of indigenous justice traditions, these historical accounts act to legitimate ‘restorative practices’ and to normalise or naturalise their acceptance into the contemporary criminal justice landscape. This Chapter has sought to destabilise and problematise these revered historical ‘truths’ – not in order to deny any nexus between ‘restorative justice’ and the three phenomena discussed, but to challenge their status as monolithic ‘origin myths’ (Daly, 2002b), and to suggest the possibility of alternative, critical historical accounts. After describing the methodological framework of the research, the Chapters that follow will begin to assemble such an alternative history of ‘restorative justice’. 
CHAPTER TWO: THEORETICAL FRAMEWORK, METHODOLOGY AND METHODS

As outlined in detail in the previous Chapter, ‘restorative justice’ has recently emerged as a popular criminal justice practice in numerous countries around the world. The field of ‘restorative justice’, it was suggested, is informed by multiple discourses, which are shifting, conflicting and even contradictory in nature. A range of competing accounts of the origin of ‘restorative justice’ have been proposed; these ‘origin myths’ (Daly, 2002b) vie with one another for legitimacy.

In order to begin to make sense of these myriad, seemingly incompatible discourses and histories, this thesis aims to address the problem of how it is that ‘restorative practices’ have come to be an acceptable way of ‘doing justice’ by developing a genealogy of ‘restorative justice’. My aim, therefore, is not simply to replace the existing histories of ‘restorative justice’ with another authoritative version. Rather, this thesis intends to take an alternative approach to exploring the history of ‘restorative justice’. This approach will be outlined below.

This Chapter has three principle aims. Firstly, it will introduce the work of Michel Foucault, and his influence on the social sciences generally, and criminology in particular. Secondly, it will detail the methodological prescriptions to be found in an analysis of his works, and the works of those
scholars who have followed his approach. Finally, this Chapter will discuss in
detail the methods used in this thesis.

2.1 The Influence of Michel Foucault

Michel Foucault was born in Poitiers, France in 1926, and died in 1984. During his lifetime, Foucault was an influential theoretician – “a star on the French philosophical scene” (O'Farrell, 1989, p. 1). Foucault studied widely, gaining qualifications in philosophy, psychology and psychopathology, and later taking up Professorships at the Universities of Clement-Ferrand and Vincennes (Smart, 1985, pp. 12-13). Eventually, he moved to the prestigious College de France, where he created his own title – Professor of the History of Systems of Thought (Smart, 1985, p. 13). Foucault was a prolific writer, “covering an astonishing range of topics” (Couzens Hoy, 1986, p. 2), and was particularly difficult to categorise, his work being influenced by a range of thinkers (Smart, 1985, pp. 13-14) and considered neither purely historical nor purely philosophical.

Despite, or perhaps because of, his tendency to work across disciplinary terrains, as well as his awkward identity as “compound philosopher-and-historian” (Goldstein, 1994, p. 1), Foucault’s work has had a substantial impact on a broad range of disciplines, and on the humanities and social sciences in particular. Arac (as cited in Prado, 1995, p. 1), for instance, claims that the work of Foucault has “changed the basis for the work of all scholars”, and Howe (1994) likens what she terms the “Foucauldian industry”
(p. 82) to a religion, arguing that Foucault’s *Discipline and Punish* “is widely accorded the status of a Bible” (p. 83).

While Arac’s claim in particular may be somewhat exaggerated – positivism and forms of structuralist inquiry are, after all, still alive and well (May, 2001, p. 176) – it is nonetheless safe to assert that Foucault has had a significant impact on the discipline of criminology. Garland (1986) claims that Foucault’s major work in the area, *Discipline and Punish* “has quite fundamentally changed the way in which intellectuals think about punishment and penal institutions….Virtually by itself, it has transformed a field of inquiry” (p. 866). Garland (1986, p. 866) further demonstrates his point by citing Stan Cohen’s (1985) famous remark that “to write today about punishment and classification without Foucault, is like writing about the unconscious without Freud” (p. 10). Cohen’s comment, according to Howe (1994) has been “cited ad nauseam, as if it were a mantra” (p. 83).

### 2.1.1 Foucauldian Scholarship and ‘Restorative Justice’

Certainly, the work of Foucault has prompted a large body of secondary literature, as well as a substantial quantity of scholarly work undertaken using the analytical tools he advances. This has been the case both in the social sciences and humanities generally, and in criminology specifically. A number of authors have even applied Foucault’s perspectives to ‘restorative justice’ and related topic areas. Bagshaw (2003), for example, draws on Foucauldian concepts in an article exploring the links between language, power and discourse in the practice of ‘mediation’. The focus of Bagshaw’s (2003) article
is the role of the mediator and the importance of mediators being aware of the discourses that shape the subjectivity of clients. Bagshaw (2003) argues that mediators need to adopt an anti-essentialist stance towards clients; that by “deconstructing the influence of dominant discourses on their construction of reality we will be in a better position to empower parties in mediation” (p. 140). Minor and Morrison’s (1996) useful essay “A Theoretical Study And Critique Of Restorative Justice” considers ‘restorative justice’ from multiple theoretical perspectives, including Foucauldian. Drawing on Foucault’s concepts of governmental power, normalising processes and disciplinary control, Minor and Morrison (1996, p. 127) argue that from a Foucauldian perspective, ‘restorative justice’ is a technique of exercising power and social control, irrespective of whatever else it might have to offer. Furthermore, drawing on Foucault’s notion of governmentality, Minor and Morrison (1996, p. 127) claim that since ‘restorative justice’ programs increase knowledge of offenders, they provide greater potential for the exercise of power on offending populations. ‘Restorative justice’ thus “effectively provide[s] greater power to normalize offenders” (Minor & Morrison, 1996, p. 127).

It is perhaps the work of George Pavlich that comes closest to the parameters of my own research. Pavlich’s (1996) early text *Justice Fragmented: Mediating community disputes under postmodern conditions* developed a genealogical account of ‘community mediation’ in British Columbia, Canada. Like Minor and Morrison (1996), Pavlich (1996) draws heavily on the concept of governmentality, and aims to explain how ‘community mediation’ emerged as a viable alternative to the formal criminal
justice system at a historical moment in which justice is highly dispersed. Pavlich (1996, pp. 4-5) situates the birth of ‘community mediation’ as a consequence of the convergence of two models of power articulated by Foucault – pastoral and sovereign-law power. As such, he is able to explain ‘community mediation’ as a manifestation of Foucault’s concept of ‘governing at a distance’ or what he terms “remote control [italics in original]” (p. 5).

Pavlich’s (2005a; 2005b) later work applies Foucauldian theoretical concepts to ‘restorative justice’ more specifically. In Governing Paradoxes of Restorative Justice, Pavlich (2005b) applies Foucault’s concept of governmentality to ‘restorative justice’. His main argument here is that despite proponents’ visions of ‘restorative practices’ as constituting an alternative paradigm of justice, ‘restorative justice’ is reliant upon the existing criminal justice system for its discursive legitimacy: “it is presented as a separate and autonomous entity; yet its foundational concepts derive from the very system it claims to substitute” (p. 14). Pavlich (2005b) illustrates his argument by applying it to four fundamental concepts of ‘restorative justice’: harm, victims, offenders, and community. Despite proponents’ efforts to conceptualise these in a distinct fashion from traditional understandings, Pavlich (2005b) argues, each of these categories similarly rely upon the very understandings they seek to replace.

My own research departs from this body of existing scholarship in a number of respects. As a doctoral thesis, it is able to present a much more detailed and comprehensive analysis than Minor and Morrison’s (1996) brief account.
Unlike Bagshaw (2003) and Pavlich (1996), furthermore, this research focuses specifically on ‘restorative justice’, rather than considering ‘mediation’ or ‘community mediation’ more broadly. Perhaps most significantly, and as will be discussed later in this Chapter, this thesis adopts a broad sociological approach to history of the present, whereas Pavlich’s (1996; 2005a; 2005b) work is grounded very much in the governmentality tradition.

2.2 Some Definitions

A number of concepts are integral to an understanding of Foucault’s historical methodology. Three major, interrelated ones – discourse, power/knowledge and governmentality – are defined below. Others – most notably ‘genealogy’ and ‘conditions of possibility’, which are central to this thesis – require greater attention, and as such, will be described in greater detail throughout this Chapter.

2.2.1 Foucault’s Concept of Discourse

In a Foucauldian analysis, unlike a range of other analytical perspectives, discourse is not conceived of in purely linguistic terms (Fairclough, 1992, p. 40; Foucault, 1972b, p. 233; 1978b, p. 14; Kendall & Wickham, 1999, p. 35). Instead, it is taken to mean that which it is possible to speak of in a given historical moment (Bagshaw, 2003, p. 134; Ramazanoglu, 1993, p. 19). In other words, discourses “construct certain possibilities for thought” (Ball, 1990, p. 18). Additionally, discourses are seen to be constituted by both what can and cannot be said or thought - by inclusions as well as exclusions (Ball,
The important thing to recognise about Foucault’s notion of discourse, however, is, as Bagshaw (2003) puts it, “not all discourses are equal” (p. 132). Jupp and Norris (1993) explain that there are hierarchies of discourse, so that “one person’s or one group’s discourse – its definitions, explanations and solutions – carry little weight in relation to others and therefore have little credibility as ‘knowledge’ or as what is seen as ‘right’ and ‘correct’” (p. 48).

2.2.2 Power/Knowledge

For Foucault, the idea of discourse is inextricably linked with another of his well known concepts – power/knowledge. The two are intimately connected since “power operates in and through discourses…thus the term *power/knowledge* [italics in original]” (Gubrium & Holstein, 2000, p. 494). In other words, ‘truth’ is produced by discourse, and power cannot be exercised “except through the production of truth” (Foucault, 1980, p. 93). When we examine what is taken as knowledge or considered ‘truth’, therefore, we are examining power. An example might help make this clearer. As argued by Jupp and Norris (1993, p. 48) above, discourses compete with each other for legitimacy, with some being accepted as ‘truth’ or ‘knowledge’ while others are dismissed as implausible or false. Gubrium and Holstein (2000) use Foucault’s interest in medical and clinical discourses to illustrate this: “the power of the medical discourse partially lies in its ability…to appear as *the* only possibility while other possibilities are outside the plausible realm” (p.
Discourses such as medicine, which are upheld as ‘truth’ are described by Foucault as ‘veridical discourses’; that is, as those discourses “concerning what is taken as true knowledge” (Dean, 1998, p. 187). For Foucault, therefore, power and knowledge are inseparable concepts; “power produces knowledge...a site where power is exercised is also a place at which knowledge is produced” (Smart, 1992, p. 65).

2.2.3 Governmentality

Foucault (1991) posited governmentality as a type of power that is not overtly coercive, but rather directs the actions of subjects by implicating them in the ongoing process of their own governance. By government, therefore, Foucault (1982) did not mean the political structure of the state, but “the way in which the conduct of individuals or groups might be directed....To govern, in this sense, is to structure the possible field of action” (p. 221).

Governmental power relies upon the positioning of individuals’ goals in line with the goals of the state; “government is not...the suppression of individual subjectivity, but rather the cultivation of that subjectivity in specific forms, aligned to specific governmental aims” (Garland, 1997a, p. 175). In other

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17 There is some disagreement over the precise relationship of governmentality to genealogy. Many projects claiming to be genealogies, for example, rely heavily on an analytics of government (see, for example, Dean, 1991; Johnson, 2000; Pavlich, 1996). Garland (1997a), however, argues that while authors in the governmentality body of literature purport to be doing both governmentality and genealogy, the latter “requires a broader, more sociological agenda than the former” (p. 193). This project takes the view that while Garland (1997a, p. 193) is certainly correct that writing a history of the present entails a wide-ranging and more historically-oriented framework than an analytics of government, it is very difficult to separate the two completely. As such, while this thesis is situated very much in broad, sociological terms as a genealogy, it draws on the concept of governmentality throughout. In particular, Chapter Five presents an analytics of government of ‘restorative justice’.

18 Although Foucault (1991) did not articulate the notion of governmentality in any depth until his posthumous article of the same name, many of his earlier works, such as those quoted here, indicate that his thinking was heading in this direction much sooner.
words, individuals’ collaboration in relation to governmental aims is often not conscious, but exists in response to dominant ‘truths’ in a particular culture and historical moment (Bagshaw, 2003, p. 135).

The concept of governmentality is thus linked with the other concepts outlined above – discourse and power/knowledge. As Bagshaw’s (2003, p. 135) earlier comment indicates, individuals become collaborative partners in their own governance only in relation to the (il)legitimacy of particular discourses. An analytics of government therefore entails investigating “the connection between ways of distinguishing true and false and ways of governing oneself and others” (Foucault, 1981a, p. 11).

2.3 Foucault, History and Genealogy

Despite Foucault’s considerable influence on academia, and the body of scholarship claiming Foucauldian heritage, there is little consensus about what it means to write a genealogy. Analyses written from a genealogical perspective in the social sciences are highly diverse; neither Foucault nor his followers provide detailed directions as to what genealogy should entail. Foucault nonetheless left some clues throughout his works, albeit in a haphazard and shifting fashion.

An analysis of his work reveals that he spoke on a number of themes that might be considered a loose guide to genealogy as a theoretical or philosophical framework. This section aims to describe each of these themes or guidelines. A range of works by Foucault will be drawn on here in this
regard. In particular, his two major genealogical studies – *Discipline and Punish* (1977) and *The History of Sexuality* (1978a), as well as his discussions of methodology – *The Archaeology of Knowledge* (1972a), “Nietzsche, Genealogy, History”\(^{19}\) (1984), and “Questions of Method” (1981a) will be discussed. “Questions of Method” (1981a), which Dean (1998) describes as the “legend to all Foucault’s work” (p. 184), is particularly relevant here. In other words, this Chapter aims to consider both what Foucault *did*, and what Foucault *said* he did. As a number of authors concede, this is not always the same thing (Foucault, 1972a, pp. 16-17; B. Hudson, 2003a, p. 149; McNay, 1994, p. 85).

### 2.3.1 Foucault’s Critique of Classical History

Throughout his oeuvre, Foucault repeatedly criticises the discipline of traditional history. His comments in this regard offer some insight into how to approach genealogical research, if only by indicating how *not* to do so. There are a number of criticisms made by Foucault in this regard, as outlined briefly below:

Firstly, Foucault (1972a, p. 13; 1984, p. 77) criticises histories that focus excessively on the teleological. That is, he believed history should avoid presenting its object of inquiry in functionalist terms. Secondly, he opposes

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\(^{19}\) There is some disagreement over this text, with some authors (Scheurich & Bell McKenzie, 2005; Sutcliffe, 2003, p. 1) supporting its application as a series of guidelines for conducting genealogical research, and others vehemently denying its appropriateness for this purpose. Dean (1994) stresses that “Nietzsche, Genealogy, History” is “not, primarily, a statement of Foucault’s method” (p. 17), as does Prado (1995, p. 33). These authors concede however, that the essay nonetheless “serves as an excellent guide to his position” (Prado, 1995, p. 33) (see also Dean, 1994, pp. 17-18). In addition to these authors' comments, I have included material from “Nietzsche, Genealogy, History” in this discussion of methodology because its contents appear to be consistent with the methodological precautions that Foucault outlines in much of his other work.
the search for ‘origins’ altogether, as it represents to him “an attempt to capture the exact essence of things” (Foucault, 1984, p. 78). This, he felt, was a “hindrance to research” (Foucault, 1980, p. 81) that seemed “foreign” (Foucault, 1978b, p. 10) to him. Thirdly, and as demonstrated by both his genealogical works, Foucault (1977; 1978a) eschews the tendency of traditional historians to adhere to the myth of progressivity. Historians should not, he believes, represent their object of inquiry as inherently progressive or superior to whatever preceded it, but as merely the current episode “in a series of subjugations” (Foucault, 1984, p. 83). Fourthly, Foucault criticises traditional histories for portraying the past in a linear and continuous manner. This, he believes, falsely represents the past as ascribing to a logical flow or pattern (Foucault, 1978b, p. 25; 1984, p. 83). Fifthly, Foucault condemns histories that aim to depict the birth of particular phenomena as culminations or “final term[s]” (Foucault, 1984, p. 83). This, he claims, only serves to make the object of inquiry appear in a superior light, as the “climactic stage in the investigation” (Foucault, 1981a, p. 7). Finally, Foucault (1984) reproaches traditional historians for claiming to possess what he sees as false objectivity, for taking “unusual pains to erase the elements in their work which reveal their grounding in a particular time and place, their preferences in a controversy – the unavoidable obstacles of their passion” (p. 90).

For Foucault, all these intersecting and overlapping shortcomings of classical or “conservative history” (Dixon, 1996, p. 79) result in history being used to validate and valorise the present - to make our current situation appear as an inevitable progression from a less enlightened past. Such histories, it is
claimed, aim “not to enlighten us about the past but to legitimise the present” (Rose, 1988, p. 181). Additionally, traditional histories are presented in a monolithic manner, thereby excluding multiple accounts of the past; to write a traditional history is to “create a particular interpretation and, more often than not, impose it by displacing or over-riding another” (Jose, 1998, p. 28). Foucault (1984) therefore believes that “the traditional devices for constructing a comprehensive view of history and for retracing the past…must be systematically dismantled” (p. 88).

In addition to his critique of traditional history, an analysis of Foucault’s works reveals a number of themes in relation to how genealogical inquiry might be approached. These are outlined below.

2.3.2 History of a Problem

In contrast to traditional history, genealogy or history of the present seeks to investigate a problem rather than a historical period (Kendall and Wickham, 1999, p. 22). In Discipline and Punish, for example, Foucault (1977) sought to explore how the prison had emerged as the dominant form of punishment, from the standpoint of the historical moment in which he was writing. Foucault (as cited in Kritzman, 1988) sees this as a feature of all his historical work, claiming, “I set out from a problem expressed in the terms current today and I try to work out its genealogy” (p. 262).

In keeping with Foucault’s suggestion that historical research address problems rather than periods, it has been recommended that researchers
attempting to emulate Foucault devise ‘how’ questions to guide their research. Dean (1999) argues that according priority to ‘how’ questions enables us to examine “how different locales are constituted as authoritative and powerful, how different agents are assembled with specific powers, and how different domains are constituted as governable and administrable” (p. 29). In this sense, posing ‘how’ questions is necessitated by Foucault’s unique conception of power (discussed later in this Chapter). In place of asking questions such as ‘who rules?’ as one might using a structuralist theoretical framework, for example, history from a Foucauldian perspective aims to examine how power operates through the “loose and changing assemblage of governmental techniques, practices and rationalities” (Dean, 1999, p. 29; see also Kendall & Wickham, 1999, p. 22).

Certainly, this is the approach that Foucault appeared to take in his own historical research. Consider for example, his reflection on Discipline and Punish (1977) and Madness and Civilization (1967):

In order to get a better understanding of what is punished and why, I wanted to ask the question: how does one punish? This was the same procedure as I had used when dealing with madness: rather than asking what, in a given period, is regarded as sanity or insanity, as mental illness or normal behaviour, I wanted to ask how these divisions are operated. It’s a method which seems to me to yield…a fairly fruitful kind of intelligibility [italics in original] (Foucault, 1981a, p. 4).
2.3.3 Eventalisation

In place of ‘totalising histories’ or ‘grand narratives’ of the past, Foucault (1981a) proposed what he termed “eventalisation” (p. 6). By this, he meant that historical inquiry should aim to rupture the self-evidence of its object of study. Foucault (1981a) explains:

It means making visible a singularity at places where there is a temptation to invoke a historical constant, an immediate anthropological trait, or an obviousness which imposes itself uniformly on all….A breach of self-evidence, of those self-evidences on which our knowledges, acquiescences and practices rest [italics in original] (p. 6).

Looking back on his own works, Foucault (1981a) argues that this was his aim in some of his most renowned works: “it wasn’t as a matter of course that mad people came to be regarded as mentally ill….it wasn’t self-evident that the causes of illnesses were to be sought through the individual examination of bodies” (p. 6). Elsewhere, Foucault (1996c) reveals that his aim in *Discipline and Punish* was likewise to breach the unproblematic nature of the practice of imprisonment: “[my aim was] to discover the system of thought, the form of rationality, which since the end of the 18th century has underlain the idea that the prison, in sum, is the best means…to punish infractions in a society” (p. 423). In doing so, Foucault (1977) also demonstrates how eventalising the birth of the prison disrupts progressivist notions that
incarceration emerged as a humanitarian response to the brutality of public torture.

2.3.4 Contingency and the ‘Historical Accident’

Instead of resorting to a teleological search for causes and functions, Foucault (1984) promotes histories of various phenomena that exist “not in order to trace the gradual curve of their evolution, but to isolate the different scenes where they engaged in different roles” (p. 76). Foucault is thus advocating the notion that “far from being teleologically governed, the historical processes that give rise to the emergence of events are in fact…governed by chance” (McNay, 1994, p. 89). Foucault (1981b) argues that historians should “accept the introduction of the aléa [chance] as a category in the production of events” (p. 69). The inclusion of the “dimension of chance” (Foucault, 1981b, p. 68) is, for Foucault (1981b), one of the “fundamental notions” (p. 68) required of critical historians. Using Foucault’s methods necessitates “recognising strangeness in all social arrangements” (Kendall & Wickham, 1999, p. 8), and the “generation of surprising stories” (Kendall & Wickham, 1999, p. 22).

One technique of highlighting the contingent nature of events that has been adopted by critical historians is the description of ‘historical accidents’. Genealogists often demonstrate how things that are assumed to be quite natural or inevitable have in fact resulted from a ‘chance’ event or ‘accident’ (see, for example, Pratt, 1992, pp. 12-13). The origin of particular practices is thus never simply ‘waiting to happen’; rather, historical events are contingent,
serendipitous or accidental: “nothing that has been in discursive or any other relations need have been so” (Cain, 1993, p. 91). Foucault is therefore promoting histories that focus on the contingent; that is, he argues that the birth of certain practices is never necessary, but always merely “one possible result of a whole series of complex relations” (Kendall & Wickham, 1999, p. 5).

2.3.5 (Dis)continuities

Although Foucault spoke out vehemently against the attribution of continuity to disparate historical events, the belief that he was concerned only with demonstrating history’s discontinuities is largely inaccurate. In one interview, the view of Foucault as a ‘thinker of discontinuity’ is derided by the questioner as a “misguided portrayal” (see Foucault, 1981a, p. 8). Although Foucault may have frequently been subjected to this ‘misguided’ representation, it is not continuity per se, but the assumption of continuity that he decries. As R. Smith (1988) puts it, Foucault “is happy for research to determine continuity and discontinuity; what he vehemently rejects is the presumption of the continuous subject” (p. 158).

Nonetheless, Foucault’s work often focused heavily on what he saw as discontinuities. Indeed, in his early work, Foucault (1972a) advocated transforming discontinuity from “the obstacle to the work itself” (p. 9). In other words, rather than having to be reduced or manipulated to form a linear

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20 See also Dilger (1999) for a critique of Foucault’s “unwanted and problematic” (p. 1) label as a philosopher of discontinuity.
progression, discontinuities should be focused upon and explored. Describing the impetus of *Discipline and Punish*, Foucault (1981a) states:

> All the early nineteenth century texts and discussions testify to the astonishment of finding the prison being used as a general means of punishment – something which had not at all been what the eighteenth century reformers had had in mind….I took this discontinuity…as my starting-point and tried…to account for it (p. 5) (see also Foucault, 1996c, p. 427).

Similarly, Foucault (1978a) highlighted the discontinuity of methods of policing children’s sexuality in *The History of Sexuality*. Reflecting on this text, Foucault (1980) claims that the forms of controlling children’s sexuality which he describes “could in no way have been predicted” (p. 100), and that “such a system can perfectly well tolerate opposite practices” (p. 101).

### 2.3.6 Never-Ending Stories

Foucault argued that history never stops (Kendall and Wickham, 1999, p. 4); that is, the present is not the ‘end’ of history, but part of an ongoing series. For this reason, a genealogy must emphasise the position of its subject as being the current chapter in a series – almost as though it were merely today’s episode in a soap opera.

More significantly here, perhaps, is the importance of genealogists being aware of their own contribution to this unending history. That is, if a
genealogy adheres to its own rules, it must acknowledge that it, like the history it aims to critique, does not represent the final word on the matter either. As such, this thesis seeks at all times to be aware of its own role in contributing to historical accounts of ‘restorative justice’ – its own role in ‘rewriting history’.

2.3.7 Perspectivity and Subjectivity

In the place of the false objectivity professed by conventional historians, history of the present highlights the perspectivity of knowledge. That is, as well as declaring that traditional histories are inherently subjective and thus always present a biased reading of history, the genealogist must themselves recognise that their own work is merely another interpretation of the past, and is therefore both subjective, and in accord with a particular viewpoint. As Bailey (1993) claims, genealogy acts “to blur the boundary between ‘fact’ and ‘fiction’ by acknowledging its own interests [and] recognising the subjective process of its emphases” (p. 105).

Furthermore, Sawicki (as cited in Cain, 1993) points out that the genealogist is never removed from, or outside of, their work: “as an engaged critic the genealogist does not transcend power relations” (p. 92). In fact, it is not the aim of the genealogist to present to the reader the ‘truth’ of the past; rather, genealogy aims to explore how it is that some ‘truths’ and knowledges have come to be accepted as unproblematic (Bailey, 1993, p. 120). As Nikolas Rose (1996a) puts it, “genealogy seeks not to reveal falsity but to describe the constitution of truths” (p. 80).
2.3.8 Heterogeneity of Practices

Another aspect of the past that Foucault encourages us to emphasise is the heterogeneity or disparity of practices. He instructs the genealogist to “render apparent the polymorphous cluster of correlations” (1978b, p. 13) underpinning one’s object of inquiry. Rather than tying historical events to a solitary, over-riding ‘cause’, Foucault (1981a) champions the notion of “causal multiplication” (p. 6); that is, “analysing an event according to the multiple processes which constitute it” (p. 6). In other words, “what emerges or comes-to-be does so because of a compilation of disparate factors” (Prado, 1995, p. 37). The aim of genealogical research is therefore to describe the “‘polyhedron’ of intelligibility” (Foucault, 1981a, p. 6) of its object of study; that is, to articulate the “multiple elements, relations and domains of reference that incompletely make this event intelligible” (Dean, 1998, p. 188).

2.3.9 Power

Finally, it is Foucault’s unique conception of power that distinguishes the genealogical approach both from other theoretical perspectives, and from Foucault’s other main method of historical inquiry21. Foucault wrote about

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21 There has been much debate about the relationship between Foucault’s concepts of archaeology and genealogy (see, for example, Scheurich & Bell McKenzie, 2005). Some authors view archaeology as Foucault’s method (analysing documents in the archive) and genealogy as a series of methodological prescriptions that guide the writing of history using the results of archaeology (Dean, 1994, p. 33; Kendall & Wickham, 1999, p. 31). Others argue that the two concepts represent quite separate approaches to the writing of history (Bevir, 1999, p. 347). Interestingly, Foucault (1980) seems to support both of these ideas at different times. He did say, for example, “if we were to characterise it in two terms, then ‘archaeology’ would be the appropriate methodology of this analysis of local discursivities, and ‘genealogy’ would be the tactics whereby, on the basis of the descriptions of these local discursivities, the subjugated knowledges which were thus released would be brought into play” (p. 85). Here, Foucault’s words are compatible with Dean’s (1994) interpretation, which suggests that “the roles of genealogy and archaeology appear complementary, the latter performing analyses that are a necessary condition of the former” (p. 33). Elsewhere,
power at length; consequently, his writings reveal a number of methodological prescriptions pertaining to the analysis of power in the writing of genealogy.

Although Foucault “offers no definition of ‘power’” (Flynn, 1994, p. 34) as such, we can ascertain from his works that he did not conceive of power as a monolithic entity; for Foucault, power does not exist as a unitary ‘thing’ – it has no essence (Sheridan, 1980, p. 218). In a dramatic shift from the structuralist theories – for example, those of Marxists and structuralist feminists who conceptualise power as something inherently repressive, which is held and exercised by the ruling class and men respectively – Foucault (1980) argues that power cannot be possessed by any individual or group:

Power is not to be taken to be a phenomenon of one individual’s consolidated and homogeneous domination over others, or that of one group or class over others. What, by contrast, should always be kept in mind is that power, if we do not take too distant a view of it, is not that which makes the difference between those who exclusively possess and retain

however, Foucault acknowledged that his shift from archaeology to genealogy required a new focus on the role of power: “Foucault conceded, in retrospect, that the weak point of the archaeological method was its failure to incorporate a theory of power into the analysis of discourse” (McNay, 1994, p. 85) (see also Fairclough, 1992, p. 39; Kendall & Wickham, 1999, p. 34). This thesis will take the view accepted by most scholars - that Foucault’s shift from archaeology to genealogy was a shift of emphasis to incorporate an increased focus on power relations, rather than a complete change of methodology (Dean 1994, p. 32; Fairclough 1992, pp. 38-39; Prado 1995, p. 30). As Kendall and Wickham (1999) neatly summarise, “genealogy maintains many of the essential ingredients of archaeology….However, Foucault added to it a new concern with the analysis of power” (p. 29).
it, and those who do not have it and submit to it. Power must be analysed as something which circulates....It is never localised here or there, never in anybody’s hands, never appropriated as a commodity or piece of wealth (p. 98).

According to the Foucauldian perspective, therefore, power is circulating rather than static. In this sense, power is constantly being exercised by everyday citizens in unremarkable situations; it does not exist externally to society. In Foucault’s (1982) terms, “power relations are rooted deep in the social nexus, not reconstituted ‘above’ society as a supplementary structure whose radical effacement one could perhaps dream of” (p. 222). Although we might normally consider some groups of people – such as children or prisoners – to be powerless, using a Foucauldian perspective of power we can see that few members of such groups do not find some way of exercising power – perhaps mostly on each other (Sheridan, 1980, p. 218). Kendall and Wickham (1999) therefore suggest that in developing a genealogy, “we should think of power not as an attribute (and ask ‘What is it?’), but as an exercise (and ask ‘How does it work?’)” (p. 50).

Foucault’s conception of power also holds that it is not inherently negative; that is, it does not work only to repress people. The first of four general rules for his study of prisons in *Discipline and Punish*, is “do not concentrate the study of the punitive mechanisms on their ‘repressive’ effects alone, on their ‘punishment’ aspects alone, but situate them in a whole series of their possible positive effects, even if these seem marginal at first sight” (Foucault,
According to Foucault, therefore, power is not only repressive, but is actually productive: “power produces resistance to itself; it produces what we are and what we can do; and it produces how we see ourselves and the world” (Danaher, Schirato, & Webb, 2000, p. xiv). The idea that power produces resistance to itself is crucial to an understanding of power in the Foucauldian sense. For Foucault, power and resistance exist as an inseparable pair. Foucault (1978a) states, for example, that “where there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power” (p. 95). Foucault (1978a) goes on to assert that this resistance to power is not always passive in nature, not always merely “a reaction or rebound, forming with respect to the basic domination an underside that is in the end always passive, doomed to perpetual defeat” (p. 96); rather, there exists a multiplicity of potential forms of resistance.

According to Foucault, therefore, we should consider power as a much more subtle phenomenon than it is often thought to be, particularly by those who adopt structuralist frameworks. That is, Foucault argues that power is exercised in many understated and often freely adopted ways, through a variety of social practices (McNay, 1994, p. 2). As will be demonstrated throughout this thesis, individuals often willingly adopt varying subjectivities through which they govern or are governed. In this sense, power is seen by Foucault as having what we might call a non-conspirational nature. That is, there is not necessarily a conspirational or sinister motive behind the exercise of power. Rather, the effects of power are often the result of
unintended and routine actions or activities. For Foucault (1980), therefore, “analysis should not concern itself with power at the level of conscious intention or decision” (p. 97).

Finally, Foucault’s conception of power implies a ‘bottom up’ rather than ‘top down’ analysis. Foucault (1980) claims:

The important thing is not to attempt some kind of deduction of power starting from its centre and aimed at the discovery of the extent to which it permeates into the base, of the degree to which it reproduces itself down to and including the most molecular elements of society. One must rather conduct an ascending analysis of power, starting, that is, from its infinitesimal mechanisms, which each have their own history, their own trajectory, their own techniques and tactics, and then see how these mechanisms of power have been - and continue to be - invested [italics in original] (p. 99).

Again, therefore, the emphasis of genealogical research is to be on the everyday, mundane exercise of power rather than the grand, all-encompassing model. Foucault (as cited in Fairclough, 1992, p. 50) gives the example of power developing ‘from below’ in ‘microtechniques’ such as examination in the medical or educational sense; these processes emerged in schools, hospitals and prisons, rather than being inflicted from above.
Most importantly in the context of this thesis is the relationship between power, knowledge and discourse. This thesis aims to demonstrate, in a limited way, how power operates via credibility bestowed upon some discourses in the ‘restorative justice’ sphere. These discourses are positioned as ‘knowledge’ or ‘truth’ - they thus represent or embody the operation of relations of power.

2.4 From Methodology to Method: Applying Foucault’s Thought

How, then, is one to apply Foucault’s broad ranging and often highly philosophical thoughts about writing history to a piece of research such as this? As Prior (1997, p. 77) notes, it is not always easy to convert Foucault’s thinking into a series of maxims that can be followed by researchers. A number of factors make this a challenging task. Firstly, Foucault’s approach to history is highly idiosyncratic; Struver (1985, p. 254) goes so far as to suggest that his approach is so individualistic that it is impossible to imitate. Secondly, the high level of interest in Foucault’s work while he was alive resulted in a substantial body of interviews, prefaces, postscripts and commentaries in which Foucault reflected on his own approach. Quite frustratingly, this secondary body of literature reveals Foucault as a scholar whose methods were never stable (Dean, 1998, p. 183). Indeed, Dean (1998, pp. 183-184) suggests that if Foucault’s name were to be removed from his books, we would never have guessed that a sole author had produced them all. Foucault’s (1972a) *The Archaeology of Knowledge*, in which he attempts to articulate the method he utilised in his earlier works,
reveals that in hindsight, he was dissatisfied with these texts, calling them “a very imperfect sketch” (p. 15) of his enterprise, and admitting that they “were carried out, to some extent, in the dark” (p. 16). Not only was Foucault (1972a) attempting to recount his method retrospectively, using “results already obtained to define a method of analysis” (p. 16), but for some, was unsuccessful in attaining this goal. Struever (1985), for example, argues that Foucault’s techniques “resist description even by his own [The Archaeology of Knowledge]” (p. 254).

Finally, a number of critics have argued that even Foucault himself was unable to strictly adhere to his own method. As B. Hudson (2003a, pp. 148-149) demonstrates, Foucault has often been criticised for unintentionally producing the type of history he denounces, by inadvertently lapsing into functionalist and progressive accounts of history. B. Hudson (2003a) agrees with Foucault that histories that portray the birth of the prison as ‘humanitarian’ are falsely progressive. According to B. Hudson (2003a), however, Foucault’s own account of the emergence of the prison is also ‘progressive’ and uses terms that “carry an evaluative charge, such as ‘better’, ‘more sophisticated’, ‘penetrating deeper’. He thus produces a mirror image of the histories which he refutes” (p. 149). Moreover, Foucault (1972a) himself acknowledges a number of instances in his early works in which he was unable to adhere to his philosophy of history in carrying out research. He admits “it is mortifying that I was unable to avoid these dangers” (p. 16).
An important consideration in regards to translating Foucault's methodology into a manageable and applicable method is therefore the work of others in criminology and related social science disciplines that have used this approach. After all, this research aims to situate itself amongst this body of work. Somewhat disappointingly, however, this literature offers little in the way of explicit articulation of the application of Foucault's methodology. Pratt's (1992) genealogy of the New Zealand penal system, for example, merely acknowledges that it "could not have been undertaken without the intellectual opening that Foucault established" (p. 10). There is, however, no discussion of what this might entail, or how Pratt (1992) actually conducted his research. Even Hacking's (1981) article "How Should We Do the History of Statistics?", described by Kendall and Wickham (1999) as one of the two "most instructive" (p. 152) guides to using Foucault's methods, has little to say on the matter.

The other text nominated by Kendall and Wickham (1999) in this regard is Rose's (1985) work on the history of psychology. Significantly, however, Kendall and Wickham (1999) concede in regards to Rose's (1985) text that "the methodology of this book is not really foregrounded. However, it is an excellent example of how Foucault's methods can be put to use [italics added]" (p. 152). What seems to be transpiring here is that authors who utilise Foucault's methods simply attempt to replicate Foucault's and others' genealogies, rather than explicating and justifying their own use of this framework. Garland's (1994) work on the history of criminology is an effective case in point. In this piece of work, Garland (1994, pp. 24-25) claims that he
has relied on the methodological guidelines set out by a number of authors in the history of human sciences field; namely, Rose (1988), Danziger (1990), Hacking (1990) and R. Smith (1988). An inspection of these authors’ works, however, reveals that they too have spent little time detailing their methodology. While Hacking’s (1990) debt to Foucault is clear, for example, it is never made explicit. In fact, Hacking (1990) circumvents the problem of methodology entirely by simply declaring that “accounts of methodology have been given elsewhere” (p. 9). Similarly, Danziger’s (1990) history of psychological research bears some of the markings of genealogy, but stops short of outlining a methodological framework in any detail. More significantly, R. Smith’s (1988) commentary on the history of psychology, which addresses the Foucauldian framework in greater depth, ultimately argues that “successful and intelligible history-writing…should avoid Foucault’s strictures” (p. 165). Garland (1994) must therefore have been drawing on the examples set by these authors, rather than any detailed discussions of their application of Foucault’s methodology to their own research.

What we have in this body of research, therefore, is a type of ‘do as I do, not as I say’ approach. The tendency to subtly imitate others’ interpretations of the genealogical perspective, rather than methodically detailing the approach oneself, is, of course, acceptable for this cohort of well known and widely regarded researchers. It is satisfactory for authors such as Garland and

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22 In Garland’s (2001) defence, he does list a small number of methodological principles which, although they do not relate specifically to the creation of a genealogy, make, as he claims “methodological good sense” (p. 22). These cautionary guidelines include the need to distinguish short-term movements from profound structural change, and to recognise the
Pratt to evade the complex issues that arise from the application of an intricate methodology to a specific research project, on the grounds that they are already widely respected for producing high quality research. Where, however, does this leave researchers for whom this is not the case – lesser mortals who must demonstrate an intimate understanding of these issues? The following section attempts to overcome this stumbling block by addressing the notion of the ‘archive’, which, it will be argued, can assist in bridging the divide between methodology and method.

2.5 The Archive

A nightmare has haunted me since my childhood: I am looking at a text that I can’t read, or only a tiny part of it decipherable. I pretend to read it, aware that I’m inventing; then suddenly the text is completely scrambled, I can no longer read anything or even invent it, my throat tightens and I wake up (Foucault, 1998, p. 290).

The concept of the archive is central to Foucault's historical method; essentially, his technique of generating material from which to construct an alternative history involves “investigating the archives of discourse” (Kendall and Wickham, 1999, p. 25). For Foucault, however, the notion of the archive differs substantially from its traditional meaning. That is, rather than conceptualising the archive as “the site for the accumulation of records”

difference between ‘talk’ and ‘action’, and ‘means’ and ‘ends’, for example. Garland’s (2001) remarks here make good sense for the writing of a history of the present, and as such will be borne in mind throughout this thesis.
(Featherstone, 2000, p. 161), Foucault extended the concept, using it to refer to “the totality of discursive practice, that falls within the domain of the research project” (Fairclough, 1992, p. 227). His concept of the archive as “the accumulated existence of discourses” (Foucault, 1998, p. 289) transforms it from an empirical to an abstract notion, with a “virtual existence” (Featherstone, 2000, p. 169; see also Osborne, 1999, p. 53). Once again, therefore, we can see that Foucault’s approach to constructing a history of the present involves highly idiosyncratic methods, which may be difficult for others to apply to their own research.

Authors who utilise Foucault’s historical methodology, however, have tended to apply the notion of the archive in its empirical sense, describing the types of documents that they have drawn upon in the development of alternative histories. In fact, as Jupp (1989) points out, Foucault’s own work was “largely restricted to the analysis of texts” (p. 128) itself (see also Featherstone, 2000, p. 169). Furthermore, Foucault (1984) himself describes genealogy as “patiently documentary. It operates on a field of entangled and confused parchments, on documents that have been scratched over and recopied many times” (p. 76).

Researchers utilising the Foucauldian approach to historical research can therefore fairly straightforwardly accept that such a framework involves the “vast accumulation” (Foucault, 1984, p. 76) and rigorous analysis of...

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23 Foucault (1996d, p. 149) also addresses the issue of his archival technique in “From Torture To Cellblock”, where his interviewer asks whether he has a ‘method’. Here, Foucault stresses the importance of not searching for hidden meanings in texts, rather than providing a discernable answer. Importantly, however, he appears to put forward a notion of the archive that is compatible with the empirical sense in which others have often applied it.
documentary sources relating to their object of study. Although research involving documentary analysis is often considered to be ‘unobtrusive’ (Kellehear, 1993, p. 51; R. Lee, 2000), however, like all other methods of social inquiry, it cannot be approached unproblematically. A difficulty arises, for example, when one considers which of these texts they will analyse. Castel (1994) sets out the issue well:

[An alternative history] is at least partly constructed using historical data or materials. Therefore it leads to the ‘choice’ of significant elements from a past time. But obviously it does not reconstruct the totality of an epoch with all its institutions, its plurality of individuals and groups, its innumerable problems. How is it possible to avoid making an arbitrary or careless selection (p. 239)?

For Featherstone (2000), the problem therefore becomes “not what to put into the archive, but what one dare leave out” (p. 161). Garland (1994) also acknowledges this problem, calling history writing a “contentious undertaking” (p. 17) which involves the selection and use of historical data. Even Foucault (1972a, p. 11) acknowledges this dilemma, listing it as one problem of the type of history writing he advocates. Here, he refers to the “establishment of a principle of choice” (p. 10) in the selection of archival material, suggesting that this will depend on whether one can look at all the relevant material, or will need to adopt a sampling method to limit the relevant sources. He does not, however, give any indication of how he, or others, might go about this.
Nonetheless, it is, as Silverman (2000, pp. 828-829) points out, necessary to limit the quantity of source material that will be analysed in a research project; “it is hardly ever appropriate or possible to consult all surviving documents of relevance” (Scott, 1990, p. 27). This is especially the case where research projects utilising poststructuralist frameworks are concerned, as they require the “relentless erudition” (Foucault, 1984, p. 77) and detailed analysis of texts (Fairclough, 1992, p. 230; Prado, 1995, p. 40; Silverman, 2000, pp. 828-829).

Unfortunately, Foucault offered little direction or even example on this issue, with his own work demonstrating “the absence of detailed notes and bibliographies, accumulated and acknowledged references” (see Foucault, 1996b, p. 19; see also Foucault, 1998, p. 279). In any case, as Macdonald and Tipton (1993, p. 188) and Milner (1999, p. 99) point out, any archive is necessarily fragmentary, since documents pass through a process of sortition, whereby some are kept and others are not. Additionally, Milner (1999) argues that both the archive itself, and the historian, are partial: “both the archive as documentary corpus and the historian as phenomenal corpus are capable of manipulation and subject to the coercion of academic

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24 With the exception, perhaps, of the edited text *I, Pierre Riviere, having slaughtered my mother, my sister and my brother...*, which Jupp (1989) posits as a good example of Foucault’s approach to using documents. Certainly, this text is, as Jupp (1989) argues, an effective example of the “need to treat documents as objects of inquiry” (p. 71); in it, Foucault (1975, p. xii) discusses both the types of documents used and the method of retrieving them. This text, however, avoids the issue of choosing which documents to analyse by simply using them all. In this work, Foucault (1975, p. xii) concedes that his topic – the case of Pierre Riviere’s 1835 act of parricide – is one that was not considered noteworthy at the time, and as such, there remains only a small quantity of textual sources relating to it. Foucault (1975, p. xii) and the other contributors to *I, Pierre Riviere...*, are thus able to consider the relevant documentary sources in their entirety.
disciplines” (p. 99). Even individual documents themselves may be considered partial; May (2001) considers documents interesting “for what they leave out, as well as what they contain” (p. 183). As Foucault (1972a) acknowledges, therefore, it is “obvious that the archive of a society, culture, or a civilization cannot be described exhaustively” (p. 146).

How, then, does one address this issue of selecting a sample of archival documents, which is inherently a consideration in any research project of this nature? Frustratingly, very little appears to have been said on this issue. Both Braithwaite (2003b, p. 7) and Castel (1994, pp. 239-240,242) argue the need for Foucauldian scholars to make transparent their methods of archival selectivity, but neither offers a potential solution to this predicament. Additionally, the research literature on documentary analysis offers few clues, perhaps because the analysis of texts is often overlooked as a research method (Scott, 1990, p. 1), or because it is considered to be a complementary, rather than a primary, research technique (May, 2001, p. 175).

The problem here, then, is how to sample the existing archival material given the theoretical framework of a genealogy. The sampling of documents is not in itself a major dilemma; if one were conducting research using documents from a positivist perspective, for example, one would simply undertake a random sampling of the available material. Such a sampling method would be satisfactory if the researcher was taking documents at face value; that is, as reflections of objective meaning, or unambiguous manifestations of ‘truth’
(Jupp and Norris, 1993, pp. 40-41). The Foucauldian perspective maintains, however, that the contents of documents cannot be regarded as impartial ‘truths’; “the document is not the fortunate tool of a history that is primarily and fundamentally memory [italics in original]” (Foucault, 1972a, p. 7). Rather, for Foucault, the question to be asked is how certain perspectives come to be regarded as dominant or truthful. For Foucault, “the most important philosophical projects have to do with understanding how and why we hold some things true, how and why we deem some things knowledge, and how and why we consider some procedures rational and others not” (Prado, 1995, p. 10). Attempts to sample texts in a representative manner are thus not in adherence with the genealogical perspective. As discussed previously, genealogists must always strive to acknowledge their own perspectivity; as such, they are not bound to the pretence of ‘objectivity’ in the way that Foucault suggests traditional historians are. Additionally, as genealogical research emphasises knowledges which are marginal, repressed or illegitimate, it may well be those documentary sources that are unrepresentative which prove most useful in research of this nature.

What is required therefore, is a corpus of source material that is compatible with the genealogical perspective, a “theoretically…meaningful selection of documents” (Scott, 1990, p. 27). As Scott (1990, p. 24) concedes, good research is possible with an unrepresentative sample of documents, insofar as the researcher recognises that this is the case.
2.5.1 Selection of Archival Material

Many techniques were employed throughout this research to guide and limit the selection of documents from the archive. Following Fairclough (1992, p. 230), I aimed to ground this process in a thorough knowledge of the literature on ‘restorative justice’. I read widely on the topic, and confirmed the centrality of my reading materials against bibliographies such as Bouhours and Daly’s (2004) as they appeared. I further sought to incorporate what are considered key texts in the field. As well as being directed by the literature on this topic, I made decisions in this regard based on informal and formal discussions with people involved in the ‘restorative justice’ field or criminology more broadly, including those that I interviewed for the research, reviewers and colleagues. In this way, I focused on including sources that are considered significant or authoritative in the field. There were also arbitrary and serendipitous decisions made in relation to the selection of archival material. I had access to some documents, for example, via existing contacts in the area. Often, reading or researching for purposes unrelated to the research – such as preparing teaching materials or even simply reading the newspaper – would bring a particular source to my attention. Eventually, once potential ‘conditions of existence’ began to appear, I conducted a broad search – via the internet, electronic databases, journals, books and libraries – for sources that might illuminate particular silenced discourses.

I also developed a number of criteria which were designed to help guide the selection of archival documents further, given the abundance of material on ‘restorative justice’ that exists in the public domain. In keeping with a
Foucauldian approach, I therefore proposed the following three allied criteria as guidelines to assist in this task:

2.5.2 Resistance to Power: ‘Cruces’ and ‘Moments of Crisis’

In line with his thoughts about the nature of power, Foucault (1982) suggests taking as a “starting point” (p. 211) sites of resistance to power: “[this approach] consists of using this resistance as a chemical catalyst so as to bring to light the power relations, locate their position, find out their point of application and the methods used” (p. 211). This technique is supported by Hazleden (2003), whose Foucauldian analysis of ‘self help’ texts argues that since Foucault “sees resistance as such an integral part of power…he proposes in methodological terms that, in order to locate where power is at work, we should try to find resistance” (p. 426, note 4). This approach is also consistent with Fairclough’s (1992) advice on the issue of archival selectivity. Fairclough (1992) suggests the following:

One selection strategy which has much to recommend it is to focus on...‘cruces’ and ‘moments of crisis’. These are moments in the discourse where there is evidence that things are going wrong...exceptional disfluences (hesitations, repetitions) in the production of a text, silences; sudden shifts of style (p. 230).

Fairclough’s (1992) ‘moments of crisis’ are important to consider in a genealogical research project as they “make visible aspects of practices which might normally be naturalized, and therefore difficult to notice” (p. 230).
In other words, this technique prompts the genealogist to consider the marginal, silenced or ‘invisible’ elements of their topic of study.

2.5.3 (Un)ordinary Talk: Authoritative and Marginalised Elements of Discourse

The following quote from Prado (1995) admirably sets out Foucault’s main purpose in developing alternative accounts of history: “Foucault is everywhere concerned with exhuming the hidden, the obscure, the marginal, the accidental, the forgotten, the overlooked, the covered-up, the displaced. His subjects for investigation are whatever is taken as most natural, obvious, evident, undeniable, manifest, prominent, and indisputable” (p. 26). Prado’s (1995) words reveal Foucault’s ubiquitous twin foci of the authoritative and the ‘invisible’. Here, I mean ‘invisible’ in two ways: firstly, as that which is simply not present in discourse, and secondly, as that which is so taken-for-granted that its existence in discourse is rendered utterly unproblematic: “the sort of thing that nobody even asks about” (Hacking, 1995, p. 95). As discussed above, Foucault’s main concern is with understanding how and why some knowledges come to be accepted as ‘truth’; he asks, what ways of thinking enable particular phenomena to emerge? In this sense, it is with the ‘truth’ — that is, those aspects of one’s object of study that are authoritative, taken-for-granted and ‘invisible’ — that a genealogist must begin. As Prado (1995) argues, “Foucault is not concerned with ordinary talk; he is concerned with expert or learned talk, with the idioms of science, of the academy, of authority” (p. 36). It is feasible to suggest, therefore, that a genealogy of ‘restorative justice’ might take as its starting point precisely that which is
taken to be unproblematic, natural and seemingly indisputable about this field.

This proposition is compatible with the claim that genealogy is intrinsically reliant upon already existing, traditional histories. As Prado (1995) asserts, history of the present “needs the historians’ grand narratives, because without them it would have no counterpoint. Without those epics claiming to depict underlying continuities, genealogy would have no marginal and neglected items to notice and use in building alternative accounts” (p. 40). In this sense, the genealogist does not use an entirely separate corpus of documents to the conventional historian; instead, it is in the use of these texts that the two approaches vary. Foucault (1972a) acknowledges this when he contrasts conventional history with his new approach:

The document...is no longer for history an inert material through which it tries to reconstitute what men have done or said, the events of which only the trace remains; history is now trying to define within the documentary material itself unities, totalities, series, relations (p. 7) (see also Jupp & Norris, 1993, p. 46).

In addition to subjecting the existing body of documents to a new and different analysis, writing a genealogy involves “the retrieval and presentation of previously ignored but provocative historical documents” (Scheurich, 1997, p. 98). Both the Introduction and References List of this thesis demonstrate
the utilisation of the revered historical texts of ‘restorative justice’, as well as many others that one might not have expected to find in a history of this topic. This technique of beginning with the ‘authoritative’ appears to have guided a number of other writers in the Foucauldian tradition. Hacking (1995), for example, limits himself “scrupulously…to matters of public record” (p. 7). Elsewhere, Hacking (1990) states that he draws only on printed and published material, rather than personal documents or other ephemera “for I am concerned with the public life of concepts and the ways in which they gain authority” (p. 7).

This suggested technique for restricting the source material analysed also fits with Osborne’s (1999) laudable treatment of Foucault’s concept of the archive. Osborne (1999) champions a notion of archive that rests somewhere between Foucault’s abstract notion and the traditional historian’s empirical notion:

Somewhere between such a virtual, functional notion of the archive and the more actualist notions, we might see the archive as a principle of credibility. Obviously there are real places called archives…just as alternatively one can think of the archive, in the manner of the early Foucault, in a very abstract way. But to think of the archive as a principle of credibility is to situate oneself more pragmatically somewhere between these two extremes of literalism and abstraction [italics in original] (p. 53).
Here, Osborne (1999) supports the idea outlined above; that is, that texts which appear as authoritative or credible be taken as a starting point for historical research of the Foucauldian tradition.

2.5.4 Primary and Prescriptive Documents

Lastly, it makes sense to focus on primary over secondary documents, and prescriptive over descriptive documents, given genealogy’s concern with explaining the emergence of phenomena. Jupp (1989) differentiates primary and secondary criminological data as follows: “primary data are those observations collected at first hand for the specific purpose of addressing the criminological issue in question….Secondary data are those observations collected by other people or other agencies with other purposes in mind” (p. 33). In a more general sense, Tuchman (1994) suggests that we consider primary sources as “the historical data (documents or practices) of the period one is trying to explain” (p. 318) and secondary data as “books and articles written by historians and social scientists” (p. 318) about a particular topic.

Similarly, we might distinguish prescriptive texts – those that precipitate, enable or ‘come before’ an emergence, such as agency plans, policy documents, legislation, parliamentary debates, and governmental papers – from descriptive texts, – those that follow, record, reflect on or ‘come after’ an emergence, such as evaluations and media reports. Of course, in the ‘restorative justice’ arena, prescriptive documents seem to be far more
scarce than evaluation reports, given the administrative demands placed on such programs, and the importance of determining programs’ ‘success’.

Additionally, it is important to recognise that demarcations such as those between primary and secondary, and prescriptive and descriptive texts are, “like all attempts to draw a line...more easily stated than accomplished” (Tuchman, 1994, p. 318). This is particularly so in the complex ‘restorative justice’ field, in which not only is there a seemingly inexhaustible supply of source matter – ranging from legislation and United Nations policy to media reports and promotional material – but also a vast body of academic literature which is intimately linked with its emergence and development. Often, it appears that any distinction made between this literature on ‘restorative justice’ and documents from the ‘restorative justice’ archive would be an arbitrary one. To complicate matters further, a number of theorists in the ‘restorative justice’ field are also leading practitioners of ‘restorative practices’ such as ‘victim offender mediation’ and ‘family group conferencing’. Excluding the academic literature on ‘restorative justice’ entirely might therefore operate to privilege it as though it were somehow ‘objective’ or external to discourse. For this reason, the academic literature on ‘restorative justice’ will be treated as part the archive of ‘restorative justice’.

These criteria, in addition to the range of techniques listed above, informed the selection of archival documents undertaken as part of this research. These guidelines were not strictly adhered to as ‘rules’, but loosely guided decisions regarding which documents to privilege over others. As a result, a
wide range of documents – including legislation, position papers, government consultation documents, court decisions, parliamentary debates, training manuals, and statements on policy or ‘restorative justice’ principles by a range of local, international and supranational agencies, in addition to a large body of academic literature and evaluation data – were used in this thesis.

2.5.5 Analysing Documents in the Archive

In keeping with this approach, and the framework used to analyse interview data (discussed later in this Chapter), documents in the archive were considered in terms of both what they did and did not say. Of archival data, I asked the following questions:

1. What is taken-for-granted, left unsaid or assumed?
2. What terms are left undefined, but used as though they have a fixed and universally accepted meaning?
3. What grand narratives or ‘truth’ claims are relied upon?

I thus searched for the invisible; that is, what is so taken-for-granted that it does not need to be articulated, and what is so marginalised or silenced that it is almost absent from the archive? Chapter Three considers discourses that are ‘invisible’ in the first sense, while Chapter Four examines discourses that are ‘invisible’ in the second. This technique enabled me to begin to construct a history of discourse of ‘restorative justice’ which stands in stark contrast to functionalist historical accounts such as Weitekamp’s (1999). As the following Chapters demonstrate, searching for the assumptions on which
rationalities of ‘restorative justice’ rely allowed this research to describe a series of ‘game openings’ in relation to the ‘restorative justice’ project, rather than posit a fixed and monolithic history.

2.6 Interviews

In addition to the rigorous analysis of documents, this research involved conducting a small number of interviews with key actors in the ‘restorative justice’ field. Given the above discussion of the difficulties and dangers of ‘sampling’ this seemingly boundless topic area, the inclusion of a further data gathering method may appear incongruous. The rationale for conducting interviews was, however, to illuminate silenced discourses in the ‘restorative justice’ field identified by the analysis of documentary sources. As such, the purpose of the interviews was not to add still more texts to the plethora of existing sources on ‘restorative justice’, but to produce useful data on the silenced discourses identified by my genealogical analysis. This follows Fairclough (1992), who argues that interviews are a commonly used way of “enhancing a corpus” (p. 227), or adding another dimension to documentary analyses. In this sense, the interviews conducted as part of this research are to be considered as a secondary methodology producing “supplementary data” (Fairclough, 1992, p. 227).

The use of interviews is uncommon in research situated within a genealogical framework. Certainly, they were not used by Foucault in his own histories of the present. Nonetheless, a number of studies using this theoretical framework have recently been undertaken which included interviews as a
complementary method (Hannah-Moffat, 2001; Johnson, 2000; Pavlich, 1996; Walters, 2003). One potential explanation for this is that while Foucault’s (1977; 1978a) works focused on phenomena with centuries-long histories, these genealogies have considered much more recent cultural phenomena (reform in women’s prisons, crime statistics, ‘community mediation’, and critical criminology respectively). This focus on more recent history gives researchers the opportunity to draw on the key players in the emergence of the phenomenon they are studying, as many of these are still alive and active in the fields of inquiry in question. Following these authors, interviews were used as part of this study in order to capitalise on the knowledge that key actors in the ‘restorative justice’ field have on this recent phenomenon. This genealogy, like those by Hannah-Moffat (2001), Johnson (2000), Pavlich (1996) and Walters (2003), does not aim to be a traditional, ‘purist’ Foucauldian genealogy, but to use this framework in order to contribute to the broader critical conversation about ‘restorative justice’.

2.6.1 Selection of Participants

Participants were therefore selected because of their perceived ability to add depth to knowledge of specific, silenced discourses identified in my genealogical analysis as significant in the emergence of ‘restorative justice’. That is, interviewees were chosen “on the basis of their expertise in areas relevant to the research” (C. Marshall & Rossman, 1999, p. 113). All participants were key players in the ‘restorative justice’ area – that is, they had played key roles in establishing, developing and/or administering ‘restorative justice’ programs and practices. Participants held, or had
previously held, key positions within the ‘restorative justice’ arena, in both government departments and private or community organisations. Often, these figures had held positions across all these sectors. At least one participant was chosen from each of the main English-speaking localities in which ‘restorative justice’ has had an impact – Australia, Canada, New Zealand, the United Kingdom and the United States of America. The sample consisted of 7 men and 2 women.25

Interviews were conducted over a twenty-two-month period from March 2004 to December 2005 as the research progressed. Interviews thus took place at differing stages of the research process. The implications of this will be discussed in more detail below. A total of 10 interviews were conducted in total. One of the participants was interviewed twice - once early in the research process, and again towards the ‘completion’ of the study. This was considered necessary because the research had yielded insights following the first interview that it was thought this participant could shed light on as the research progressed. This respondent had indicated at the time of the first interview that he would be willing to speak with me again at a later date. The remaining participants, however, were interviewed once only. The average length of the interviews was slightly longer than one hour.

2.6.2 Type of Interview

Interviews were ‘semi-structured’ or ‘guided’ interviews; that is, they followed a flexible series of questions based on a pre-designed interview schedule

25 See Appendix A for a full list of persons interviewed.
This interview format is considered highly suitable when studying elite cohorts: “elites respond well to inquiries about broad areas of content and to a high proportion of intelligent, provocative, open-ended questions that allow them the freedom to use their knowledge and imagination” (C. Marshall & Rossman, 1999, p. 114).

Interviews were conducted in person wherever possible. Due to the global nature of the ‘restorative justice’ phenomenon, however, this was not always appropriate, and five of the interviews had to be conducted by telephone. There are a number of issues that have to be considered in regards to conducting telephone interviews (Keats, 1988, pp. 89-91). Perhaps most importantly to qualitative interviews such as those conducted in this study, is that the researcher is not privy to any non-verbal responses the participant may have: “they miss the feedback which they usually obtain from posture, gestures, and facial expressions….the interviewer cannot make use of these cues but must rely entirely on the verbal mode” (Keats, 1988, p. 89). This works both ways, of course, and the interviewee is likewise prevented from picking up on the interviewer’s non-verbal cues. Telephone interviews can thus be more confusing for respondents than face-to-face ones: “without visual feedback the respondent has no way of knowing that the interviewer is still listening or that the telephone is still working” (Keats, 1988, p. 90).

A number of measures were taken to help minimise these potential problems. Following Keats’ (1988, p. 90) suggestion, I aimed to establish a clear and
concise structure with respondents prior to the interview. This was achieved by communicating to interviewees in writing the general themes the interview would cover prior to the interview, and, where possible, by keeping questions short and asking them one at a time in a simple sequence (Keats, 1988, p. 90).26

With permission from the respondents, all interviews were audio taped to enable them to be transcribed for analysis (discussed below). Handwritten notes were also taken during the interviews. There were a number of reasons for this. Firstly, the notes were to act as a record of the interview in the event that the audio tapes failed, were inaudible or became unusable at a later stage. Secondly, the notes were to act as points of clarification during the process of transcription, if, for example, a respondent’s words became momentarily unclear. Finally, taking physical notes allowed me to make note of questions or ideas that came up during the interviews and to have a record of points to be followed up. Happily, there were only minor mishaps with the audio tapes, and handwritten notes were thus primarily used for the latter two purposes.

2.6.3 Type of Interview Questions

Interview questions were open-ended. That is, respondents were not presented with a set of fixed alternatives, but could reply however they wished (Keats, 1988, p. 142). A fairly broad and unthreatening question was

26 This, however, was not always possible. One respondent answered my questions at such length that I had to resort to asking double- or even triple-barreled questions – asking the main question and probing questions at the same time – in order to give the participant a general sense of what I was asking before he launched into another lengthy response.
chosen as the opening question in the interviews, in order to ‘break the ice’ and put respondents at ease. This was adopted following Keats (2000, p. 49), who recommends starting with the least threatening aspects of the material, as well as moving through the topics from the most general to the more specific.

In a number of instances, I began by asking a respondent to elaborate on comments they had made during the process of arranging the interview, or on written material they had suggested I read. This technique was also designed to ‘break the ice’ and make the interviewee comfortable discussing the topic.

Participants were asked a series of broadly constructed, standard questions along the following thematic areas:

1. How they had come to be involved in the ‘restorative justice’ field;
2. Their beliefs about ‘restorative justice’;
3. Their perceptions of the ‘restorative justice’ field when they had first become involved;
4. Their current position in the ‘restorative justice’ field, and;
5. Their perception of changes within the ‘restorative justice’ field.

Additionally, each participant was asked a series of questions about specific aspects of the ‘restorative justice’ field that they were perceived to have detailed knowledge of, or views on. For example, participants who had
written and spoken widely on the spiritual orientation of ‘restorative justice’
were asked questions about the relationships between religion, spirituality
and ‘therapeutic’ culture, and the emergence of ‘restorative justice’. As such,
respondents were asked to reflect on various discourses articulated by the
research as it took place.

Probing questions were also used throughout the interviews. Probes are
secondary questions used by interviewers when further information is
required (Keats, 2000, p. 64). These were usually of the “non-directive”
(Sarantakos, 1993, p. 195) variety of probing, which aim to support the
primary question being asked, and elicit further or clarifying detail from
respondents.

2.6.4 Interviewing ‘Elites’

Interviewing ‘elites’ – that is, “well known personalities, prominent and
influential people” (Sarantakos, 1993, p. 187) – is relatively uncommon in the
social sciences (Hertz & Imber, 1995, p. viii; Odendahl & Shaw, 2002, p. 299;
Ostrander, 1995, p. 133). The nature of social science research – most
notably its broad concern with understanding disadvantage – usually results
in researchers interviewing ‘down’ (that is, interviewing individuals in lower
socioeconomic circumstances or career positions than themselves), instead
of ‘up’ (interviewing individuals who occupy a higher socioeconomic status
and/or more influential career position than themselves) (Hertz & Imber,
Interviewing elites is nevertheless a useful research method, given that it
allows the researcher access to data that may be impossible to obtain by using another method (Sarantakos, 1993, p. 187).

This research method has some unique issues that must be considered. Firstly, the high-profile position of participants typically makes maintaining confidentiality paramount (Odendahl & Shaw, 2002, p. 313). In light of this, participants in this study were given the choice of being named or remaining anonymous in this thesis and any other work stemming from it. Participants were also given the opportunity to view a transcript of their interview to ensure that their comments had been accurately represented. All but one, however, agreed to be identified by name, and only four requested a copy of the interview transcript.

In this respect, participants in this study differed significantly from elites in other fields, and from what I had expected at the outset. As ‘restorative justice’ is a ‘hot topic’, experts in this area often take an ‘evangelical’ approach, and are enthusiastic about informing others of their area of expertise. Reaching members of this group and obtaining their permission to conduct interviews was therefore not as challenging a task as might be expected by researchers trying to access other elite groups. Additionally, in contrast to some elite groups (for example, famous actors, sporting celebrities or the very wealthy), experts in this field are almost always tertiary educated and familiar with academia. Indeed, some held doctorates or other postgraduate qualifications and/or held or had previously held academic

27 See Appendix A.
positions. As such, members of this cohort were often sympathetic to the researcher’s plight and appreciative of the importance of research. Accessing this particular group of elites thus involved fewer challenges than one might expect. Indeed, each individual I asked to be interviewed for the research agreed to become involved.

High status respondents are furthermore often pressed for time, and can find it difficult to set aside time to be interviewed (Keats, 1988, p. 88; C. Marshall & Rossman, 1999, p. 113). Even when access to an elite individual has been obtained, the temporal limitations that are frequently placed upon members of this group raises potential ethical concerns. In interviewing high status individuals for this project, a number of precautions were developed in order to minimise these problems. Firstly, interviewees were able to choose interview dates, times and locations that were suitable to them (Odendahl & Shaw, 2002, p. 309). In a number of instances, this meant either scheduling a time for the interview many weeks in advance, or being available to conduct the interview at a moment’s notice. Secondly, as mentioned above, participants were given an indication of the thematic areas the interview would cover prior to the interview (Odendahl & Shaw, 2002, p. 309). The aim of this was to enable the respondent to think about these themes before being interviewed, and thus potentially minimise the length of the interview. These themes were usually strictly adhered to; as Keats (1988, p. 88) argues, keeping to the stated purpose of the interview is good practice with
busy, high-profile respondents. Finally, each participant’s written work on ‘restorative justice’ was read in depth prior to his or her interview. Often, I was familiar with much of this literature prior to approaching the individual for an interview. Indeed, as will be explained below, this sometimes indicated to me a particular person’s suitability for the research. Nonetheless, a thorough literature search was conducted after access to a participant was gained. In addition to informing interview questions, this technique aimed to capitalise on the potential of the interview, avoid ‘wasting the time’ of the respondent and likewise avoid collecting data that already existed in the public domain (Odendahl & Shaw, 2002, p. 309).

Another unique aspect of interviewing elites is that power relations between interviewer and interviewee are often reversed (Sarantakos, 1993, p. 187). That is, in contrast to much social science interviewing, the interviewee is often more knowledgeable on the topic being discussed than the interviewer. As Keats (1988, p. 87) points out, that can be problematic, but it need not be so. Keats (1988) suggests attempting to develop a “shared acceptance” (p. 87) of the differing positions of the researcher and the respondent. She argues that problems are much more likely to occur where either party does not recognise or accept the difference in status between the two (Keats, 1988, p. 87). In order to prevent any difficulties of this nature arising in this study, I consistently and clearly outlined my status as a postgraduate student researcher when approaching interviewees. I also stressed that participants’ input would be both much appreciated and highly valued. Emphasising the

28 Although in a small number of cases, an interviewee indicated an interest in hearing about my research, and a less formal exchange of ideas took place, usually at the conclusion of the formal interview.
valuable nature of respondents’ insights in this type of “flattering approach” (Odendahl & Shaw, 2002, p. 311) can be helpful in gaining the co-operation of elite individuals. Communication with participants was undertaken in a formal, polite and respectful manner (Odendahl & Shaw, 2002, p. 310). I further sought to highlight my lesser status by permitting respondents to arrange the date, time and location of interviews, and stressing that I would meet whatever arrangements were most suitable to them. The aim of this was to emphasise to interviewees that I understood their tight schedules and appreciated their time spent being interviewed for my research.

A final dilemma peculiar to the method of interviewing elites is how to avoid receiving stock, standard responses to questions, the “formalized responses with which people at the top tend to communicate with the press and the public” (Odendahl & Shaw, 2002, p. 313). It became apparent to me as a result of taking part in informal discussions with experts in the early months of my research that members of this group have a tendency to answer questions with well-prepared responses, almost resembling ‘sound bites’. A number of experts that I spoke with had been interviewed previously, often by various media representatives. As a result, these respondents appeared to have concise and pre-rehearsed responses to some lines of questioning. As stated previously, the purpose of conducting interviews with elites was to add another layer or dimension to my genealogy, and to gain insights from respondents that could not be obtained via another method. As such, I wanted to avoid these stock responses. This was of particular concern, as
ethical considerations necessitated allowing interviewees to peruse the themes they would be questioned on prior to the interview.

In order to prevent this from occurring, and in keeping with the theoretical framework of this thesis, interview questions were designed to gently disrupt and fragment respondents’ standard narratives about ‘restorative justice’. Some participants were asked, for example, to discuss the changes, setbacks and interruptions that they could identify in the ‘restorative justice’ field. This was intended to orient interviewees’ responses away from the standard, progressive narrative of ‘restorative justice’ that is frequently adhered to in this field. Others were asked for their views on the future of ‘restorative justice’. This was designed to prevent interviewees lapsing into the traditional tale of the development of criminal justice in which ‘restorative justice’ is portrayed as the pinnacle or culmination of this process. Most participants were also asked to define a range of taken-for-granted terms used widely in the ‘restorative justice’ field. As discussed later in this thesis, many were taken aback by this line of questioning. Following Odendahl and Shaw (2002, p. 313), furthermore, questions were posed in a personalised fashion. Rather than asking broad questions about the organisation each interviewee belonged to, questions were directed to the respondent’s personal views.

Gender and age can also impact upon power relations when interviewing elites (Odendahl & Shaw, 2002, pp. 311-312). In a number of the early interviews I conducted, I felt that my status as a young, female student
occasionally resulted in respondents making the assumption that I knew nothing about ‘restorative justice’ and giving me very basic information that was of little value. In order to avoid this in the remainder of the interviews, I began to make a point of demonstrating my knowledge of the field in early communications with participants, as well as referring to interviewees’ written work so that they would not be tempted to repeat stories from it.

Other respondents, however, seemed to speak more freely as a result of this power differential. It appeared that some participants – older males in particular – did not regard me as capable of using the interview data in any significant way (Odendahl & Shaw, 2002, p. 312). This was demonstrated to me when two male ‘restorative justice’ experts contacted early in the research asked me my age – one in person, and one over the telephone. Indeed, one of these well known figures, whom I later interviewed, repeatedly referred to me as ‘kid’ after having met with me in person.

2.6.5 Sampling and Recruitment

Interview participants were chosen for their perceived ability to add depth to insights generated from the documentary analysis conducted as the primary method of this thesis. In this sense, the selection of participants was informed by the genealogy in progress. This type of sampling, in which a researcher’s own judgement is used to build a sample “which enables the researcher to satisfy her specific needs in a project” (Robson, 2002, p. 265) is known as ‘purposive’ or ‘judgmental’ sampling (Babbie, 2001, p. 179; Robson, 2002, p. 265). Participants’ suitability was assessed in a variety of ways. In most
cases, a participant’s written work in the area indicated their potential to provide insight into silenced discourses identified in the process of constructing a genealogy of ‘restorative justice’.

The selection of interviewees therefore involved both a subjective and a serendipitous element. Choosing respondents based on their writing in the area was necessarily influenced by the sample of literature analysed, for example. On a number of occasions, meeting with a key player at a conference by chance, or attending the delivery of a particular conference paper indicated to me that certain individuals would be well placed to illuminate particular hidden discourses. Additionally, some existing contacts were invited to participate in the study. Some of these were also able to recommend other key figures that they thought would be helpful. This multi-layered approach to selecting and gaining access to elite participants is quite common, given the difficulties sometimes associated with accessing this group. Odendahl and Shaw (2002) describe this part of the process as requiring “the incorporation of strategies that include a mixture of ingenuity, social skills, contacts, careful negotiation, and circumstance” (p. 305). To this, McDowell (as cited in Odendahl & Shaw, 2002) adds the element of luck: “a great deal depends on luck and chance, connections and networks, and the particular circumstances at the time” (p. 307).

One issue that is often raised in regards to the use of purposive sampling is the notion of *generalisability*; that is, “the extent to which what we have found in a particular situation at a particular time applies more generally” (Robson,
2002, p. 260). These sampling techniques are described as ‘non-probability’ techniques; statistical conclusions cannot be drawn about the broader population based on the responses of the sample (Robson, 2002, p. 261). Making broader generalisations based on interview data is not the intention of this research; my aim here is not to produce a replicable study, but to provide potentially significant insights about ‘restorative justice’ using a non-representative sample. The use of non-probability sampling methods is suitable in this context (Robson, 2002, p. 264).

2.6.6 Data Analysis

Interviews were transcribed verbatim. Following Grbich (2004, pp. 112-113), transcripts included a side column for comments on, and preliminary analysis of, the interview data. Grbich (2004) suggests that this approach is particularly suited to postmodern research, as it “encourages display of process in a more transparent manner in order to allow the reader to ‘see’ into the mind processes of the researcher” (p. 114). In other words, it emphasises to the reader (and perhaps more importantly, I would add, to the researcher) the subjective and idiosyncratic nature of the research process. Wengraf (2001) argues that the preliminary analysis undertaken during the initial transcription of an interview is an extremely important opportunity to reflect on this primary data: “when you listen to the tape for the first time, but only for that first time, a flood of memories and thoughts will be provoked. These memories and thoughts are…available only once” (p. 209).
Thorough notes were written following each interview. These “debriefing-notes” (Wengraf, 2001, p. 142) included thoughts on the interview – how it had gone, any problems encountered and how these might be addressed in the future, thoughts on the relationship of power between the interviewee and myself, the physical space, things that needed to be followed up, and anything else that seemed relevant.

The transcripts of the interviews were not privileged as somehow external to the ‘restorative justice’ field, but were treated as additional elements of the archive of ‘restorative justice’: “interviews…are further discourse samples…one way in which they enhance the corpus is simply by being added to it” (Fairclough, 1992, p. 228). In this sense, the interviews conducted for this study could be seen as attempts to produce additional, supplementary documents on specific, marginalised discourses in the ‘restorative justice’ field.

In addition to this process of rudimentary analysis, I asked three main questions of my interview data:

1. How does that data support my existing analysis?
2. How does this data challenge my existing analysis?
3. What is taken-for-granted, left unsaid, ‘invisible’ and/or assumed in interviewees’ responses?
2.6.7 Triangulation

Often, the use of multiple research methods is justified by reference to the concept of ‘triangulation’. This concept refers to the notion that comparing different types of data or using different methods to approach the same problem will increase research ‘validity’ as it will allow the researcher “to see whether they corroborate one another” (Silverman, 2001, p. 233). The purpose of ‘triangulation’ is therefore to “overcome partial views and present something like a complete picture” (Silverman, 2001, p. 234). In other words, the inaccuracies or limitations involved in utilising one particular theory, method or even researcher can be overcome by the application of an additional theory, method or researcher.

In the early months of this research, a number of people suggested to me that I use interviews as a way of ‘triangulating’ my research findings. That is, the data produced via interviewing could help corroborate the ‘findings’ of my genealogical analysis. This is problematic, however, and the concept of ‘triangulation’ sat awkwardly with me for some time. Others have found the idea of ‘triangulation’ awkward also. Fielding and Fielding (as cited in Silverman, 2001, p. 234) caution that using multiple methods, which are often informed by competing theories and methodological assumptions, cannot produce an ‘objective truth’. This is of little consequence here, however, given that an ‘objective truth’ is not what is being sought by this research. What I find problematic about the idea of ‘triangulation’ is the underlying assumption that an ‘objective truth’ exists and that it is the researcher’s role to ‘find’ it. To say that this sits awkwardly within a poststructuralist piece of
work is something of an understatement. It is not, however, the concept of ‘triangulation’ per se that is incompatible with poststructuralist frameworks. Rather, it is the intended outcome of ‘triangulation’: the arrival at a point of ‘truth’.

Nonetheless, it would seem that the application of multiple research methods or ‘triangulation’ could be beneficial to a research project where the notion of discovering the ‘truth’ is abandoned. In its place, ‘triangulation’ could be useful to provide a challenge to the existing data – to fracture, fragment or provide alternative or plural perspectives on the data. In this sense, the process of ‘triangulation’ would be undertaken in much the same way in poststructuralist research as in any other type of study. The difference would occur in how the researcher uses the additional data.

In this study, therefore, interviews were used for the purposes of ‘triangulating’ data produced via the methodology of documentary analysis. Rather than being used solely in the traditional sense, however, the data from interviews was used to both add to, and challenge, the genealogy in progress.

2.7 The Purpose of Genealogical Research

Traditionally, historical research is regarded as being somewhat superfluous to the criminological enterprise. In this discipline, history is usually “marginalised as, at best, introductory or background matter” (Dixon, 1996, p. 77). Pratt (1996a) sees this neglect of history as a symptom of the view that
criminology’s ‘real purpose’ ought to be pragmatic, policy- and future-oriented; historically, Pratt (1996a) claims, criminology’s “structural parameters determined that it was a discipline primarily concerned with providing answers rather than raising questions” (p. 61).

This is an assumption that both Pratt (1996a) and Dixon (1996) fervently reject. Pratt (1996a, p. 62) points to the usefulness of a number of historical works in the criminological discipline, arguing that these demonstrate the significance of criminology’s history to the sites in which crime research is now being produced. Dixon’s (1996) comments on the subject are far more contemptuous:

It is a profound irony that people who easily dismiss historical research as ‘merely academic’ or ‘impractical’ are so often busily introducing ‘reforms’ which would be identified as ill-conceived and ineffective by anyone with a passing historical knowledge of the issue (p. 79).

This critique is particularly relevant to the ‘restorative justice’ field, in which programs have been introduced quite rapidly, with little consideration given to the past. Here, we can see the way in which the production of ‘real’ empirical data is accorded priority over research which is primarily analytical or historical. ‘Restorative justice’ is therefore a fitting example of Dixon’s (1996, p. 79) claim – that criminal justice reforms are frequently hurried affairs in which little importance is accorded to the past.
The case put forward by both Pratt (1996a) and Dixon (1996) – that the history of criminal justice practices is indeed worthy of consideration – is especially pertinent in relation to genealogy, which aims to shed light not solely on the past, but on our current situation. In Pratt’s (1996a) words, genealogy represents a different role for history: “not to hide in the past but to critically interrogate what ha[s] made possible the present [italics in original]” (p. 62). In contrast to conventional history, therefore, the purpose of genealogical research is not merely to describe the past, but to explain or ‘diagnose’ the present: to produce hypotheses “about the relationship between concepts in their historical sites” (Hacking, 1981, p. 18).

A genealogist’s task is therefore to provide a series of proposals that partially explain the emergence of this event. Foucault (1981a) described this series of propositions as “game openings” (p. 4); that is, propositions that are “not meant as dogmatic assertions that have to be taken or left en bloc” (p. 4), but act as invitations for interested parties to join in conversations (see also Foucault, 1996a, p. 275). As a genealogy of ‘restorative justice’, therefore, this thesis aims to put forward a series of ‘game openings’ about the birth of ‘restorative practices’. My aim here is to offer an explanation or diagnosis – albeit an incomplete and partial one – of the acceptance of ‘restorative practices’ into the criminal justice sphere.

This notion of history of the present as a series of ‘game openings’ fits neatly with its function as a process of defamiliarisation. In this way, genealogy is a
methodological approach with “the same effect as a precocious child at a
dinner party: genealogy makes the older guests at the table of intellectual
analysis feel decidedly uncomfortable by pointing out things about their
origins and functions that they would rather remain hidden” (Kendall &
Wickham, 1999, p. 29). Foucault (1981a) candidly describes his purpose in
proposing ‘game openings’ as having “an irritant…effect on a good many
people. The epidermi bristle with a constancy I find encouraging” (p. 12).

On a broader scale, histories of discourse on aspects of criminology can lay
claim to sharing some of the wider political purposes of critical criminology. B.
Hudson (2000) avidly promotes critical criminological research which aims to
“investigate the political/social context in which policy-oriented knowledge is
produced” (p. 177). Carlen (2002, p. 244) sees critical criminological projects
as those aimed at examining the relationships between social and criminal
justice (see also Scraton, 2002, pp. 34-35). For B. Hudson (2000, pp. 176-
177), this is important for criminology more so than for other disciplines,
given criminology’s unique and potentially dangerous relationship to power.
Particularly concerning for B. Hudson (2000) is the way in which
criminological knowledge can be appropriated in “vulgarized, piecemeal
ways” (p. 177) in various political contexts. She gives the example of
criminological discourses of ‘subordinated masculinity’ being used to
legitimate the increased incarceration of men – especially men from ethnic
minority groups – in an increasingly punitive environment. This concern is
highly relevant to the study of ‘restorative justice’, which has in some
contexts been implemented in ways not intended by its criminological
instigators\textsuperscript{29}. As Braithwaite (1995a) admits, ‘restorative justice’, “like all beautiful theories...can be and is corrupted by ugly practices” (p. 9). For this reason, research which utilises the analytic tools developed by Foucault – that is, research that can self-reflexively consider the relationship between the knowledge it produces and the exercise of power – is promoted by B. Hudson (2000) as highly valuable for criminology.

Genealogical research thus has both a ‘negative’ or ‘backwards-looking’ purpose (the breach of taken-for-grantededness), and a ‘positive’ or ‘forward-looking’ purpose (accounting for the event by describing its ‘conditions of possibility’)	extsuperscript{30}. Smart (1992) summarises these broad ranging tasks as follows:

The aim of genealogical analysis is to reveal the singularity of an event, to salvage the event, to disrupt the self-evident grounds of our knowledges and practices, and then to proceed to effect...a causal multiplication, to consider the multiple processes which make up the event (p. 65).

\textsuperscript{29} Marshall (1996) claims, for example, that “‘shaming’ has now entered the social work vocabulary in Britain, dropping the all-important ‘reintegrative’, to describe offence-confrontation work with an offender. As this is carried out by a social worker and for the most part does not involve crucial members of the offender’s own social network, this practice does not accord with the community process envisaged by Braithwaite” (pp. 38-39).

\textsuperscript{30} There are a number of different terms for ‘conditions of possibility’ that Foucault uses throughout his oeuvre, including ‘conditions of emergence’, ‘surfaces of emergence’, ‘conditions of existence’, ‘modes of existence’ and ‘conditions of functioning’ (see, for example, Foucault, 1972b). Although I favour ‘conditions of possibility’, which highlights the contingent nature of ‘restorative justice’, these will be used interchangeably throughout the thesis for readability purposes.
The purpose of this genealogy of ‘restorative justice’ is therefore to destabilise ‘restorative justice’ as a natural or inherently progressive phenomenon; to describe the heterogeneous prerequisites of thought that underpin, enable and sustain ‘restorative justice’ – that is, to describe how ‘restorative justice’ has been made to seem like ‘common sense’, and; to present a series of ‘game openings’ that can – albeit in a partial and incomplete manner – account for the emergence of ‘restorative justice’. To reiterate, the research problem for the thesis is: How has ‘restorative justice’ recently emerged as a legitimate method of responding to crime? In Foucauldian terms, the research problem might be stated as: What are (some of) the ‘conditions of possibility’ of ‘restorative justice’? This broad research problem was approached while bearing in mind a set of more narrow subquestions as follows: What are the systems of thought or ‘rationalities’ that underpin the emergence and acceptance of ‘restorative justice’? Which knowledges are disguised by functionalist accounts of the emergence of ‘restorative justice’? How are these knowledges disguised? Which discourses legitimise ‘restorative justice’? How do these discourses act to valorise this field? How do the discourses that (in)form ‘restorative justice’ shape the ways in which individuals govern themselves and others?

2.7.1 A Note on Judging

Foucault made it quite clear that the purpose of genealogical analysis is not to judge or criticise one’s object of inquiry. He claimed:
It’s amazing how people like judging. Judgement is being passed everywhere, all the time. Perhaps it is one of the simplest things mankind has been given to do. And you know very well that the last man, when radiation has finally reduced his last enemy to ashes, will sit down behind some rickety table and begin the trial of the individual responsible….I can’t help but dream about a kind of criticism that would not try to judge (as cited in Kendall & Wickham, 1999, p. 30).

His own intention in writing Discipline and Punish was not “to write a directly critical work, if one means by ‘critical’ the denunciation of the drawbacks of today’s penal system” (Foucault, 1996c, p. 423), although as B. Hudson (2003a, p. 149) points out, he was unable to maintain this stance throughout the entire work. Other genealogists such as Garland (2001) have also been heavily criticised for their judgmental approaches (see Daems, 2004, pp. 140-143).

Foucault’s advice to avoid passing judgement, however, became more and more difficult to sustain as this thesis progressed. In the current academic climate, it seemed, it was not enough to present a series of ‘game openings’ in relation to the emergence of ‘restorative justice’. Rather, those providing feedback on my progressing analysis – including visiting Professors, journal editors and reviewers – insisted that I draw out the implications of this analysis. Indeed, as this thesis aims to make a contribution towards critical criminology, I have deemed it necessary to heed this advice and to suggest
the social justice implications of highlighting marginalised discourses in the ‘restorative justice’ field.

In doing so, however, I have embraced Foucault’s (1983) prescription that phenomena might be considered ‘dangerous’ rather than ‘bad’: “my point is not that everything is bad, but that everything is dangerous, which is not exactly the same as bad. If everything is dangerous, then we always have something to do” (pp. 231-232). In this way, the implications – or ‘dangers’ – of my analysis can be drawn out, without having to resort to judging my object of analysis as ‘bad’.

2.8 Limits and Limitations of the Study

This research has a number of limits. Firstly, it aims to explore the emergence of ‘restorative justice’ in the context of criminal justice. As already noted, ‘restorative justice’ has come to be applied not only in this domain, but in child protection matters, school settings, the workplace and a range of other contexts. These applications of ‘restorative justice’ have not been excluded entirely. Some discursive overlaps exist among these varied contexts, particularly between youth justice and child protection. Moreover, the application of ‘restorative justice’ in such diverse environments demonstrates the powerful and pervasive nature of the discourses that underpin ‘restorative justice’. As will be demonstrated throughout this thesis, some of the discourses that (in)form ‘restorative justice’ act as subtle, yet powerful and pervasive rationalities through which individuals govern and are governed in an increasing variety of domains. These varied contexts in
which the emergence of ‘restorative justice’ has had an impact will thus be considered in this thesis, but as peripheral to the main research problem of the emergence of ‘restorative justice’ in the criminal justice arena.

Secondly, the research has some geographical limits. Although it aims to consider the global ‘restorative justice’ phenomenon, some bias as a result of the location of the research was unavoidable. This bias towards the ‘home’ of the study – New South Wales, Australia – impacted on various aspects of the research, from the making of early contacts in the field, to accessing documents. The process of conducting this research was therefore subtly, yet powerfully, influenced by its geographical location.

The study was also limited to the analysis of documentary sources written in English, and to interviewing English-speaking participants. Although most research is limited to the language spoken by the researcher in this sense, this is noteworthy in the ‘restorative justice’ field, in which ‘restorative practices’ have entered culturally and linguistically diverse criminal justice settings, and in which a good deal of scholarship has been undertaken in languages other than English (see Porter, 2005, p. 1). Nonetheless, as Roche (2003a, p. 631) contends, English-speaking countries comprise those where ‘restorative justice’ has had its greatest impact.

The theoretical framework of the study also presents some limitations. Firstly, despite Foucault’s considerable impact on academia, and on the social sciences in particular, his work and his concept of genealogy have by no
means been left unchallenged. Castel (1994), for instance, warns that genealogical studies may suffer from ‘presentism’. He asks:

How can one write a history of the present, which necessitates a reading of history based on a question formulated today, that is not a projection of today’s preoccupations onto the past? This kind of projection is sometimes called ‘presentism’, and is a type of ethnocentrism: sticking onto the past a concern that holds true only, or principally, for our time (p. 239).

As Johnson (2000, p. 41) points out, however, all histories may suffer from ‘presentism’; indeed, R. Smith’s (1988, p. 149) work demonstrates that criticisms of presentism were being made long before they were directed at Foucauldian histories. As such, one can only do as Johnson (2000, p. 41) advises, and strive to interpret items from the past within their historical context in order to limit its effects.

Garland (1990a; 1990b) argues that there are potentially more serious limitations to the use of Foucault’s historical methods than this. The problem a tome like Discipline and Punish presents, Garland (1990b) claims, is that its perspective is often accepted as offering a grand theory; that is, it is often accepted “in a manner which tends to displace other interpretive accounts, rather than supplement them or add a new dimension to their explanations” (p. 155). Importantly, Garland (1990b, p. 155) acknowledges that Foucault’s work was not intended by him to be read as a ‘grand theory’ or to offer a
totalising or complete analysis of any of his chosen subjects. Rather, the poststructuralist tradition promotes the acceptance of a multiplicity of perspectives. For Foucault, the notion of an absolute ‘truth’ is to be avoided: “insistence on only one meaning, on the Truth, is a strategy which enforces dominance and fixity [italics in original]” (Beasley, 1999, p. 93).

As such, this thesis does not propose to construct a ‘grand theory’ of ‘restorative justice’, or to tell the complete story of its coming into being. Rather, the research aims to be aware at all times of its own perspectivity and partiality, and of the fact that “genealogies, as much as authorised histories, are interested and partial” (Bailey, 1993, p. 103). In Silverman’s (2000) words, it is important to recognise that “every way of seeing is also a way of not seeing” (p. 825). As stated at the outset of this Chapter, the aim here is not to merely replace existing accounts of the birth of ‘restorative justice’ with another, opposing account. That is, this thesis does not seek to propose counterarguments that are symmetrical but opposed to existing authoritative accounts.

Genealogy, then, can be “as problematic as the authoritative versions [of history] it contest[s]” (Rose, 1988, p. 181). As discussed previously, the work of Foucault has been criticised for producing the very type of history which he rallies against; even Foucault himself was the victim of epistemological ‘slippage’ (B. Hudson, 2003a, p. 149). What this means for those utilising his theoretical approach is that, while it may be difficult to construct a genealogy that is less problematic than the histories it is refuting, the genealogist must
endeavour at all times to be aware of the partial nature and power effects of what they themselves are producing, and calling ‘history’. As Kendall and Wickham (1999, p. 13) suggest, it is the process of attempting to adhere to Foucault’s methodology, rather than realising the outcomes associated with doing so, that is central to using this framework.

More pointedly, perhaps, any genealogical study is necessarily incomplete. Many other studies in the ‘restorative justice’ area are relatively small, and are aimed at ‘answering’ a much more manageable and specific research question, often in the context of a government report or similar. For example, many studies have focused on evaluating a particular ‘restorative’ program or one aspect of such a program, such as rates of recidivism amongst participating offenders. In the context of genealogical research, however, there are potentially an infinite number of discursive connections that might be explored. Although no research study can be perfect or ‘complete’ in the sense of having exhausted every angle for consideration, many government- or privately-funded empirical studies can come much closer to ‘completion’ than my own research.

Genealogical analyses could go on forever; such is the nature of a methodology that does not search for causes or origins. For each ‘condition of emergence’ one identifies, there are many more avenues for potential investigation produced. The three main ‘conditions of emergence’ of ‘restorative justice’ identified in this thesis are no different: each gives rise to myriad more problems to be explained or diagnosed. Three powerful and
related ‘conditions of possibility’ of ‘restorative justice’ are examined in the body of this thesis: the legitimacy of the ‘psy’ disciplines, the responsibilisation of parents, and the rise of ‘empowerment’ discourses. Each of these, in turn, has its own ‘conditions of possibility’ that could be examined. This thesis focuses primarily on accounting for the emergence of ‘restorative justice’ – on how ‘restorative justice’ came to occupy an accepted role in the contemporary criminal justice project. It also hints towards the discursive underpinnings of the ‘conditions of possibility’ it posits in relation to ‘restorative justice’. The thesis thus seeks to present the beginnings of another ‘layer’, so to speak, of the emergence of ‘restorative justice’. This is intended to give the reader some indication of the body of secondary literature that might be helpful in further accounting for the formations of power from which the ‘conditions of emergence’ of ‘restorative justice’ themselves stem.

Genealogies are also inherently partial and subjective. Like all research, this study has been influenced by the subjectivity of its author. Throughout the research, it often occurred to me that had another individual set out to attempt the same task – to write a genealogy of ‘restorative justice’ – two quite different pieces of work would emerge.

Of course, the application of any theoretical framework to a particular research problem necessarily highlights only part of the picture. This study is thus limited in the sense that it considers ‘restorative justice’ from a singular theoretical angle. As Garland (1990b, p. 13) has argued, theoretical research
could be enhanced by the application of multiple frameworks of inquiry. Garland (1990b, p. 13) lists Durkheimian, Marxist, Foucauldian and Eliasian perspectives as approaches that might be jointly applied in attempts to understand the sociology of punishment, for example. What Garland (1990b) inadvertently demonstrates, however, is that even the use of multiple theoretical frameworks requires some arbitrary decision-making; one cannot consider an object of inquiry from every analytical perspective. Indeed, Garland (1990b) himself had neglected to include feminist perspectives as frameworks that might prove fruitful in the analysis of punishment – surely a gross oversight from the point of view of feminist criminologists.

This demonstrates that even the theoretical jigsaw puzzle of ‘restorative justice’ (or any other topic being researched) – to which studies such as this one seek to add – is itself always subjective, shifting and incomplete. The undertaking of research such as this, in which a single analytical framework is applied, is thus an inherently modest enterprise.

Finally, the research is limited by the particular interpretation of Foucault’s methodological approach that I, as the researcher, have made. While some authors warn that they have not ‘correctly’ interpreted Foucault, I am of the belief that this would be both impossible and undesirable (see Scheurich & Bell McKenzie, 2005, p. 841). Foucault (1996d) himself invited researchers to use his works as ‘little tool boxes’: “if people want to...use a particular sentence, idea, or analysis like a screwdriver or wrench in order to short-circuit, disqualify or break up the systems of power...well, all the better!” (p.
149). I therefore do not claim that my own interpretation of Foucault is either ‘correct’ or ‘complete’. I have, nonetheless, tried to be transparent about my understanding and application of this framework. My aim here is to yield some interesting and important insights about ‘restorative justice’ – to say something useful about this topic via one particular interpretation of a single theoretical perspective.

Despite these limitations, genealogy is the methodology I have chosen to explore the emergence and ascendancy of ‘restorative justice’ in multiple jurisdictions around the world. As Garland (1997a, p. 193) points out, this type of analysis is by no means appropriate for all research problems; indeed, irrespective of the eminence of Foucault’s methodology, many projects are better approached with more developed theoretical traditions. There are a number of reasons why genealogy has been chosen to address the research problem of this thesis. Firstly, while ‘restorative justice’ has been considered from a variety of theoretical frameworks, including a range of feminist perspectives (see Braithwaite & Daly, 1994; Currie & Kift, 1999; Daly, 1996; Daly & Stubbs, 2006; B. Hudson, 2002; Morris & Gelsthorpe, 2000; Stubbs, 1997), using the analytic tools of Elias (Braithwaite, 1993; Russell, 1998) or Derrida (Pavlich, 2002, 2003), and most commonly from a “cosy, uncritical and often atheoretical” (McEvoy, 2004, p. 611) stance, a genealogical account of ‘restorative justice’ has not, to my knowledge, been developed before\(^\text{31}\). In fact, the field of ‘restorative justice’ has seldom been considered using the theoretical frameworks advanced by Foucault (see

\(^{31}\) Although Pavlich (personal communication, 9/2/05) describes his recent work as a genealogy, as I have argued here, it considers ‘restorative justice’ through the guise of governmentality rather than presenting a history of discourse as such.
section 2.1). In this sense, the aim of this thesis is to add another dimension to the conversation on ‘restorative justice’, or to add a small piece to its theoretical map or jigsaw.

Moreover, the bulk of literature on ‘restorative justice’ is premised on a traditional, structuralist version of historical events, and consequently, on a structuralist conception of power. The tale of William the Conqueror making an audacious grab for political authority – and thereby displacing the ‘restorative’ model of justice that had existed up until the Norman invasion of Britain took place – is repeatedly told by supporters of ‘restorative justice’ (Bazemore & Schiff, 2001, p. 22; Braithwaite, 2002, p. 5; Braithwaite & Braithwaite, 2001, p. 26; Llewellyn & Howse, 1998, Justice in History section, para 9; Mantle, Fox, & Dhami, 2005, p. 8; McElrea, 1994, p. 44; Sarre, 1999b, pp. 11-12; Umbreit, 2001, p. xxix; Umbreit, Lewis et al., 2003, p. 385; Van Ness, 1993, pp. 255-256; Weitekamp, 1999, p. 89; 2000, p. 99; 2003, p. 117; Wilkinson, 1997, p. 6; see also Wright, 1991, pp. 1-2). Bazemore and Schiff’s (2001) is a good example:

The Norman invasion of Britain marked the beginning of a paradigm shift, a turning away from the understanding of crime as a victim-offender conflict within the context of community toward the concept of crime as an offense against the state. William the Conqueror (1066) and his descendants saw the legal process as one effective tool for centralizing their own political authority. Eventually, anything that violated the ‘king’s
peace’ was interpreted as an offense against the king and offenders were thus subject to royal authority. Under this new approach, the king – and, gradually, ‘the state’ – became the paramount victim, while the actual victim was denied any meaningful place in the justice process (p. 22).

This account of events – in which ‘restorative justice’ is posited as the catalyst for the redirection of funds from the greedy State to deserving victims – renders ‘restorative justice’ an intrinsically progressive reform (see Johnstone, 2002, p. 41). Constructing a critical account of the history of ‘restorative justice’ therefore necessitates an analytical framework that contains an alternative to this conspirational and structuralist conception of power. As discussed in detail earlier in this Chapter, this view of power is what is often considered to differentiate Foucault’s approach to history from both traditional approaches, and his own earlier framework of ‘archaeology’.

Additionally, as ‘restorative justice’ is often portrayed as representing the ‘re-emergence’ of the justice practices of various ancient cultures (Braithwaite, 2002, pp. 3-5; Carey, 2000, p. 32; Leung, 1999; Van Ness, 1993, pp. 252-257; Weitekamp, 1999), a methodological perspective that enables the detailed consideration of the discontinuities of history – as well as its continuities – is vital. As Foucault (1978b) acknowledges, genealogy allows the researcher to investigate:
Amongst the discourses of previous epochs or of foreign cultures, which are the ones that are retained, which are valued, which are imported…? And what does one do with them, what transformations does one impose upon them (commentary, exegesis, analysis), what system of appreciation does one apply to them, what role does one give them to play (p. 15)?

Finally, as Rose’s (1996a) work suggests, phenomena that enjoy support from diverse and even seemingly opposed political realms are not best explained from structural frameworks: “such strange alliances…resist explanation in terms of a logic of class…[or]…gender” (p. 104).

For these reasons, it is hoped that a genealogical study of ‘restorative practices’ will be able to make a small, but significant, contribution to this field, by investigating how what have come to be considered the ‘truths’ of ‘restorative justice’ have emerged onto the contemporary criminal justice landscape.

2.9 Conclusion

This Chapter has described in detail the theoretical framework used in this study. I have also described here the research methods employed in this research project – documentary analysis and interviews. The Chapters that follow constitute the beginnings of a history of the present of ‘restorative
justice’ – with all the partiality, subjectivity, incompleteness and perspectivity
that – as I have argued here – this enterprise necessarily involves.
CHAPTER THREE: UNLIKELY FRIENDS? OPRAH WINFREY
AND ‘RESTORATIVE JUSTICE’

At one international conference I attended on ‘restorative justice’, a respected academic in the field had been invited to address conference delegates as an opening keynote speaker. Despite the early start, the large room she was to address was almost full, and the academics, practitioners and others who made up the audience sat keenly grouped around large tables. The topic of the address was relatively dry and quite theoretical, and the keynote speaker continually let out a hoarse cough and cleared her throat throughout the paper. I presumed, as I am sure most others present did also, that the speaker was recovering from a cold. In the final moments of her paper, however, the woman appeared unable to continue. Again, I silently reasoned that she must have been battling the ‘flu. Ultimately, the woman broke down in tears and delivered the final section of her paper between strangled sobs. I silently raised an eyebrow at the audience member next to me, who stared at the speaker in appalled disbelief. We nonetheless joined the rest of the audience in hearty applause as the address concluded, but stopped short of joining the standing ovation the speaker received in spite of – or perhaps rather because of – her seemingly unwarranted display of emotion.

3.1 ‘Oprahfication’ and ‘Restorative Justice’

This Chapter argues that ‘restorative justice’ has recently emerged as an accepted approach to criminal justice partly due to its embeddedness within the celebrated ‘psy’ ethos. As Rose (1996a) has demonstrated, the ‘psy’
disciplines have had a profound impact on “the creation of the kind of present in which we ‘the West’ have come to live” (p. 48). I suggest that the ascendency of ‘psy’ knowledges – and their popularisation via the ‘self help’, ‘new age’ and ‘therapeutic’ movements – act as ‘conditions of emergence’ of ‘restorative justice’. ‘Psy’ discourses are widely, if implicitly, used as a rationalisation and justification for ‘restorative practices’; they are so taken-for-granted as to be almost entirely unchallenged. Indeed, they are so integral to the ‘restorative justice’ project that they are even used unproblematically by those authors taking a critical approach to the field (see, for example, Johnstone, 2002; 2003).

For the purposes of this Chapter, I have dubbed these discourses ‘Oprahfication’, since Oprah Winfrey is, as Kaminer (1992) points out, “a most effective proselytizer” (p. 5) for these concepts. A good deal of the critical literature on ‘psy’ knowledges similarly links the popularisation of these discourses with the genre of talk show that Oprah Winfrey hosts (see for example, Heelas, 1996, p. 129; Illouz, 2003; Kaminer, 1992, 1995; Simonds, 1992), and Rose (1996a, p. 17; 1999, p. 218) stresses that popularised ‘psy’ discourses have been disseminated via the mass media. ‘Restorative justice’ and these ‘Oprahfied’ discourses are so enmeshed that recent episodes of The Oprah Winfrey Show, including Unlikely Friends (Rakieten, 2003a) and Incredible Stories of Forgiveness (Rakieten, 2003b) have broadcast ‘restorative justice’-style encounters between victims and convicted offenders to millions of viewers worldwide. A recent edition of The Oprah Magazine (Goodwin, 2004) even featured a detailed article on
‘restorative justice’, in which a number of ‘restorative’ encounters between victims and offenders were described, and high-profile advocates Mark Umbreit, Betty Vos and Howard Zehr were quoted.

I will make a number of arguments in this Chapter. Firstly, I will argue that the expanding culture of victimhood, in which even offenders can be viewed as victims, operates as a ‘condition of emergence’ of ‘restorative justice’, especially as these practices relate to juveniles. The offender-as-victim discourse has shifted from constructing offenders as victims of material deprivation, to constructing them as victims of psychological trauma and/or abuse. Although some offenders are constructed as victims in ‘restorative’ procedures, the offender of the ‘restorative justice’ imagination is still to be held accountable.

Secondly, this Chapter proposes that ‘restorative justice’ has emerged as an acceptable approach to criminal justice partly as a result of the eminence of the counselling and therapy industries. These domains, and their associated discourses of ‘talking about it’ and ‘being heard’ act as ‘conditions of possibility’ of ‘restorative practices’. Although the need to ‘talk about it’ and ‘be heard’ is constructed in the ‘restorative justice’ field as innate and natural, the ‘talking cures’ are neither as stable nor as monolithic as they are often portrayed.

Thirdly, I will argue in this Chapter that ‘new age’ discourses such as ‘healing’, ‘closure’, and ‘inner peace’ – and their apparent legitimacy in
contemporary Western cultures – also operate as ‘conditions of possibility’ of ‘restorative justice’. The existence of a range of ‘restorative practices’, such as meetings between ‘surrogate’ victims and offenders can only be understood in this regard. A discontinuity therefore exists between the rationalisation for ‘restorative justice’ and its impact on the ‘ground level’ of criminal justice.

The embeddedness of ‘restorative justice’ within the psychological enterprise renders these practices potentially ‘dangerous’, primarily due to the individualising nature of the ‘psy’ disciplines. Accordingly, this Chapter argues that ‘restorative practices’ may locate explanations for and responses to crime within individual subjects without regard to structural inequalities.

Finally, this Chapter will argue that ‘psy’ knowledges are themselves a historical contingency, and thus a ‘problem’ to be explained. ‘Psy’ discourses, which underpin ‘restorative justice’ measures, are not static and monolithic ‘truths’, but heterogeneous, shifting and contingent phenomena with their own ‘conditions of possibility’ that could also be ‘diagnosed’. The work of Nikolas Rose (1988; 1996a; 1996b) in particular will thus be utilised to destabilise further the foundations of ‘restorative practices’.

3.2 Cries for Love? The Growth of Victimhood and ‘Restorative Justice’

A number of social commentators have remarked on the rapid growth of the concept of ‘victimhood’ that took place during the 1980s and 1990s (see, for
example, Furedi, 1997, pp. 95-103; Kaminer, 1992). During this time, it is argued, the notion of victimhood expanded beyond the legal definition to encompass a much more diverse range of ‘victims’. As Kaminer (1992) says in her book titled *I'm Dysfunctional, You're Dysfunctional* in a parody of the ‘self help’ slogan ‘I'm Okay, You’re Okay’:

> What’s remarkable about our notion of victimhood today is its inclusiveness and its spread beyond the courtroom's structured exchange of accusations. Smokers are the victims of tobacco companies, troubled teenagers are the victims of rock and roll, alcoholics are the victims of their genes, and a support group for the ‘Victims of Plastic Surgery’ claims 3,500 members (p. 154).

Similarly, Furedi (1997) discusses what he calls “the growth of the victim identity” (p. 95), pointing out that even seemingly bizarre attempts by various groups to claim victim status are treated seriously. Furedi (1997) gives the example of a support group in Britain for men who believe they have been left psychologically damaged by childhood circumcision, and whose claim for victim status – rather than being dismissed as absurd – has been treated as “received wisdom” (p. 96).

The impact of this widespread acceptance of victimhood has also come to be seen in criminal justice systems in Western countries, where, despite increasingly punitive attitudes generally, a counter-discourse that constructed
offenders as damaged ‘victims’ began to gain credence. Numerous high-profile criminal trials in which offenders have claimed victims status or have relied on the ‘abuse excuse’ (Dershowitz, 1994) have been played out in the media in recent years (see, for example, Artley, 1993; Dershowitz, 1994; Kaminer, 1992; Whitton, 1994; James Wilson, 1997). I will argue in this section that this expanded definition of victimhood – whereby offenders can be considered victims – acts as a ‘condition of emergence’ of ‘restorative justice’.

Before continuing, it must be noted that viewing offenders as victims is not a recent phenomenon, as the above discussion might appear to imply. As Pratt (2002) has demonstrated, prisoners were considered “inadequate, helpless creatures” (p. 91) as early as the period following World War II. The offender-as-victim discourse has, however, undergone a number of significant shifts since this time. Not only has it become far more widely accepted, no longer existing primarily in official prison discourse (Pratt, 2002), but it has become inclusive of offenders and accused offenders more generally, rather than being limited solely to prisoners. Additionally, offenders are no longer constructed primarily as victims of material deprivation – of what “general social arrangements had done to them” (Pratt, 2002, p. 91) – but also, perhaps predominantly, as victims of their own psychology. This argument will be expanded on below.

It must also be noted here that the impact of the ‘abuse excuse’ on the criminal justice system has been well overstated (James Wilson, 1997), and
that the growth of the victim culture is not monolithic or stable, but dynamic and shifting. In fact, a backlash in response to the ‘abuse excuse’ even took place in the United States of America during the 1990s (Kaminer, 1995, p. 13; James Wilson, 1997, p. 23). As Kaminer (1995) attests:

Even Oprah Winfrey engaged in a little self-criticism, devoting an hour to the role of talk shows in ‘popularizing abuse’. Have we ‘glorified victimhood,’ she asked, and ‘made it easy for weak people to come up with 101 excuses to explain when they can’t take charge of their lives’ (p. 13)?

3.2.1 ‘Restorative Justice’ and the Offender-as-Victim Discourse

Nonetheless, I want to argue in this section that the discursive construct of offender-as-victim is one of several stemming from the popularised ‘psy’ or ‘Oprahfied’ ethos that act as ‘conditions of possibility’ of ‘restorative justice’. In the ‘restorative justice’ field, offenders are often constructed as victims of abuse, personal problems, or other psychological – or less often, material – hardships. Braithwaite’s (1996) parable of ‘Sam’, a young man attending his first ‘conference’ for a robbery offence, is a good example:

[Sam] seems callous throughout [the ‘conference’]. His sister starts to sob. Concerned about how distressed she is, the facilitator calls a brief adjournment....During the break, the sister reveals that she understands what Sam has been through. She says she was abused by their parents as
When the conference reconvenes, Sam’s sister speaks to him with love and strength....she says that she knows exactly what he has been through with their parents. No details are spoken. But the victim seems to understand what is spoken of by the knowing communication between sister and brother. Tears rush down the old woman’s cheeks and over a trembling mouth (pp. 318-319).

This story is told repeatedly in the ‘restorative justice’ literature, by Shearing (2001, pp. 214-215) and Daly (2002b, p. 68), for example. Braithwaite (2004b, pp. 37-38) even adapts the tale for a Japanese audience, using ‘Hiroshi’ instead of ‘Sam’ for the main character’s name. Although Braithwaite (1996; 2004b) admits that this is not a ‘real’ example – rather, “he is a composite of several Sams/Hiroshis I have seen” (pp. 317, 37), this is not acknowledged in at least one other recitation of this tale (Shearing, 2001, pp. 214-215).

This is only one of many cases in which the status of ‘victim’ is reassigned (or, as discussed later, coassigned), from the victim of an offence to the perpetrator of that offence in a ‘restorative justice’ setting. Braithwaite and Mugford (1994) provide an example of this occurring at a ‘restorative justice’ ‘conference’ in which the mother of the offender – a fourteen-year-old girl – stormed out of the ‘conference’ after only a few minutes, shouting “this is a load of rubbish....She should be punished” (p. 289). Braithwaite and Mugford (1994) relate that after this outburst, “victim supporters who had arrived at the
‘conference’ very angry at the offender were now sorry for her and wanted to help. They learnt she was a street kid and their anger turned against a mother who could abandon her daughter like this” (p. 289) (see also Braithwaite & Braithwaite, 2001, p. 59). D. Smith, Blagg and Derricourt (1988) provide another example in their report on an early ‘victim offender mediation’ project in South Yorkshire. In one ‘mediation’ scenario, they claim, the victim “had been impressed by the intelligence of his (20 year-old) offender, and felt he understood him better when he heard at first hand of the difficult circumstances of his life” (pp. 384-385). T. Marshall and Merry (as cited in Masters & Smith, 1998) quote another victim after a ‘victim offender mediation’ in England: “just meeting the fellow and realizing that he was another human being the same as I was with his own problems, and really that his problems were indirectly the cause of what happened…that was the most valuable thing” (p. 12). Even the Home Office’s (2003) ‘restorative justice’ strategy includes the story of a victim of a serious assault, who, by the end of a ‘conference’ with the drug-addicted offender, “said her view of the offender had changed from a monster to a broken little girl” (p. 16).

A number of influential ‘restorative justice’ proponents have indicated that for them, victims denying their own status as victims and instead considering ‘their’ offender in this regard is an important component of a ‘restorative’ procedure:

People can be amazing when they are enmeshed in institutions that invite them to care about each other instead of hate each
other....Partly this happens because victims get an insight through the process of dialogue into the shocking life circumstances the young offender has had to confront (Consedine, 1995, p. 103).

[Victims’] responses are in sharp contrast to the cries for ‘more punishment’ heard on the steps of more conventional courts...victims commonly say that they do not want the offender punished; they do not want vengeance; they want the young offender to learn from his mistake and get his life back in order....it is surprising how often victims waive just claims for compensation out of consideration for the need for an indigent teenager to be unencumbered in making a fresh start (Braithwaite & Mugford, 1994, p. 293).

The research literature further demonstrates that crime victims targeted to participate in these ‘restorative’ processes often consider ‘their’ offender, rather than themselves, as the ‘real’ victim. Goode’s (1995, p. 10) report of ‘family conferences’ in South Australia, for example, found that the primary reason victims gave as to why they agreed to attend a conference was their desire to help the offender. Strang and Sherman (1997, p. 2), drawing on data from Canberra’s Reintegrative Shaming Experiments (RISE), report that after seeing offenders in their “family and life circumstances” (p. 2), the proportion of victims feeling sympathetic towards offenders almost doubled to 43% (see also Strang, 2001c, p. 189). Many similar findings have been
reported in the literature on ‘restorative justice’ (see, for example, Braithwaite & Mugford, 1994, p. 289; Daly, 2003b, pp. 26-27; T. Marshall & Merry, 1990, p. 185; O’Connell, n.d., p. 83). Indeed, the identification of victims with offenders in this manner was even a stated objective of the Coventry Reparation Scheme, an early example of ‘restorative justice’ (see Ruddick, 1986, pp. 21, 35). According to Retzinger and Scheff (1996), this is precisely the purpose of ‘restorative’ procedures: “participants must see themselves as being like the offender rather than unlike him or her, in order to identify with the offender (there but for the grace of God go I)” (p. 323). Indeed, tales of victims agreeing to help ‘their’ offender following a ‘restorative’ procedure – through, for example, provision of housing or employment – abound (see, for example, Braithwaite & Mugford, 1994, p. 293; J. Kidd, 2003, pp. 11, 17; Masters & Smith, 1998, pp. 11-12; Zegers & Price, 1994, pp. 814-815). For crime victims, helping offenders has even been considered “an essential element of their own healing journey” (J. Kidd, 2003, p. 33).

For a number of influential figures in the ‘restorative justice’ field, furthermore, a crime can be viewed not merely as the result of an offender’s damaged psychological state, but as a ‘cry for help’ or a ‘cry for love’. As Zehr (1990) puts it:

Many offenders have experienced abuse as children. Many lack the skills and training that make meaningful jobs and lives possible....For many, crime is a way of crying for help....They do harm in part because of harm done to them (p. 182).
T. Marshall and Merry (1990) similarly argue in the introduction to their seminal report on ‘victim offender mediation’ in Britain that “some offending, especially non-property crimes but not exclusively so, constitutes a cry for help – a desperate attempt to force others to take notice of one’s plight” (p. 2). For ‘restorative justice’ exponent Kay Pranis (2001), the ‘September 11’ terrorist attacks on the United States of America can also be seen as ‘a cry for love’. Pranis (2001) asks, “how great must be the need for love to prompt such an attack” (para 2)?

3.2.2 The Offender-as-Victim versus the Accountable Offender

In this view of offenders, it is distinctly psychological or emotional rather than material deprivation that enables their simultaneous construction as offenders and victims. Although seeing offenders as victims of social/structural circumstances such as poverty also plays a role in ‘restorative practices’ (for example, where victims offer offenders housing and/or employment assistance, as mentioned above), their construction as unwitting subjects of psychological trauma – whether as victims of abuse, or simply ‘crying out for love’ – is the more dominant in the ‘restorative justice’ field.

To a large extent, this construction of offenders is anomalous with the broader criminal justice landscape, in which a return to ‘justice’ rather than ‘welfare’ approaches – and a concomitant return to stressing the individual responsibility of offenders – has dominated the last two decades (Garland,
2001). Moreover, this construction represents a discontinuity from the individually accountable offender of the ‘restorative justice’ imagination. The accountable offender is fundamental to ‘restorative justice’ discourse; this aspect of ‘restorative justice’ is frequently used to differentiate ‘restorative’ approaches, and to position these as ‘third way’ measures distinct from either ‘justice’ or ‘welfare’ approaches (McElrea, 1994, p. 38; Zehr, 1990). In this sense, the offender-as-victim discourse represents a point of contradiction within the ‘restorative justice’ project.

The offender-as-victim discourse represents a principal mechanism through which victims of crime are engaged in ‘restorative practices’; it is not necessarily, however, a primary discourse that shapes responses to offenders. This is perhaps more so the case where juvenile offenders are concerned, given victims’ greater willingness to view youthful offenders in this light. As McElrea (1994) states, “young people, even though they are often themselves ‘victims’, are encouraged to take responsibility for the consequences of their actions, and not to blame others or ‘the system’” (p. 45) (see also O’Connell, as cited in D. O’Brien, n.d., p. 15). Here, although the social/structural context of juvenile crime is acknowledged, it has no bearing on the conduct of the ‘restorative’ process, which dictates that despite any victimisation experiences by the young person, they are still to be held accountable for their offending behaviour. In this sense, ‘restorative justice’ can be seen as an example of what Carlen (2000) identifies as a misguided element of contemporary criminal justice policy – the attempt to “address youth crime independently of questions of social justice” (p. 69).
3.3 ‘And how does that make you feel...?’: ‘Restorative Justice’ and the ‘Talking Cures’

By means of a careful prison architecture and a rigorous silence, interrupted only by the softly spoken exhortations of governors, chaplains and philanthropic visitations, the offender was made [sic] to look inwards, to contemplate the causes and consequences of his crime and thus allow his essential reason to prevail (Garland, 1981, p. 31).

Grendon [prison] had a very clear prime objective. Therapy was its purpose. Men came there to seek to understand themselves and resolve aspects of their past behavior....All staff and all prisoners were regarded as therapists....Whenever there was an issue or a problem, the mantra was, “Take it to your group.” You don’t resolve it in private. You resolve it in public (Newell, 2002, p. 2).

During the last quarter-century, the counselling and therapy industries have come to occupy a place of great social significance in Western cultures (M. Brown, 2002; Furedi, 1997, 2004; Kaminer, 1992; Polsky, 1991; Rose, 1996a, 1996b, 1999). According to Furedi (1997; 2004), for example, even in Britain – nation of the ‘stiff upper lip’ – the last 2-3 decades have been characterised by a rapid increase in demand for, and provision of,
counselling services. For some, the constant recourse to therapeutic interventions has become so widely accepted that it has begun to border on the absurd (M. Brown, 2002). Deveson (as cited in Cadzow, 2003), for example, bemoans that “there were counselling services offered to football crowds when Britain lost the World Cup last year” (p. 41). Despite these occasional attempts to challenge the legitimacy of the therapeutic ethos, and protests that there is little evidence of counselling’s professed benefits (Furedi, 1997, p. 135; Knox, 2001, p. 234), there is nevertheless “no serious questioning of its growing influence” (Furedi, 1997, p. 135).

The widespread legitimacy of the counselling and therapy industries operates to render discourses of ‘talking about it’, ‘expressing one’s emotions’ and/or ‘being heard’ – what Furedi (2004) terms the “talking cures” (p. 9) – as ‘invisible’ discursive constructs. That is, these discourses have become so taken-for-granted that their inclusion in social policy initiatives rarely requires explanation or justification, and is seldom challenged or critiqued.

Indeed, these discursive constructs have informed a range of criminal justice policies that have emerged in recent years, particularly those designed to assist victims of crime. It has come to be widely accepted that crime victims must be offered opportunities to tell the story of their victimisation, to express their pain, fear and/or anger about the offence, and to ‘be heard’ (see, for example, Erez, 1991, p. 3; Lagan, 1997). As B. Cook et al. (1999) state:
When victims of crime are denied the opportunity to tell their stories, they are in a sense disempowered, and are denied an essential aid in their recovery. It is in the telling and the retelling of the story that people hear for themselves the account of their experience – they hear their pain, their fears, what they have lost, and they hear of the new and uncertain world which they are now trying to understand (p. 43).

The introduction of victim impact statements, the right to allocution (Erez, 1991, p. 2) and similar initiatives premised on the notion that “providing victims with a voice has therapeutic advantages” (Erez, as cited in Ashworth, 2002, p. 585) has thus taken place in many Western jurisdictions in recent years. Even the United Kingdom’s *Victim’s Charter* (Home Office, 1996a) stresses the need of crime victims to “explain...how the crime has affected [them]” (para 21), as does the Home Office’s (1997a) *No More Excuses* report and the Council of Europe’s (1999) recommendations on ‘mediation’ in penal matters. The Director of the United States of America’s National Center for Victims of Crime even promotes a system of ‘parallel justice’, in which victims would have a separate hearing of their case “so that the pain they have been through would be acknowledged publicly, and appropriate remedial action taken” (Graef, 2000, p. 60).

Albeit less often, the importance of allowing *offenders* to ‘tell their story’ and ‘be heard’ has also informed recent changes to criminal justice in Western cultures. ‘Therapeutic jurisprudence’, in which offenders involved in the court
system are given “a chance to talk about the issues...to explain themselves...[and to]...have been heard by the decision maker” (Freiberg, 2002, Professor Freiberg section, para 38), is one manifestation of this discourse, for example.

These discourses also act as ‘conditions of emergence’ for ‘restorative justice’. In the ‘restorative justice’ field, it is accepted almost entirely without question that victims, offenders and their respective ‘communities of care’ must be provided with opportunities to engage in the ‘talking cures’ via participation in ‘restorative’ processes (see, for example, Carbonatto, 1995, p. 13; M. Griffiths, 2001, p. 141; Leung, 1999, New Zealand: Family Group Conferencing section, para 6; Pranis, 2002, p. 9; Zehr, 1990, p. 191). The Victim-Offender Mediation Association’s (n.d.) “Recommended Ethical Guidelines” state, for example, that “the ‘personal’ is powerful – genuine stories of people’s experience can be evocative of empathy, insight, and learning. The telling and hearing of these stories can be empowering, healing, and transformative” (p. 1). The New South Wales Department of Corrective Services Restorative Justice Unit (2002b) similarly claims that the advantage of its ‘restorative’ approach is that “victims are given an opportunity and a safe forum to talk about how they were affected....Family and other supporters also get to talk about what has happened to them as a result of the incident”. Elsewhere, the Unit (2003a) claims that “everyone benefits from being heard”. The opportunity for victims to “express to offenders their feelings and thoughts” (Booby, 1997, p. 36) was even promoted as one aim of this program during its formation. Tasmania’s
“Guidelines for Community Conferences” similarly aim to provide victims with “an opportunity to express their hurt...[and]...to describe their feelings” (Department of Health and Human Services Tasmania, 2001b, pp. 14-15; see also Ruddick, 1986, p. 21). New Zealand’s training manual for ‘restorative justice’ facilitators also positions a ‘conference’ as “an opportunity for the victim’s voice to be heard” (New Zealand Department for Courts, 2002, p. 15).

For some, crime victims even have a right to ‘be heard’ in ‘restorative’ fora. One program director interviewed as part of this research, for example, believes that ‘restorative justice’ has such widespread appeal because it is consistent with victims’ “right to be heard” (Confidential interviewee, 27/5/04). Mark Yantzi (interview, 22/9/05) expressed a similar view. Of the ‘restorative justice’ program he manages in Canada, he stated: “we’re getting people now sometimes who just don’t bother going to court and just come here, and talk about...[the offence].... And that’s their right”. Additionally, one of the principles of Canada’s Youth Criminal Justice Act (2002), under which ‘restorative’ measures were introduced for juveniles, also endows victims with the right to ‘be heard’.

Indeed, in some instances, it becomes very difficult to differentiate ‘restorative justice’ from counselling or therapy. Consider, for example, how Paul Schnell (as cited in Mirsky, 2003a), a police officer in Minnesota, incorporates ‘restorative justice’ into his policing practice:
Usually, when a cop asks you questions about a loss or a theft, he [sic] only asks you for the basics: who, what, when, where, your name, your address and those sorts of things. Never is that victim likely to be asked any other questions beyond that. One of the things that I have been trying to routinely ask people who make a complaint, or report having been the victim of crime, is one simple question, ‘What has this been like for you?’ or ‘What’s been the hardest thing for you’ (p. 2)?

The latter question – ‘what’s been the hardest thing for you?’ is also advocated by influential ‘restorative justice’ practitioner and Director of ‘Real Justice Australia’, Terry O’Connell. In fact, when facilitating the ‘conference’ described earlier in this Chapter – of a 14-year-old girl whose mother stormed out of the room – O’Connell (2002) reports that his response to this outburst was to simply turn to the offender and ask ‘what’s been the hardest thing for you’? Furthermore, O’Connell (2002) believes that this question is the single most important question that can be asked at a ‘restorative justice’ ‘conference’.

What is significant here is that this question – ‘what’s been the hardest thing for you?’ – is a therapy-style question, similar to ‘and how does that make you feel...?’ Questions such as these are designed to encourage the participant to express their emotions, ‘tell their story’ and ‘be heard’ – the mantras of the ‘Oprahfied’ ethos.
In Walker’s (2004) work, furthermore, it becomes impossible to distinguish between therapy and ‘restorative justice’. Walker (2004) instigated a program called Restorative Justice Without Offender Participation which “gives victims an opportunity to tell their stories in a small group setting. They can talk about how they have been affected by the crime and what might assist them in repairing the harm” (p. 4). Victims can choose to bring supporters with them to the meeting, but most choose to meet with just the two facilitators (Walker, 2004, p. 4). Facilitators ask victims a series of questions, including “how has the crime...affected you?”, “what is needed to help you deal with some of your hurt and pain?” and, perhaps unsurprisingly, “what has been the hardest thing about what happened” (Walker, 2004, p. 4)?

Thus while Walker’s (2004) program admirably aims to assist victims of crime by providing them with the opportunity to discuss their victimisation and its impact in a supportive setting, it is nonetheless very difficult to establish precisely how this has come to be known as ‘restorative justice’ rather than ‘counselling’ (see also Ryals, 2004). Given that Walker’s (2004) report on the program was endorsed and distributed by the International Institute For Restorative Practices, however, it appears that for this agency at least, such a distinction is not necessary (although see New Zealand Department for Courts, 2002, p. 145).

The Youth Justice Board for England and Wales (2001) also seems to confound ‘restorative justice’ and counselling or therapy. The Board’s practice guidelines suggest that “it is helpful for victims to be contacted even
if the offender is unwilling to engage in the process, as being sensitively
listened to…can assist their recovery” (p. 5). In a debate in Australia’s federal
parliament, several members even confuse ‘restorative justice’ with
therapeutic approaches, with one referring to “therapeutic restorative justice”
for ‘youth justice conferencing’, furthermore, convenors are instructed that
during the ‘conference’ preparation phase, “listening empathetically while
victims express their anger may be the most important preparation that
convenors do prior to the conference” (p. 43). Here, the role of ‘conference’
convenor becomes merged with that of a counsellor or therapist.

3.3.1 The ‘Talking Cures’ as an Innate and Human Response to Crime

Like the offender-as-victim discourse, therefore, the discursive constructs of
therapy and counselling act as ‘conditions of emergence’ of ‘restorative
justice’. These discourses form part of the ‘polyhedron of intelligibility’ of
‘restorative justice’; their legitimacy acts to render ‘restorative justice’ a
rational response to crime and to marginalise alternative responses. In fact,
therapeutic responses to crime – in which offenders and victim are subject to
the ‘talking cures’ – are depicted by advocates of ‘restorative justice’ as
natural, innate, and universal human needs: “there is an innateness about
how people generally respond…[in ‘conferences’]…as they have a need to
share their individual experiences at an emotional level” (O’Connell, n.d., p.
44) (see also O’Connell, as cited in D. O’Brien, n.d., p. 13; Zehr, 1990, p. 27).
By portraying the sharing of experiences and/or emotions as innate, natural and human, these proponents portray ‘restorative practices’ – which provide victims and offenders with opportunities for this sharing – as natural and universal by extension, and thus seek to legitimise ‘restorative justice’. Importantly, however, ‘psy’ knowledges cannot be shown to be universal or innate; the discourses that constitute it can be shown to be shifting and variable rather than monolithic. As Rose (1996a) demonstrates, ‘psy’ discourses more broadly are historically, culturally and geographically specific. Compare, for example, the two quotes at the opening of this section. These demonstrate the marked shift between the penal system of the Victorian era, in which prisoners were expected to remain silent in order to realise the roots of their offending behaviour, and the system recently termed (albeit retrospectively) ‘restorative’ (Newell, 2002), in which prisoners are exhorted to talk in order to achieve the same outcome. This shift, taking place in around a century, demonstrates that the ‘talking cures’ – which lend ‘restorative justice’ a great deal of legitimacy – were not always thought to be the most natural method of reforming offenders. Indeed, as Garland (1981) indicates, for many years, precisely the opposing rationality informed prison practice. The ‘talking cures’ – which have come to be so accepted that they inform a range of recent criminal justice developments, including ‘restorative justice’ – have thus only come to be seen as innate very recently.

Indeed, the notion that all crime victims need to ‘be heard’ and express their feelings about their victimisation can also be challenged. As demonstrated in Chapter One, a body of research exists that shows that for many victims of
minor, juvenile and/or property crimes, becoming involved in the criminal justice system is considered unnecessary at best. Victims of violent and/or serious crime might also dismiss claims that they must express their emotions about the offence via the ‘talking cures’. Consider, for example, the case of Peter Aston, a teenager brutally murdered in New South Wales in 1982. When Whittaker (2000) interviewed Peter’s parents, George and Celia Aston, in 1999, he found the couple “totally incapable of talking about [the offence]” (p. 261). In fact, Celia Aston (as cited in Whittaker, 2000) remarked of her attempt to come to terms with the murder, “I went once to a Victims of Crime meeting….but it didn’t help. They say, ‘Can you talk about it?’ You say ‘No’ and that’s it. End of story. If you’re the sort of person who can’t talk about it, what can you do” (p. 261)?

This may also apply to victims of sexual assault. It is widely recognised that for this group of victims, giving evidence in court is an especially traumatic undertaking (New South Wales Department for Women, 1996). In recent years, measures such as the use of Closed Circuit Television (CCTV) and the protection of victims’ privacy have been introduced in order to protect sexual assault victims acting as witnesses (Home Office, 1996a, Rape and Sexual Assault section, para 1; Laster & O'Malley, 1996, p. 26). Nonetheless, the idea that these victims would benefit psychologically by ‘telling their stories’ in court was raised by New South Wales Attorney-General Bob Debus in a recent parliamentary debate:
It is important to bear in mind that not all victims of sexual assault will wish to give evidence through means such as CCTV. Some of our most experienced prosecutors in sexual assault believe that the healing process for victims begins when they have faced their attackers in court (New South Wales Legislative Assembly, 2004, p. 8701).

The credibility of the discourse of ‘talking about it’ is thus used to justify what has been well documented as an extremely traumatic event for many victims of sexual assault. ‘Restorative justice’ approaches, which stress the apparently therapeutic effects of victims ‘telling their stories’ to the offender are thus discontinuous with other initiatives designed to assist sexual assault victims, most of which are premised on an opposing rationality.

That victims of crime might not feel the need to engage in the ‘talking cures’ is almost entirely unacknowledged in the ‘restorative justice’ field; as argued previously, the ‘restorative’ ethos seems premised on an imagined or essential victim. This is less the case, however, where offenders and the ‘talking cures’ are concerned. ‘Restorative justice’ has been criticised by a number of scholars on the grounds that it assumes offenders will be intelligent, engaged and articulate enough to ‘tell their story’ and ‘express their emotions’ in a ‘restorative justice’ setting (see, for example, Cronin, as cited in Chaaya, 1998, p. 104; Kurki, 2003, p. 307; Levrant et al., 1999, p. 16; Roche, 2004, p. xiv). Indeed, Dittenhoffer and Ericson’s (1983, p. 326) report of early ‘victim offender reconciliation’ programs revealed that staff in these
programs excluded offenders deemed lacking in verbal skills from participating.

Like victims, however, offenders are often constructed by supporters of ‘restorative justice’ as an essential cohort. The offender of the ‘restorative justice’ imagination is always able to draw on his or her ‘innate’ and ‘human’ capacity to express emotions about the offence. As O’Connell (n.d.) puts it:

It is often suggested that many offenders are not articulate enough to talk about what they did. This might be true if the conference process occurred at a rationale [sic] level. It does not. The dialogue takes place at an emotional level, one that nearly all offenders understand and can experience (p. 72).

This view is further supported by the Victim-Offender Mediation Association (n.d.), who list as the first of ten “underlying principles” (p. 1) of ‘victim offender mediation’, that “human beings possess untapped inner resources that, under the right circumstances, can be accessed and utilized to address issues and resolve problems of importance to them” (p. 1). Umbreit’s (2001) guide to ‘victim offender mediation’ similarly lists as one of seven principles underlying ‘mediation’ the “belief in the capacity of all people to draw on inner reservoirs of strength to overcome adversity” (p. 5).

Constructing ‘psy’ knowledges as an ‘innate human resource’ that can be drawn upon in ‘restorative’ processes, however, operates to render all
offenders ‘equal’, irrespective of gender, ethnicity and/or socioeconomic status, as well as level of verbal ability. O’Connell (as cited in D. O’Brien, n.d.) goes so far as to argue that ‘restorative practices’ can override “all the things that differentiate between us on gender, creed and culture” (p. 13). Ross (2003) even claims that in the ‘healing circles’ he witnessed at the revered Hollow Water program in Canada, “there are no colours or races or genders in those circles – only people committed to helping others” (p. 132). This is a highly contentious statement; one would think it impossible for a program focusing on child sexual abuse – a distinctly gendered crime – to be ‘genderless’. Here, the social context around child sexual abuse – an offence overwhelmingly perpetrated by men against young girls within patriarchal social structures – is made ‘invisible’.

As Arndt (2003) and Alder (2000) illustrate, furthermore, the ‘talking cures’ themselves are manifestly gendered. In one study of conferencing in Adelaide, for example, it was found that facilitators “uniformly felt that girls were able to express their feelings…[and]…were more eloquent than the boys” (Alder, 2000, p. 106). Cunneen (2004, p. 351) also points out that in court processes, indigenous people face difficulties based on communicative differences. This is likely to be the same in ‘restorative’ processes, and should be taken into consideration in light of this discussion.

What this indicates, and what I have sought to argue in this section, is that the discourses of the ‘talking cures’ that act as ‘conditions of emergence’ of ‘restorative justice’ are neither as stable and monolithic, nor as incontestable
as they are constructed in the ‘restorative justice’ field. Indeed, one wonders why, if ‘being heard’ is often all that is required by victims (McKnight, 1981, p. 293), existing measures such as victim impact statements, counselling, victims’ groups or simply talking with family or friends are found wanting by advocates of ‘restorative justice’. These advocates fail to demonstrate how ‘being heard’ by the offender will beneficially impact upon victims of crime over and above these other initiatives.

3.4 ‘Healing’, ‘Closure’ and the ‘New Age’ Rhetoric of ‘Restorative Justice’

A number of scholars have commented on the burgeoning ‘new age’ phenomenon and its increasing influence on mainstream cultures (Bruce, 2002). According to Basil (1988, p. 9), for example, the ‘new age’ – once an underground, countercultural movement – has come to impact considerably on the mainstream. For Heelas (1996, p. 129), the proliferation of all things ‘new age’ has meant that it has become almost impossible to peruse magazines in a dentist’s waiting room, for example, without coming across something about the ‘new age’. Thus despite the difficulties of defining ‘new age’ or determining the parameters of this movement (Sutcliffe, 2003), the ‘new age’ is “no longer so much a matter of ‘cults’ as it is one of ‘culture’” (Heelas, 1996, p. 128). I will argue in this section that the pervasiveness and legitimacy of some ‘new age’ discourses acts as a ‘condition of emergence’ of ‘restorative justice’.

3.4.1 The ‘New Age’ Vocabulary of ‘Restorative Justice’
Like the ‘new age’ movement’s distinct vocabulary of terms such as ‘holistic’, ‘unity’, ‘oneness’, ‘transformation’, ‘personal growth’, ‘human potential’ and ‘consciousness’ (Basil, 1988, pp. 10-11), ‘restorative justice’ relies heavily upon a range of ‘new age’ discourses such as ‘healing’, ‘closure’, ‘transformation’, ‘reconciliation’ and ‘harmony’. Proponents even discuss ‘harms’, ‘conflicts’ or ‘disputes’ instead of ‘crimes’. This ‘new age’ vocabulary of ‘restorative justice’, like the beliefs and practices of the ‘new age’ itself (Basil, 1988, p. 9), has rarely been critically examined. Indeed, it appears to have become so taken-for-granted that it is seldom even remarked upon (although see Acorn, 2004; Blagg, 1998). Thus supporters of ‘restorative justice’ have enthusiastically – at times, evangelically – embraced and promoted an approach to crime that is partially justified by reference to ‘invisible’ ‘new age’ discourses.

References to ‘new age’ concepts such as ‘healing’, ‘closure’ and/or ‘making the victim whole’, among others, are far too numerous to list32. Any scholar with even a passing knowledge of the ‘restorative justice’ field will be familiar with their use. The following examples, taken from the works of particularly prominent ‘restorative justice’ scholars, should thus suffice to situate the following discussion:

Instead of defining justice as retribution, we will define justice as restoration. If crime is injury, justice will repair injuries and promote healing….Healing….implies a sense of recovery, a

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32 See Umbreit and Burns’ (2003) bibliography of works dealing with ‘healing’ and the law, which includes a section on ‘restorative justice’.
degree of closure. The violated should again begin to feel like life makes some sense....Healing encompasses a sense of recovery and a hope for the future (Zehr, 1990, pp. 186-187).

Whether an actual settlement occurs is quite secondary to the process of transformation and healing that occurs in their relationship....A specific application of transformative mediation practice, which is particularly suited to family, community, workplace, and victim-offender mediation is the humanistic model of mediation....[which]....embraces a strong belief in each person’s capacity for growth, change, and transformation (Umbreit, 1997, p. 3).

Significantly, ‘restorative justice’ discourse is embedded within these ‘new age’ ideas not only in the works of those we might consider ‘evangelical’ supporters (such as Pranis, Zehr, Van Ness and Umbreit), but in the works of more discerning scholars also. Barton (2003), Braithwaite and Braithwaite (2001), Johnstone (2002; 2003) and Strang (2002), for example, all discuss the potential of ‘restorative justice’ to effect ‘healing’ and/or ‘closure’ for victims and offenders.

Moreover, as I have previously argued, it is nearly impossible to separate theory and practice in the ‘restorative justice’ field. These ‘new age’ discourses inform a great many ‘restorative justice’ programs and practices, particularly many of those that focus on serious, violent and/or adult
offending. Many of these programs have adopted these ideas as their stated objectives, and list, for example, ‘healing’ and ‘closure’ as potential benefits for victims and offenders who participate. Bitel (as cited in Immarigeon, 1994), for example, says of the ‘victim offender workshops’ he facilitates at the Sing Sing Correctional Facility in New York, “the aim of these workshops is to create a safe space for healing and growth” (p. 8). Grier (2000), the Director of the Restorative Parole project in Winnipeg, Canada, states that the purpose of this project is to “initiate a process of restoration, reconciliation, restitution, and reparation between victim and offender….A bringing together of the affected parties in a conciliatory manner is critical to the healing process for the victim” (Focus On Victim section, para 1).

Indeed, even government and other official and/or peak bodies concerned with ‘restorative justice’ make mention of its apparent potential for ‘healing’ and/or ‘closure’, without regard for the ‘new age’ ethos inherent in these terms. Roach (2000, p. 253) discusses the recognition of ‘restorative justice’ in public discourse in Canada, for example, and states that the provincial and federal Ministers of Justice acknowledged the ‘holistic’ and ‘healing’ aspects of aboriginal justice as essential to reform in this regard. Similarly, the slogan of the New South Wales Department of Corrective Services Restorative Justice Unit (2002a; 2002b; 2003a; 2003b) is “working with victims of crime, offenders and the community, for reconciliation and healing”. This program was partly premised on the idea that it may enable participants to “reach ‘closure’ over the incident” (Booby, 1997, p. 18). Guidelines for facilitators of Tasmania’s ‘community conferences’ also stress that these processes may
Even the concept of ‘crime’ has, to some extent, begun to be replaced in the ‘restorative justice’ field, with advocates proposing instead use of the terms ‘harm’, ‘conflict’ or ‘dispute’ (Graef, 2000, p. 30; Zehr, 1990, p. 89). Van Ness (as cited in Strang, 2000), for example, asserts as the first of three fundamental propositions of ‘restorative justice’ that “crime is primarily conflict between individuals…only secondarily is it lawbreaking” (p. 23). Umbreit and Roberts (1996, p. 6) have even coined the seemingly tautological term ‘criminal conflict’, and Bianchi (1994, p. 100) simply prefers ‘wrongs’. Although this tendency has been criticised for a number of reasons – because ‘harm’ and legal wrongdoing are not identical (Duff, 2003, pp. 185-186; Von Hirsch et al., 2003, pp. 22-23), and because “victims of rape or even burglaries do not want to be known as ‘disputants’” (Zehr, 2002, p. 9) – its influence appears to have become only more pervasive. Even in child abuse matters, for example, ‘conference’ facilitators are instructed not to discuss ‘problems’, “because these are pejorative terms. Rather, they talk about ‘concerns”’ (Quinnett & Harrison, 2002, Deal with Objectives section, para 2). The categories ‘victim’ and ‘offender’ have also begun to be replaced, with the Restorative Justice Consortium (2004), for example, describing these parties as “the person/s who has harmed and the person/s harmed” (p. 3). O’Connell, Wachtel and Wachtel (1999, p. 36) similarly advise trainee ‘conference’ facilitators that while “it would be unwieldy to keep saying ‘the person who was harmed’ or ‘the person who caused the harm’” (p. 36), the terms ‘victim’ and ‘offender’ should be avoided as they are potentially stigmatising (see also Calhoun & Borch, 2002, p. 253). New Zealand’s Restorative Justice Network (2002) goes so far as to claim that
“victims and offenders...have more in common as flawed and frail human beings than what divides them as victim and victimizer” (p. 24).

3.4.2 Rationalising ‘Restorative Justice’ Programs for Serious, Violent and/or Adult Offenders

After presenting much of the above discussion as a conference paper at the Australian and New Zealand Society of Criminology’s 17th annual conference in Sydney, Australia, I was met with a number of quite dismissive reactions. A number of conference delegates remarked, for example, that these ‘new age’ discourses surely influenced practice more so in North America, where such ideas are more widely accepted than elsewhere. This may well be the case – my genealogy is a global one, however, and as such, this is perfectly tolerable. Furthermore, discourses do not necessarily adhere to geographical boundaries; what informs practice in the United States of America might also, therefore, inform practice in other contexts, to a greater or lesser degree. It was also suggested that while these ‘new age’ discourses might be present in the language or rhetoric of ‘restorative justice’, their impact on practice was not easy to detect. It is with this argument that I will take issue here.

As detailed above, numerous ‘restorative justice’ practices and programs state as their objectives ‘new age’ notions such as ‘harmony’ or ‘closure’. I want to argue here that such discourses not only inform these practices at this level, but in some cases, exist as their only identifiable rationale. Consider in this regard ‘restorative justice’ programs that operate within prisons with the aim of bringing together an incarcerated offender, convicted
of a serious crime such as murder, sexual assault or a driving offence occasioning death, with his or her victim (such as those described by Booby, 1997; Flaten, 1996; Immarigeon, 1993, 1994, 1996; T. Roberts, 1995; Umbreit et al., 1999; Umbreit, Bradshaw et al., 2003; Umbreit, Coates, & Vos, 2001; Umbreit & Vos, 2000). The usual rationales for initiating ‘restorative practices’, such as diverting offenders from the formal criminal justice system, providing an alternative to prison, reducing criminal justice spending or preventing recidivism, do not apply to these programs. Obviously, diversion of offenders and providing an alternative to incarceration cannot act as a justification of such programs. Nor can these programs be said to save on costs; indeed, given that they are operated in addition to, rather than instead of incarceration, they must surely represent further costs rather than savings. Furthermore, as these programs are primarily aimed at part of the prison population unlikely to reoffend, any impact on recidivism would be negligible. As Rhonda Booby (interview, 12/9/05), former Director of the New South Wales Department of Corrective Services Restorative Justice Unit commented, although she hoped the program would play a role in reducing recidivism:

With serious offences, the recidivism rate is actually very low anyway, so you’d have to do it [run the ‘restorative justice’ program] for fifty years, and you’d have to evaluate for fifty

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33 Although most programs of this nature explicitly exclude offender benefits such as early release (Immarigeon, 1994, p. 3), some early programs allowed offenders to use their participation in a ‘restorative’ process to argue for early parole (Immarigeon, 1994, p. 6) or termination of parole supervision (Booby, 1997, p. 37). This is rarely the case any longer, and is no longer the case in the program described by Immarigeon (1994), for example.
years to see any statistical effect on recidivism, because
murderers and culpable drive people tend not to reoffend.

What, then, is the rationale for ‘restorative justice’ programs of this nature? If diverting offenders, reducing costs or preventing recidivism cannot be said to be their raison d’etre, they must operate primarily to offer to victims and offenders opportunities for ‘healing’, ‘reconciliation’, ‘harmony’, or ‘closure’. That is, their rationale must be informed by these abstract constructions, rather than any measurable objectives. Perhaps this helps explain the reluctance to evaluate programs of this kind (see Introduction).

The same question might be asked of other ‘restorative practices’ such as ‘surrogate’ ‘restorative justice’ – in which random groups of offenders and victims (rather than ‘matched’ pairs) meet (Graef, 2000, p. 45; Immarigeon, 1993, p. 7; 1996, p. 464; Launay, 1987, p. 283) – or ‘victim offender mediation’ between ‘death row’ inmates and members of their victims’ families (Umbreit & Vos, 2000). ‘Surrogate’ ‘restorative justice’ programs appear to be rationalised on the grounds that they may initiate ‘healing’; an evaluation of one such Canadian program found that it enabled victims and offenders to “understand each other, break down stereotypes, bring about a form of reconciliation, and encourage emotional healing” (as cited in Immarigeon, 1993, p. 6). ‘Victim offender mediation’ on ‘death row’ similarly enables victims’ families to “express the full impact of the crime on their lives, get answers to many questions they have, and gain a greater sense of closure so that they can move on with their lives” (Umbreit & Vos, 2000, p.
Walker’s (2004) Restorative Justice Without Offender Participation program, discussed above, also belongs to this group of ‘restorative practices’ for which the accepted rationales of ‘restorative practices’ do not apply.

3.4.3 Attempts to Define ‘New Age’ discourses

What is particularly striking about the use of ‘new age’ discourses in the ‘restorative justice’ field is that these concepts are rarely defined, critiqued or challenged. Aside from Acorn’s (2004) and Blagg’s (1998) brief misgivings, little has been said about the ‘new age’ ethos and/or its position as a ‘condition of possibility’ of ‘restorative justice’. As argued above, these ideas have become so taken-for-granted that they act as ‘invisible’ discourses that even discerning scholars draw upon in their work in this field. A thorough examination of the texts of this field reveals only a small number of attempts to define any of these ‘new age’ terms. Curiously, these are all attempts to define ‘closure’, rather than any of the other ‘new age’ terms used just as frequently. There is nonetheless some consensus as to what ‘closure’ is: T. Marshall and Merry (1990) describe it as “a point in time after which one can say ‘it is all over and done with now’” (p. 182); Knox (2001) as “the state of affairs when the victim or other person can regard an episode as finalised, and ‘get on with life’” (p. 233), and; Johnstone (2002) as the “point where the offender and the offence no longer dominate [the victim]” (p. 78).

Often, discussions involving any of these ‘new age’ concepts in the ‘restorative justice’ field become circular, with advocates referring to one or
more ‘new age’ ideas in support of another. Zehr’s (1990, pp. 186-187) words, quoted above, are a good example. A number of my interview participants had been, or are currently, involved with ‘restorative justice’ programs for serious, violent and/or adult offenders; I asked these respondents what they thought ‘healing’ and ‘closure’ – in my view, the two most commonly used ‘new age’ terms – meant. Circular reasoning was also evident, to some extent, in their responses:

For most victims, there will never be closure….But there is, if I could use the term, [a] ‘defining moment’ rather than closure. It’s a journey that victims of crime take, they have to learn, or must learn to deal with what’s happened, so they can re-empower themselves to take life back on….And even for offenders….it’s more about that defining moment when one sees things in a different light, and is able to deal with them more competently than before the conference (Ken Marslew, interview, 11/8/05).

I think when victims first come to conference…they’re often wanting to tell the other person [the offender] what it felt like….they come saying they want to have a say, they want to let him know what it feels like, they want to let him know what he’s done to their life…and they do that, but what they actually end up doing is being able to let go (Rhonda Booby, interview, 12/9/05).
For Ken Marslew (interview, 11/8/05), the concept of ‘healing’ is interconnected with that of ‘justice’:

Conferencing to my mind is an appropriate step to understanding the reality of justice...once the victim can understand that word ‘justice’, they can become incredibly empowered, because they’re not looking back constantly, they begin to look forward, so the healing [comes from] understanding what justice is to an individual, dealing with that issue of justice and then focusing forward rather than back...we can then begin to use our experiences, our own history, in a positive way, by learning from what’s happened.

While one interviewee avoided any attempts at a concrete definition, simply declaring that “if you talk about closure, of course, that can mean different things to different people” (Les Davey, interview, 28/9/05), most appeared to find this exercise challenging, and a number seemed surprised by my line of questioning. This would appear to indicate further the taken-for-granted nature of ‘new age’ concepts such as ‘healing’ and ‘closure’ in the ‘restorative justice’ field.

One interviewee even objected to my use of the term ‘new age’. After questioning Ken Marslew about a presentation on ‘healing’ he had made at a public forum titled ‘Earth Angels’, at which he had spoken alongside a ‘feng
shui’ expert and an ‘earth angels’ expert, I attempted to ask whether he thought ‘restorative justice’ has become acceptable because it draws on ‘new age’ ideas. He interrupted: “but are they new age? I don’t think they are. Sometimes I believe as societies we’ve become over-civilised with political correctness” (Ken Marslew, interview, 11/8/05). For Marslew, therefore, it appears that ‘new age’ discourses hold so much legitimacy that even attempts to question or challenge them are dismissed as ‘political correctness’.

Mark Yantzi (interview, 22/9/05) expressed views about ‘healing’ and ‘closure’ that challenge the dominant view implicitly endorsed in the ‘restorative justice’ sphere. For Yantzi (interview, 22/9/05), ‘healing’ can never be a fixed or final result of any ‘restorative’ procedure, but is “always a work in progress”. That is, although participants may desire ‘healing’, and this should be viewed as a worthwhile goal, “it’s only in the movies that things like that happen” (Mark Yantzi, interview, 22/9/05). Yantzi explains:

We want it to be a total thing – once you’ve healed, you’re healed….That sort of fundamentalist dichotomy I think is something that’s really a problem. Allow people to...say “yes, I’ve healed from this, but I still have a lot of sad times”.

In the ‘restorative justice’ field, therefore, ‘new age’ concepts are used unproblematically, as though they are widely understood terms with tangible and accepted meanings. Strang’s (2002, p. 112) analysis of the Reintegrative
Shaming Experiments (RISE) data even includes a graph depicting the percentage of victims that had gained ‘closure’ after participating in a ‘conference’, for example. In order to gather this type of data, victims were asked whether participating in a ‘conference’ had made them feel they could put the incident of having been victimised behind them (Strang, 2002, p. 112). Whether or not ‘putting an incident behind you’ is the same as attaining ‘closure’ is not articulated.

3.4.4 Healing the Wounds of Juvenile Crime? The ‘New Age’ as an Inconsistent Rationalisation for ‘Restorative Justice’

The ‘new age’ rhetoric so favoured by proponents of ‘restorative justice’ represents a significant rupture within the field. As demonstrated in Chapter One, ‘restorative practices’ are primarily utilised to deal with incidents of juvenile and/or minor property offending. Although some ‘restorative practices’ for juveniles target offences that are too serious to warrant a warning or caution (Maxwell & Morris, 1994, pp. 17-18), they are nonetheless aimed primarily at relatively minor offending. As also illustrated in Chapter One, victims of such crimes often do not want to become involved with the criminal justice system. In fact, as numerous evaluations of ‘restorative practices’ show, most victims of minor and/or juvenile crimes agree to participate in a ‘restorative’ procedure for one of two reasons: because they want to ‘help’ the offender in some way (Beckett, Campbell, O’Mahony, Jackson, & Doak, 2005, p. 9; Braithwaite & Mugford, 1994, p. 293; Coates & Gehm, 1989, p. 252; Goodes, 1995, p. 10; T. Marshall & Merry, 1990, p. 184), and/or because they feel a sense of social responsibility to do so.
Thus although victims of serious crimes may view their participation in a ‘restorative’ procedure through the discourses of ‘healing’ and ‘closure’ (Rhonda Booby, interview, 12/9/05), this is not typically the way in which victims of less serious and/or juvenile offending perceive their involvement. Indeed, one wonders how much ‘healing’ or ‘closure’ victims of, say, car theft, really need. Of course, this depends on a range of factors, including victims’ age, gender, socioeconomic status and coping ability (B. Cook et al., 1999, pp. 18-21; Fattah, 1998, p. 6). Nonetheless, the ‘new age’ ethos on which ‘restorative justice’ is at least partly premised is largely redundant given its primary focus on juvenile offending. This is particularly the case where ‘restorative practices’ are applied to ‘victimless’ crimes, as is often the case (Maxwell & Morris, 1993, p. 118; Moore & O’Connell, 1994; O’Connell, 1992a; Youth Justice Coalition of New South Wales, 2002, p. vii). Precisely who is being ‘healed’, for example, when ‘restorative practices’ target perpetrators of public urination (Arzdorf-Schubbe, 2000, p. 3; Roche, 2003a, p. 638)?

This disjuncture is further evidenced by Retzinger and Scheff’s (1996) comments on the most effective time to hold a ‘conference’: “any substantial amount of delay will probably diminish the emotionality of the conference….After a long delay, the conference will be an anticlimax, since the emotions involved will either have subsided or have been resolved” (p. 329). While this may be the case where minor, juvenile, and/or property offences are concerned, it is doubtful that it would occur in cases of serious
crime. If a crime is serious enough to warrant ‘healing’ or ‘closure’, furthermore, one would think that the passage of time would do little to resolve the emotions it had engendered. Indeed, if time alone can resolve these emotions, one wonders what the purpose of a ‘restorative justice’ procedure might then be.

Thus although some proponents of ‘restorative justice’ promote its ability to ‘heal the wounds of juvenile property crime’ (Cunha, 1999; Zegers & Price, 1994, p. 816), it appears that a considerable discontinuity exists between the rationalisation of ‘restorative justice’ and its impact on the criminal justice landscape.

3.5. The Spread of ‘Restorative Justice’: From the External to the Internal

The ‘invisibility’ of the ‘psy’ ethos has also meant that like ‘mediation’ (Graef, 2000, p. 10), ‘restorative justice’ has been deemed suitable for application to a rapidly diversifying range of domains. Within the criminal justice apparatus, ‘restorative practices’ have been championed as appropriate in an ever-expanding number of situations. Newell (2002, pp. 3-4), for example, suggests that ‘restorative justice’ might replace existing measures within prisons in the areas of: induction programs for new prisoners; complaints and requests systems; adjudications; anti-bullying strategies; race relations; anti-violence strategies; preparation for release; resettlement; circles upon release; prison outreach; and even staffing practices.
Perhaps more significantly, the influence of ‘restorative justice’ has spread beyond the criminal justice system to encompass schools, workplaces, churches and other arenas. In many of these contexts, ‘restorative justice’ is implemented not as a response to wrongdoing, but as a preventative or proactive measure:

We really are now promoting what we would call proactive restorative practices. In other words, we all think of restorative justice as a reaction to wrongdoing, to crime...But particularly in the school setting there’s the opportunity to do a great deal of connectedness building, community building, and relationship building which we could then tap into (Ted Wachtel, interview, 25/5/05).

‘Restorative justice’ therefore becomes a lifestyle or guise through which all our actions are mediated rather than a discrete and identifiable response to offending behaviour: “restorative justice must be perceived as a social movement dedicated to making restorative practices integral to everyday life” (Wachtel, 1999, p. 4).

Indeed, even practitioners and scholars in the ‘restorative justice’ field are exhorted to live, as well as work, ‘restoratively’:

Work in restorative justice...calls for inner reflection and inner work as much as it calls for helping others. The personal and
the professional do not separate into distinct boxes. They are inextricably intertwined, offering a way to make our lives more holistic and integrated in all aspects….Restorative justice is not just about a group of people that we set apart with the label of ‘offender’ or the people they hurt. It’s about all of us (Pranis, 2004, p. 147; see also Quinney, 1991, pp. 5-6; Umbreit, 1997, p. 5).

Again, therefore, ‘restorative justice’ becomes something so taken-for-granted that it represents not merely a job or field of study, but an overarching philosophy through which to live one’s life: “restorative justice is about us. There is no ‘them’” (Rucker, 2005, p. 119). Indeed, at some level, it almost resembles a religious affiliation. Perhaps this helps explain the standing ovation received in response to a presenter’s tears described at the opening of this Chapter. As Acorn (2004) puts it, “most advocates of restorative justice are aware of their obligation to ‘walk the talk’” (p. 7).

During the writing of this thesis, I attended a number of international conferences convened around the topic of ‘restorative justice’. That ‘restorative justice’ has come to be viewed in this light was nowhere more evident than at these conferences, where delegates cannot simply study or practise ‘restorative justice’, but must exhibit ‘restorative’ values. This is a highly uncomfortable situation to find oneself in if one happens to take anything less than an evangelical approach to ‘restorative justice’. Thus although I respectfully participated in Canadian First Nations and Maori
prayer ceremonies, my level of discomfort meant that I tried to avoid those conference papers in which I would be required to display my ‘restorative’ credentials. These included Abramson’s (2004) session, which “will provide a safe space to share ideas...[and]...opening and closing circles” (International Institute For Restorative Practices, 2004, p. 15), Leonard and Pranis’ (2004) paper, in which “participants will learn how to ‘story’ and...get ‘the whole story’ from others, and use mythical stories to...create sacred space in the peacemaking process” (International Institute For Restorative Practices, 2004, p. 14), and Guimond’s (2004) session, in which “using the medium of music, participants will address the question, Why practice restorative justice” (International Institute For Restorative Practices, 2004, p. 14)?

Moreover, the apparently self-evident superiority of the ‘restorative’ approach to criminal justice, grounded in the ‘psy’ ethos, has meant that in some quarters, the search for evidence of this superiority is derided as a Western imperative not relevant or necessary to the ‘restorative justice’ project:

For many a restorative approach is common sense and does not require proof – just as many aspects of our life do not require proof. We don’t ask for proof that we should eat when we are hungry or that we should sleep when we are tired. Some people don’t need proof that, when harm happens, we should focus our response on repairing the harm. And many don’t need proof to know that bringing people together in a
safe, respectful, reflective process to speak truth and listen deeply will make the community healthier and safer (Pranis, 2004, p. 150).

There are therefore approved and censured subjectivities that one might adopt in the ‘restorative justice’ field. In a sense, ‘restorativeness’ becomes an obligation for actors in this field; practitioners and scholars are exhorted to govern themselves according to an accepted code of ‘restorative’ behaviour. Beliefs, values and actions deemed to reflect ‘restorative’ principles are rewarded; those that challenge, criticise or fall short of this standard are marginalised. This perhaps begins to explain the repetitious and largely homogenous nature of much work on ‘restorative justice’. The voices of those whose work supports existing celebrated discourses are privileged over those whose work presents a challenge to the status quo. Although there is a great deal of discontent over this status quo, it is difficult for individuals to speak outside of approved discourses and thus to present any challenge to the ‘restorative justice’ enterprise. This became clear to me during the writing of this thesis as I began presenting papers critiquing ‘restorative justice’ at various conferences. A number of fellow conference delegates commented to me that they agreed with many of my ideas and felt that critique was too marginal in the ‘restorative justice’ field. Most of these remarks, however, were made in private; some were almost whispered, as though the speaker was confessing a secret. When I interviewed Mike Doolan for this research, he indicated that his own work, which in some respects challenges the dominant ‘restorative justice’ ideology, had been met
with similar reactions. At one conference in particular, Doolan (interview, 21/12/05) claimed the conference organiser “was so nervous of me he ended up in all my workshops. Every time I looked up, I could spot him! I don’t know whether he thought he was moderating somewhat by being there”. This further demonstrates the difficulty of speaking outside of the discourses legitimated by the ‘restorative justice’ project and its revered experts.

3.6 ‘Alternative Dispute Resolution’ and the Incongruity of ‘Restorative Justice’

If I am correct to assert that ‘restorative justice’ has emerged as a legitimate approach to criminal justice due, in part, to its embeddedness within the popularised and taken-for-granted therapeutic or ‘Oprahfied’ ethos, as outlined above, then it is safe to suggest that it represents a continuity with one recent shift in the direction of criminal justice policy. A number of scholars have commented on what is variously dubbed ‘the reassertion of emotionality’ (Laster & O’Malley, 1996) or the ‘return of emotions’ (Karstedt, 2002) in criminal justice processes (see also A. Brown, 2003; Freiberg, 2001; Garland, 2001; Masters & Smith, 1998; Pratt, 2000). If the beginnings of the history of discourse outlined above are accurate, ‘restorative justice’ can be seen as a manifestation of this shift, as a number of these authors contend (Freiberg, 2001; Garland, 2001; Karstedt, 2002; Pratt, 2000).

Simultaneously, however, ‘restorative justice’ represents a discontinuity in this regard. Many authors posit ‘restorative practices’ as an extension of the ‘alternative dispute resolution’ or informal/community justice paradigms

Umbreit (1995), for example, states that the “field of mediating conflict between crime victims and their offenders is an important element within the larger field of alternative dispute resolution” (pp. 274-275). This apparent link with ‘alternative dispute resolution’ procedures lends ‘restorative justice’ legitimacy – both conceptually, as ‘alternative dispute resolution’ processes were already widely established and accepted when ‘restorative justice’ began to emerge, and pragmatically, as ‘restorative justice’ procedures are sometimes auspiced by existing ‘alternative dispute resolution’ agencies (Umbreit, 1995, p. 269).

I want to suggest here, however, that in one sense, ‘restorative justice’ represents a break from ‘alternative dispute resolution’ and forms of ‘neighbourhood justice’. The task of facilitators in ‘alternative dispute resolution’ processes is “to find out exactly what each [party] wants from the other in a positive and less emotional manner than if the disputing parties confront each other under other circumstances [italics added]” (Harding, 1982, p. 23). ‘Restorative justice’ and the range of other practices concomitant with the ‘return of emotions’, however, is designed to be a more emotional event than its major opponent – the court process. One of three criteria used by Gehm (1986) in his National VORP Directory to differentiate ‘victim offender mediation’ programs from those within the community dispute
resolution area is that the former must focus to some degree on the need for ‘closure’, ‘reconciliation’, and the ‘expression of feelings’ (see also Gehm, 1992, p. 546). Again, therefore, this focus on emotionality positions ‘restorative justice’ procedures as discontinuous with processes of ‘alternative dispute resolution’.

The focus on emotionality that is central to ‘restorative practices’ further differentiates ‘restorative justice’ from ‘community’ or ‘alternative’ forms of ‘mediation’, via its privileging of the process or event over the potential outcome. In ‘restorative justice’ procedures, “the result’s not so important. You’re not aiming at the result - the process is what’s crucial” (Rhonda Booby, interview, 12/9/05). In this sense, therefore, the achievement of a ‘restorative’ process is intended to lie in the emotional, rather than the practical or material realm (T. Marshall & Merry, 1990, p. 30); unlike ‘alternative dispute resolution’, ‘restorative justice’ dictates that the “reaching an agreement is…secondary to emotional healing and growth” (Kurki, 2003, p. 295; see also Umbreit & Vos, 2000, p. 67; Victim-Offender Mediation Association, n.d., p. 3).

Despite resembling ‘alternative dispute resolution’ procedures in other ways – for example, in facilitating the bringing together of parties in conflict outside the formal criminal justice system – ‘restorative justice’ therefore represents a rupture with this approach to justice.
3.7 ‘Restorative Justice’, Postvictimhood and Governmentality

As argued above, ‘restorative practices’ – especially those that focus on incidents of serious, violent and/or adult offending – seek to facilitate victims’ attainment of ‘closure’. These procedures thus aim to bring to an end the period of an individual’s victimhood, to have them “move from being victims to being survivors” (Zehr, 1990, p. 25). As Pavlich (2005b) has described it, the subjectivity of ‘victim’ is “transient, to be replaced, through appropriate processes, with a restored, non-victim, sense of self” (p. 51). Moving beyond the ‘victim mode’, or renouncing victim status, was a theme introduced by two of the experts I interviewed:

The questions and the ‘if onlys’ and the ‘what ifs’ both debilitate people and keep them in that victim mode, but also the answers to those things help them get closure….I can think of people who are victims of serious crimes, who’ve told me they’d never enter a conference. And they’re empowered in the sense that they’re energised, they’re energised in opposing offenders, and they’re energised in writing to [government] ministers….they use their victim status to try and improve things, as they would see it….but for me, they’re coming from a victim perspective, whereas the people I’ve seen that have been through [a] conference don’t see themselves as victims anymore, they see themselves as, yeah, people who have been the victim of a crime, but are now able to let that go (Rhonda Booby, interview, 12/9/05).
We have a process called ‘Victim-Survivor-Thriver’…[based on the belief that]….we need to encourage people who see themselves as victims to start to move to that place where they start to deal with their options in a positive way. They then become a survivor. A survivor is one who is getting on with their life, but dealing with the issues that made them feel like a victim….That word ‘victimhood’ is about living your life in blame, and there is a real need for society to start saying, “it’s not what happens to you, it’s what you do when it happens that counts” (Ken Marslew, interview, 11/8/05).

For Ken Marslew (interview, 11/8/05), counselling processes utilised by crime victims often impede a victim’s journey to ‘survivor’ or ‘thriver’ status by being overly compassionate, soft, or ‘disempowering’:

[When accessing counselling services] too many victims…get “oh, sorry you’re a victim, sorry, you poor thing, this never should have happened”. [These are] all disempowering statements….I don’t believe there is enough in victims’ services out there that focuses on moving people forward, on empowering them to live their full potential…I think that much of the counselling process actually keeps people within victims mode.
If one of the aims of ‘restorative justice’ is to assist in bringing to a close individuals’ experiences of victimhood, we might ask why this ‘postvictim’ identity is so imperative to the ‘restorative justice’ project. Obviously, it represents potential benefits to individual victims’ psychological well-being. Might it also, however, represent broader potential social benefits? We might surmise from Rhonda Booby’s thoughts, quoted above, that crime victims who will not agree to participate in a ‘restorative’ process – and therefore are stuck in the ‘victim mode’ – represent something of a thorn in the side of the State and its agencies with their campaigning activity. Those victims who have participated in ‘restorative justice’, however, have been able to ‘let go’, and no longer see themselves as victims. Presumably, these ‘healed’ or placated victims do not represent a challenge to governments in the same way in which their counterparts in the ‘victim mode’ apparently do. As Ken Marslew (interview, 11/8/05) declared:

If we deal with the emotionality around an issue....when you have these conferences with serious offences, you will find that...victims aren’t wanting death penalties and life sentences and all that sort of thing, because they’re getting their needs met.

‘Restorative justice’ might therefore result in the proliferation of appeased (and apathetic) rather than angry (and active) victims. Here, the goals of citizens and the state become aligned. Victims’ wishes – to forgo campaigning for the death penalty, for example – come to resemble those of
governments, and victims and governments advance the same, rather than opposing, platforms. In the passages above, Ken Marslew (interview, 11/8/05) seems almost disparaging of those who see themselves as victims. Elsewhere (as cited in MacGregor, 1996), he advises, “don’t think like a victim! Don’t act like a victim!” (p. 159). In one sense, therefore, ‘healing’ – or, in Ken Marslew’s parlance, ‘thriving’ – becomes something of an obligation for victims. Indeed, one of the stated ‘desired outcomes’ of the New South Wales Department of Corrective Services (n.d.) approach to ‘restorative justice’ is that “victims [be] able to transform emotions such as anger, personal hurt and fear into constructive activity” (p. 8). This issue will be discussed in greater detail in Chapter Five.

### 3.8 ‘Restorative Justice’ and the Legitimacy of ‘Psy’ Discourses

As the contents of this Chapter indicate, ‘restorative justice’ relies profoundly on, and is deeply embedded within, the ‘psy’ disciplines. ‘Restorative justice’ views its object of interest – crime (or ‘harm’) and how to respond to it – through the guise of psychology. It presupposes subjects possessed of a psyche or soul, and seeks to govern these subjects via the ‘psy’ sciences. This approach is so thoroughly taken-for-granted that it is rendered ‘invisible’ in the ‘restorative justice’ field. The framework of psychology presents itself not as one potential perspective among many, but as the *truth*.

The debate over whether ‘restorative justice’ represents a ‘soft option’ for offenders is a potent example both of the ‘invisible’ nature of the
3.8.1 The ‘Soft Option’ Debate and the ‘Invisibility’ of Psychology

Whether or not ‘restorative justice’ represents a ‘soft option’ for offenders is a question that has commanded the attention of advocates for some time. Proponents do not debate whether or not this is the case, as such, but rather rebut the imagined arguments of invisible detractors who apparently view ‘restorative justice’ in this light (Benjamin, 1999, p. 8; Clarke & Davies, 1994, p. 173; Criminal Justice Review Group, 2000, p. 201; Fitzgerald, 2000, pp. 248-249; M. Griffiths, 1999, p. 5; Hadley, 2001, p. 9; Home Office, 2003, p. 5; McElrea, 1994, p. 51; McInnes, 1996, para 124; Morris & Young, 2000, p. 18, 22; Sherman & Strang, 1997, p. 1; Stevenson, 2001, p. 2). Comments made by the New South Wales Attorney-General’s Department (1996) are typical in this regard:

Whilst some may view conferencing as a ‘soft option’ for young offenders, the working party is of the view that conferencing is a far more confronting and intensive process than that currently provided by the court system. The average conference usually takes up to 2 hours, or longer, in some cases. Unlike the court process, young people are required to consider and articulate what they have done, face their victim, [and] their extended family (p. 37).
As a number of authors have pointed out, these arguments are quite redundant, especially given the absence of any link between ‘tough’ approaches to crime and the reduction of (re)offending behaviour (Maxwell & Morris, 1996, pp. 90-91; Sherman & Strang, 1997, p. 1). One could argue, furthermore, that whether ‘restorative justice’ represents a ‘soft option’ for offenders is dependent on a myriad of variables, not the least of which are offenders’ own perceptions (see Daly, 1999). Additionally, if claims that ‘restorative practices’ represent a widening of the net of control are correct (see, for example, New South Wales Attorney-General’s Department, 1996, p. 15; Roche, 2003b, pp. 39-40; B. Williams, 2005, p. 15), it could be argued that ‘restorative’ measures certainly represent a tougher approach when they are used in place of less formal procedures such as police cautions or warnings.

What is infinitely more interesting than this debate, I would suggest, is what its very existence tells us about the rationalities that inform the ‘restorative justice’ field. What proponents mean when they say that ‘restorative justice’ is “tougher and more challenging than…a court appearance” (New South Wales Attorney-General’s Department, 1996, para 7) is that ‘restorative justice’ requires a more demanding psychological or emotional engagement from offenders: “it is a tough-minded journey that challenges the human spirit” (Hadley, 2001, p. 10). Consider, for example, Ross’ (2003) comments on the revered Hollow Water ‘circle sentencing’ program for perpetrators of child sexual abuse in an indigenous Canadian community:
The word ‘healing’ seems such a soft word, but... Hollow Water’s healing process is anything but soft. In fact, jail is a much easier alternative, because it does not require the victimizer to face the real truths about [the] abuse (p. 136).

Ross (2003) also claims that “healing is much more painful than simply hiding from the truth in a jail cell” (p. 130).

This is a bold claim, to say the least. Given what is known about the treatment of reviled child sex offenders inside prisons, it is hard to imagine a ‘restorative’ procedure as the more difficult of these two measures. Ross’ (2003) assertion is essentially that facing up to one’s offending in a ‘circle sentencing’ process is more challenging than enduring a gaol term in which verbal, physical and even sexual assaults at the hands of other prisoners are a very real possibility, and exclusion from familial, friendship and employment networks, not to mention the deprivation of one’s liberty, are certainties. This claim, however, is accepted without challenge in the ‘restorative justice’ sphere. Even the Justices in Canada’s famous R. v. Gladue case, involving the sentencing of a young indigenous woman for manslaughter, adhere to this argument, and claim:

The existing overemphasis on incarceration in Canada may be partly due to the perception that a restorative approach is a more lenient approach to crime and that imprisonment constitutes the ultimate punishment. Yet in our view a sentence
focussed on restorative justice is not necessarily a ‘lighter’ punishment. Facing victim and community is for some more frightening than the possibility of a term of imprisonment (Lamer et al., 1999, para 79).

This brings into sharp relief the centrality and ‘invisibility’ of psychology to the ‘restorative justice’ ethos. Often, ‘restorative’ processes will not involve the imposition of any of the physical – nor many of the material, relational or social – consequences that incarceration would necessarily involve. To argue that ‘restorative justice’ represents the more difficult of the two sanctions therefore demonstrates its embeddedness within the psychological enterprise.

3.8.2 Destabilising ‘Psy’ Knowledges

The ‘psy’ ethos is not, however, as universal, monolithic or unassailable as it appears in relation to the ‘restorative justice’ field. Firstly, as Rose (1996a; 1996b) has demonstrated, the dominance of psychology as a framework through which social policies are constructed is itself a contingency, and its pervasiveness is likewise historically, culturally, and geographically specific. The psychological perspective:

is itself an outcome of history, one that emerges only in the nineteenth century. For it is only at this historical moment, and in a limited and localized geographical space, that a way of thinking emerges in which human being is understood in terms
of persons each equipped with an inner domain, a ‘psychology’
(Rose, 1996b, p. 129).

As such, this ethos must be viewed as one perspective among others, rather than the grand narrative through which to view the experience of being human. Secondly, the efficacy of the practical techniques of ‘psy’, such as counselling and/or therapy – although widely heralded – is in fact far from indisputable (Furedi, 1997, p. 135; Knox, 2001, p. 234; Polsky, 1991). There is evidence to suggest, for example, that the celebrated practice of ‘talking about it’ or ‘telling one’s story’ does not necessarily result in psychological benefits for victims (Ashworth, 2002, p. 585). Thirdly, emotional responses to crime are not universal, as supporters of ‘restorative practices’ suggest. Rather, they differ considerably across cultures and are thus not an intrinsically ‘human’ or ‘innate’ reaction, but are shaped by “specific emotional cultures and their institutional settings” (Karstedt, 2002, p. 305). Fourthly, the ‘psy’ apparatus and the techniques of intervention it underpins has been subject to a range of challenges from various fronts, as Polsky (1991, pp. 12-14) details. Finally, and perhaps most significantly, ‘psy’ knowledges primarily appeal to, and are directed towards, white, middle class individuals, and to women more so than men (Kaminer, 1992). This is almost entirely obscured in the ‘restorative justice’ field, however, where the ‘psy’ framework is portrayed as an innate and universal approach to dealing with wrongdoing.
3.8.3 Tracing ‘Psy’ Discourses

It is worth considering, therefore, how ‘psy’ discourses themselves came to be bestowed such legitimacy. If ‘restorative justice’ is steeped within ‘psy’ knowledges, and draws on their credibility, how did these discourses in turn come to be seen as the ‘truth’? This is especially important given that ‘psy’ discourses seem to persist despite their apparently limited significance: “how is it that the therapeutic apparatus has established itself so firmly that, despite substantial opposition, it can continue to expand even when its ineptitude is starkly evident” (Polsky, 1991, p. 7)? Drawing primarily on the work of Nikolas Rose (1988; 1996a; 1996b; 1999), this section aims to begin to trace the rise of ‘psy’ knowledges.

According to Rose (1996a, p. 15; 1999, p. 217), although the ‘psy’ disciplines emerged at the end of the nineteenth century, their influence became entrenched only after their ‘rebirth’ following World War II. Importantly, the reign of the ‘psy’ framework is primarily a Western phenomenon; although these discourses have played a role under diverse regimes of rule, it is primarily liberal democratic states in which they have had a profound impact (Rose, 1996a, pp. 13-15). The rise of psychology and related disciplines since the late nineteenth century is thus related to shifts in the exercise of power in Western democracies: “the history of psy...is intrinsically linked to the history of government” (Rose, 1996a, p. 11; see also Rose, 1999, pp. 221, 231).
Significantly, Rose (1996a) sees the monopoly of the ‘psy’ framework as intrinsically linked with the emergence of governmental forms of power identified by Foucault (1991). ‘Psy’ approaches and techniques thus found legitimacy as they were potent manifestations not of authoritarian or coercive strategies of rule, but of “governing individuals in terms of their freedom [italics in original]” (Rose, 1996a, p. 16). ‘Psy’ techniques and strategies allow individuals to be ‘governed at a distance’, “not through coercion but through persuasion, not through fear produced by threats but through the tensions generated in the discrepancy between how life is and how much better one thinks it could be” (Rose, 1996a, p. 73). The ‘psy’ ethos therefore enables government through, rather than domination of, the subjects of liberal democratic states (see also Cruikshank, 1993).

Rose (1996a) further argues that the reign of ‘psy’ is fundamentally underpinned by the emergence of ‘the social’ as a governable domain. The existence of ‘the social’ enables individuals to be governed – and, importantly, govern themselves – “as subjects simultaneously of liberty and of responsibility” (Rose, 1996a, p. 12). ‘Psy’ techniques and strategies, through which individuals are enjoined to ‘work on themselves’ in line with social goals (Rimke, 2000), are thus capable of fulfilling the requirement of liberal governance – “that human beings conduct themselves simultaneously as subjects of freedom and subjects of society” (Rose, 1996a, p. 98).

It must be highlighted here, furthermore, that ‘psy’ itself is not a “behemoth” (Polsky, 1991, p. 6) or monolithic phenomenon. On the contrary – ‘psy’
comprises many and varied techniques, theories and practices. In part, it is this ‘generous’ (Rose, 1996a, p. 87; 1996b, p. 139) or ‘nonparadigmatic’ (Rose, 1996a, p. 60; 1996b, p. 139) nature of ‘psy’ knowledges that have enabled them to exercise such great influence. Rather than representing a weakness in the ‘psy’ enterprise, this heterogeneity “is a key to the wide-ranging power of psychology” (Rose, 1996a, p. 60).

The ‘psy’ apparatus on which ‘restorative justice’ is partly rationalised is thus itself a culturally, historically, and geographically specific entity. A consideration of the emergence of the ‘conditions of possibility’ of ‘restorative justice’ can thus further reveal ‘restorative justice’ as a contingent effect of shifting relations of power. In the following section, I begin to address some of the potential ‘dangers’ this analysis of the underpinnings of ‘restorative justice’ produces.

3.8.4 (What’s so Dangerous) ‘bout (Inner) Peace, Love and ‘Healing’?

The trouble with psychology and the emotions, of course, is that they necessarily belong to individuals. It is in this sense that the reign of psychology as a ‘condition of existence’ of ‘restorative justice’ represents, if not something bad, then certainly something potentially dangerous. It is furthermore in this regard that ‘restorative justice’ represents a manifestation of the shift towards individual rather than social/structural explanations for, and responses to, crime.
Consider the following passage taken from a promotional video played annually at the ‘restorative justice’ conference convened by the International Institute For Restorative Practices:

Lots of people like to say that there is a cause-and-effect relationship between violence and living conditions. These are environmental factors we all understand: stress, alienation, poverty, the manipulation of entire groups or individuals, the epidemic of drug use and an overall sense of helplessness to control our destinies. All of these factors are important. Yet our two decades of research has shown that each individual who has been affected by powerlessness, poverty, and all the other conditions, experience emotions that are caused by these conditions…It is not the conditions which are responsible for the reactions of individuals, but the emotions experienced by these individuals and their habitual ways of responding to these emotions (Silvan S. Tomkins Institute, 2003).

Here, social explanations for violence are minimised in favour of viewing crime as a result of individuals’ “inappropriate responses to shame” (International Institute For Restorative Practices, 2004, p. 29; 2005, p. 44). The centrality of psychology/emotionality to the ‘restorative justice’ project thus has the potential to become a mechanism through which the individual responsibility of offenders becomes entrenched. We might therefore posit
‘restorative justice’ as a neo-liberal strategy through which offenders are increasingly responsibilised and ‘autonomised’ (Rose, 1996c, p. 342).

The work of Richard Quinney, a ‘peacemaking criminologist’ whose work is celebrated and widely cited by supporters of ‘restorative justice’ is a good example of the way in which ‘restorative practices’ might be viewed as a manifestation of this shift. Compare, for example, the passages juxtaposed below. The first is taken from Quinney’s (1974) highly regarded text *Critique of Legal Order: Crime Control in Capitalist Society*, and posits entrenched structural disadvantage as the cause of crime. The second is from Quinney’s (1991) essay “The Way of Peace: On Crime, Suffering, and Service”. Here, the concern with the social/structural context of crime has been replaced with a treatise on individual ‘inner peace’ as the solution to crime:

Only a vision that goes beyond reform of the capitalist system can provide us with a humane existence….Only with a critical philosophy of our present condition can we suggest a way out of our possible future. We are capable of an alternative existence, one that frees us and makes us human. We must think and act in a way that will bring about a world quite different from the one toward which we are currently heading. A socialist future is our hope (Quinney, 1974, p. 135).

As long as there is suffering in this world, each of us suffers....without inner peace in each of us, without peace of
mind and heart, there can be no social peace between people and no peace in societies, nations and in the world. The ending of both suffering and crime, which is the establishing of justice, can come only out of peace, out of a peace that is spiritually grounded in our very being. To eliminate crime...requires a transformation of our human being. We as human beings must be peace if we are to live in a world free of crime, in a world of peace [italics in original] (Quinney, 1991, pp. 10-11).

This shift is profound; despite the similarity of Quinney’s language and tone, these excerpts demonstrate the importance placed on individual psychology by ‘peacemaking criminologists’ and, by extension, proponents of ‘restorative justice’. Thus despite claims that Quinney’s new focus on the individual does not cancel out his prior concern with the uneven distribution of wealth (Anderson, 2002, p. 238; Quinney, as cited in Wozniak & Braswell, 2002, p. 199), the newfound focus on the individual – and the responsibility of individuals to “look within...and discover the roots of all suffering” (Mobley, Pepinsky, & Terry, 2002, p. 327) – certainly appears to represent a call to swap “the political for the personal” (Cruikshank, 1993, p. 327). Quinney’s work, previously grounded in a staunchly Marxist framework (see Quinney, 1974; 1977; 1979) thus clearly shows the potential nexus between the ‘psy’ ethos, ‘restorative justice’ and an increased focus on individualisation, rendered possible by the “contraction of the state” (B. Hudson, 1998b, p.
556) and the beginnings of what Rose (1996c) has termed the ‘death of the social’.

Although ‘restorative justice’ might thus be understood as an approach premised on a “much reduced place for the social determination of crime” (O’Malley, 1996, p. 31), or a “greater emphasis on individual responsibility” (Cunneen, 2003, p. 184), it by no means signifies a completed development in this regard. Instead, it acknowledges the existence of poverty, marginalisation, unemployment, and so on, but posits individuals’ psychological reactions to such disadvantage, rather than disadvantage per se as the source of crime.

In so doing, proponents of ‘restorative justice’ construct and maintain an internal anomaly. Advocates deride prisons for their discriminatory focus on the poor, vulnerable, marginalised and addicted, and situate ‘restorative justice’ as a progressive alternative to incarceration based on this criticism (see, for example, Consedine, 1995). Some ‘restorative’ processes, however, can assume an individually deficient and responsible offending subject. ‘Restorative’ or therapeutic prison regimes such as England’s Grendon prison (Newell, 2002) thus disregard the structural disadvantage common to many of their inmates in favour of using therapy to address the apparently individual and psychological causes of inmates’ offending. Thus while it is acknowledged that prisoners are “some of the most damaging people…[but also]…the most damaged people” (Newell, 2002, p. 2), the ‘damage’ done to
inmates is clearly perceived as psychological rather than material or structural.

Of course, it is commendable that prisoners – many of whom suffer mental illnesses – receive treatment while incarcerated. It is also possible, however, that the psychologisation of crime will result in the legitimation of prison under the guise of ‘restorative justice’ (Robert & Peters, 2003, p. 116). Consider Newell’s (2002) comments in this regard:

I celebrate the work that is taking place at present within prisons….it’s the one advantage of a prison setting. You have people, you are containing them and you can offer them choices and chances. You can do some work with them within a boundary. That’s one of the real advantages (pp. 1-2).

‘Restorative justice’ is thus one way in which Foucault’s (1996d, p. 147) prediction – that the ‘psy’ disciplines would operate as an alibi via which the prison system would be maintained – appears to be taking hold. This appears to be the case, in part at least, due to the apolitical and depoliticising nature of ‘psy’ knowledges (Hazleden, 2003, p. 413; Rimke, 2000). As the ‘psy’ disciplines are constructed as a universal and monolithic perspective, they appear as though they are neither aligned with the left nor the right, but are somehow ‘above’ politics. This not only acts to privilege ‘psy’ discourses over others, and to silence alternative perspectives, but to perpetuate the focus on individuals and individual responsibility in place of the social, and
the responsibilities of the State. The embeddedness of ‘restorative justice’ within this ethos thus goes some way towards explaining its appeal across the political spectrum.

Another area of concern in relation to the psychologising tendency of ‘restorative justice’ is that these strategies may be deemed more suitable for dealing with female offenders. It has been well documented that women’s criminal behaviour is viewed through the guise of psychology more so than men’s. Alder (2000, p. 112), for example, believes that in the juvenile justice arena, sexual abuse has become the primary discourse through which girls’ behaviour is viewed, even in cases where girls have not disclosed any such abuse. The propensity to psychologise women offenders’ behaviour was to be made manifest by a ‘reintegrative shaming’ pilot program to be introduced into Mulawa, New South Wales’ main women’s prison. The ‘reintegrative shaming’ trial was to be introduced in order to deal with internal disciplinary offences committed by inmates (New South Wales Department of Corrective Services, n.d., p. 14). This meant that acts that had been dealt with via the use of dismissals, cautions or reprimands would now be subject to a ‘reintegrative shaming’ procedure (New South Wales Department of Corrective Services, n.d., p. 15). Victims in these procedures would thus be either other inmates, correctional staff or even the Governor on behalf of the Department (New South Wales Department of Corrective Services, n.d., p. 16). While the Department reasoned that this pilot was suitable for Mulawa because its inmates are more likely to be charged with offences against internal discipline than male prisoners (New South Wales Department of
Corrective Services, n.d., p. 14), it is worth considering whether it appeared suitable for women due to an existing tendency to control women via their psychology/emotions. Although this pilot scheme was never implemented, the intention to do so demonstrates how ‘invisible’ psychological discourses might be more readily applied to women over men.

Thus although as Blagg (2002, pp. 198-199) demonstrates, ‘healing’ can have a meaning outside of the individualised sense with which it is usually imbued within the ‘restorative justice’ field, its use in this latter fashion gives rise to the potential for ‘restorative practices’ to be ‘dangerously’ applied.

3.9 Conclusion

I have argued in this Chapter that the pervasive and widely accepted ‘psy’ ethos acts as a ‘condition of existence’ of ‘restorative justice’. ‘Restorative practices’ have been able to emerge due partly to their embeddedness within the legitimated concepts of this ethos. A number of potential ‘dangers’ stemming from this connection were also considered in this Chapter. These include the individualising and psychologising thrust of ‘restorative practices’, the potential for ‘restorative justice’ to create placated victims via the ‘healing’ process, and the contradictory nature of constructing offenders simultaneously as victims, and as accountable for their offending behaviour.

In the following Chapter I posit an intentionally contrasting set of discourses as ‘conditions of existence’ of ‘restorative justice’. Read together, these varied ‘game openings’ demonstrate the heterogeneity of the roots of
'restorative justice', and destabilise the unity that is often bestowed upon practices subsumed under the 'restorative justice' label.
CHAPTER FOUR: PARENTAL RESPONSIBILITY AND ‘RESTORATIVE JUSTICE’ FOR JUVENILES

As stated already, the discourses explored in the previous Chapter are ‘invisible’ in the sense that they are so taken-for-granted in the ‘restorative justice’ field as to require no explanation or analysis. The discourses to be discussed in this Chapter are ‘invisible’ in the opposite sense. Although the focus on families more broadly is central to ‘restorative justice’ in some guises and/or localities, such as ‘family group conferencing’ in New Zealand, the discourse of parental responsibility itself is almost absent and thus, literally, ‘invisible’.

I first stumbled across the existence and potential significance of this discourse accidentally, while exploring ‘psy’ discourses and researching ‘restorative justice’ more broadly. It was in this context that I came across archival sources relating to the emergence of ‘restorative justice’, including the Home Office’s (1997a) *No More Excuses* report as well as reports and other documentation relating to the origins of the Wagga Wagga ‘restorative justice’ program. The content area of this Chapter thus came about serendipitously – some of the documents that first seemed to suggest that parental responsibility might be considered as a rich area for exploration had been provided to me by an existing contact in the ‘restorative justice’ field.

This Chapter aims to posit parental responsibilisation as another ‘condition of emergence’ of ‘restorative justice’. In it, I will argue that in recent years, there has been an increased focus on responsibilising parents for children's
criminal and/or anti-social behaviour in many Western jurisdictions. Discourses of parental responsibility thus act as ‘conditions of possibility’ of some ‘restorative practices’, particularly those that focus on juvenile offending. Despite the silenced nature of these discourses, they can be shown to have played a role in the emergence of ‘restorative practices’ in some jurisdictions.

This Chapter also argues that a small and marginalised body of research literature exists which indicates that ‘restorative practices’ for juveniles can and do act as responsibilising mechanisms for parents, and that parents can experience ‘restorative practices’ as responsibilising and/or blaming.

I further argue here that the identification of discourses of parental responsibilisation as a ‘condition of existence’ of ‘restorative justice’ produces a range of ‘dangers’ or implications that might be considered in relation to the current and future operation of ‘restorative practices’. These potential ‘dangers’ include: a negative impact on rates of juvenile recidivism; the increased responsibilisation of parents via the rhetoric of deprofessionalisation, and; the disproportionate responsibilisation of disadvantaged groups including mothers, single parents, and indigenous parents.

Finally, this Chapter argues that a number of theoretical insights result from examining the silenced discourse of parental responsibilisation as it relates to ‘restorative justice’. These include its challenge to Braithwaite’s (1989) theory
of ‘reintegrative shaming’; its challenge to traditional ‘restorative justice’
histories; its status as a strategy of ‘government at a distance’; and
specifically, that ‘restorative justice’ practices for juveniles represent a
modern manifestation of government through the child-centred family – a
form of power identified by Donzelot (1980).

4.1 The Responsibilisation of Parents

The idea that parents of juvenile offenders should be held responsible for
their children’s criminal behaviour has recently gained momentum in various
Western jurisdictions. In recent years, governments have frequently accused
parents – or at least, some groups of parents – of being incapable of proper
parenting in light of declining ‘family values’, high divorce rates and other
‘social ills’ (Hil, 1998, p. 101). As Mooney (2003, p. 100) argues, there have
been numerous media reports on the ‘poor parenting’ that results in juvenile
crime in recent years. She gives the example of one United Kingdom
columnist who described disorderly youths as “feral children” (p. 100) and
praised Prime Minister Tony Blair’s proposals that single mothers have their
welfare payments withdrawn if “they fail to keep their brats under control”
(Anderson, as cited in Mooney, 2003, p. 100). There are many similar
examples in Australian media also, such as Hay and Maher’s (1998) article
“Where are your kids?” in which the authors describe calls by officials for
parents to take responsibility for disciplining their children (see also Silmalis,
2006).
A range of measures aimed at curbing juvenile crime by holding parents accountable have been implemented in this context. Mooney (2003, p. 109) lists a range of initiatives in the United Kingdom, for example, including ‘parenting orders’ requiring parents to be responsible for their children (together with penalty fines for non-compliance), ‘parenting contracts’ for those who ‘allow’ their children to truant, and ‘intensive support schemes’ for families, including residential programs for parents (see also Home Office, 2004). Parents can also be ordered by magistrates to attend their child’s court hearing (Home Office, 2000a, s. 3.17). Likewise, in Australia, a number of jurisdictions have, during the last 10 to 15 years, passed legislation in which the enforcement of parental responsibility over juvenile offenders is a feature. Hil (1996a) describes legislation of this nature in almost all Australian states and territories. The explicitness and extent of the focus on parental responsibility obviously varies substantially amongst jurisdictions, both within Australia and internationally. Some examples of legislation in which a strong emphasis is placed on parental responsibility, however, include Queensland’s Juvenile Justice Act (1992) and Victoria’s Children and Young Persons Act (1989), both of which have provisions for courts to order parents to reimburse victims of their children’s offending, and Western Australia’s Young Offenders Act (1994), which includes an option for courts to order parents to recompense victims when the young offender is unable to do so. In terms of jurisdictions within Australia, it is perhaps the Northern Territory’s Juvenile Justice Act (1997) that emphasises the responsibilisation of parents most overtly. This legislation requires parents, where it is deemed that they have “failed to exercise reasonable supervision and control of the juvenile” (s.
55A) to be liable to contribute towards the cost of their child’s detention. The Act states:

Where…a juvenile is ordered by the Court to be detained at a detention centre, the Court may…order that a parent or the parents of the juvenile pay an amount towards the cost of detaining the juvenile in the detention centre, which amount shall not exceed $100 per week, for each week during which the juvenile is detained (s. 55A).

Legislation governing Idaho (the Idaho Juvenile Corrections Act (1995)), Oregon (the Oregon State Juvenile Code (1998)) and Kansas (the Kansas Juvenile Justice Code (2001)) contain similar provisions. The Kansas Juvenile Justice Code (2001), for example, orders that the “parents or guardians of any juvenile offender placed under a house arrest program…shall be required to pay the county the cost of such house arrest program” (s. (g)). In Florida also, parents who are deemed “nonindigent or indigent-but-able-to-contribute” (Yee, 1998, p. 13) are liable for the costs of prosecuting their child as an adult. Indeed, holding parents legally responsible for their children’s criminality appears to have been a significant trend in many jurisdictions within the United States of America during the 1990s. Yee (1998) describes numerous examples of changes to juvenile justice in various American states in which responsibilising parents was a key feature. These include amendments to Oklahoma laws, which now allow courts to fine parents if their child fails to perform community service, and
laws in Tennessee that can require parents to undertake community service themselves, or with their child (Yee, 1998, p. 3) (see also Weinstein, 1991).

4.1.1 Responsibilisation of Parents for Anti-Social Behaviour

These sorts of responsibilisation strategies have taken place in a context in which parents are increasingly being held responsible not only for their children’s *criminal* behaviour, but for their *anti-social* behaviour more broadly. Cases in the United Kingdom and the United States of America in which parents have been incarcerated for failing to curtail their child’s truanting, for example, have received widespread publicity (see, for example, Britten, 2003). Calls to introduce similar measures have also occurred in Australia (Hancock, 2001). Additionally, in a bid to reduce anti-social activity – which has been identified as one of four key national policing priorities for the United Kingdom (Willis, as cited in Bullock & Jones, 2004, p. 2) – the British government has recently introduced ‘Acceptable Behaviour Contracts’ into England and Wales. These contracts between young persons, police and housing offices are agreements under which the young person in question pledges not to carry out certain anti-social acts for a fixed period of time (Bullock & Jones, 2004, p. 4). ‘Acceptable Behaviour Contracts’, or ‘ABCs’, have been deemed a success in reducing anti-social behaviour by young people in England and Wales, with the Home Office (2002a) declaring that they “have proved effective as a means of encouraging young adults, children, and importantly, parents to take responsibility for unacceptable behaviour [italics added]” (p. 7).
These contracts, however, may result in the criminalisation of parents for the behaviour of children below the age of legal responsibility. Bullock and Jones (2004, p. 23), describing the process of applying an ‘ABC’ to a young person, state that the young person and their parents are ‘invited’ to attend an ‘interview’ which, they are informed, will result in the signing of a contract. If parents fail to attend this ‘interview’, however, “a further letter would be sent. If the family failed to comply the second time, a report would be made which could be used if further proceedings were to be taken against the family” (p. 23). Here, one can see that the emphasis quickly shifts from the ‘problem child’ to the ‘problem family’. Not only can parents be criminalised as a result of the often non-criminal behaviour of their children (contracts can be instigated due to the child participating in a variety of behaviours ranging from selling drugs to verbal abuse to cycling on the footpath (Bullock & Jones, 2004, p. 16)), but a variation of the contract scheme has even been introduced for children aged under ten years (Bullock & Jones, 2004, p. 4). As a result, parents of children below the age of legal responsibility in England and Wales are still able to be held ‘criminally’ responsible for the conduct of their children (see also Scraton, 2002, p. 31).

Similarly, in the Arkansas city of Dermott, parents can be harshly penalised simply for failing to make their children abide by a council-imposed curfew. Geis and Binder (1991, p. 312) report that in Dermott, parents whose children violate the curfew - which operates from eleven o’clock each night to half past five each morning - can be sentenced to a two-day term in an open-air stockade. Parents can also have their photograph published in a local
newspaper over the caption ‘Irresponsible Parent’ (Geis & Binder, 1991, p. 312). If parents are unable to control their children, they must refer their children to the juvenile court as delinquents, and pay $100 or perform 20 hours of community service for each child so designated (Geis & Binder, 1991, p. 312).

4.1.2 Growing Emphasis on Parental Responsibility

That juvenile crime occurs as a result of the inadequate control of young people by their parents is, of course, by no means a novel perspective. As Utting (1994) describes, this view – which Hillian and Reitsma-Street (2003) term the “faulty parenting paradigm” (p. 20) - was expressed even in ancient times. Utting (1994) claims, for example, that an ancient Mesopotamian stone tablet, discovered by archaeologists, is “inscribed with a lament that society is in danger of disintegration ‘because children no longer obey their parents’” (p. 15). Likewise, the idea that parents should be held legally responsible for the actions of their children is by no means a new phenomenon (Burchell, 1979, p. 128; Ebenstein, 2000, p. 14; Graham, 2000, pp. 1725-1726), having existed at least since the Victorian era (Graham, 2000, p. 1).

Nonetheless, it does appear that recently, the notion of holding parents responsible has gained a new impetus (Carrington, 1993, p. 78). As Hil (1996a) argues, “although legislative provision aimed at penalising parents is hardly new, the current crop of acts…reflects a growing emphasis on the alleged culpability of parents in the criminal behaviour of their children” (p. 6).
In a number of instances, tighter restrictions on parents in relation to their children’s conduct has occurred as a consequence of a particularly heinous offence by a young person or persons (Schmidt, 1998). Hil (1999) and Ebenstein (2000), for example, relate the impact that the Columbine High School shootings had in terms of holding parents responsible for the criminal actions of their children in the United States of America, and Haydon and Scraton (2000, p. 431) detail the moral panic about inadequate parenting that followed the abduction and murder of toddler James Bulger in the United Kingdom.

Of course, as Davidson (1996, p. 23) demonstrates, the increased responsibilisation of parents is by no means the dominant response to juvenile delinquency in the current system, with increasingly punitive responses to juveniles themselves being more prominent. As Hillian and Reitsma-Street (2003) point out, furthermore, responsibilisation is not the primary approach to parents in youth justice systems either. Rather, parents are subject to a “patchwork of ideas, expectations, and rights” (p. 34).

### 4.2 Parental Responsibility and ‘Restorative Justice’

Despite this context of the increasing responsibilisation of parents, the discourse of parental responsibility is rarely remarked upon in the ‘restorative justice’ field. Although there is some literature on the relationship between parental responsibility and ‘restorative justice’ (Cunha, 1999; Graham, 2000; Hil, 1996a, 1996b, 1998; Prichard, 2002, 2004; Yee, 1998; Zegers & Price, 1994), it is neither well known nor widely cited, and exists externally to the
mainstream body of literature utilised by ‘restorative justice’ scholars. As stated above, it is the aim of this Chapter to suggest that in a limited way, the discourse of parental responsibility informs the practice of ‘restorative justice’ as it applies to juveniles. Before elaborating on this statement, it is important to emphasise that I am not suggesting that this is necessarily a dominant discourse in the ‘restorative justice’ field, or that this discourse informs ‘restorative justice’ in a universal fashion. Obviously, the concept of parental responsibility is less relevant in relation to ‘restorative practices’ such as ‘victim offender mediation’, ‘circle sentencing’ or ‘conferencing’ for adult offenders, of which the participation of the family is not necessarily a key feature. Even in terms of ‘conferencing’ for juveniles, furthermore, the discourse of parental responsibility is not relevant across all localities or jurisdictions in which it is practised. Indeed, the practice of juvenile justice ‘conferencing’ varies significantly from one program to another in this regard, with some programs discouraging parental participation and others relying heavily upon it. McKnight’s (1981) description of the role of parents of juvenile offenders in early ‘victim offender reconciliation’ projects in North America is a case in point. McKnight (1981) says: “experiences dealing with the parents of young offenders varied. VORP staff kept the parents informed of the process and suggested that they be supportive but allow the youth to carry out the process on his own” (p. 297) (see also Umbreit & Zehr, 1996, p. 25). My argument is therefore that to a limited extent, discourses of parental responsibility, connected to notions of individual responsibility more broadly, form one ‘condition of emergence’ of ‘restorative justice’.
4.2.1 The Silenced Discourse of Parental Responsibility in the ‘Restorative Justice’ Field

Some early scholarship on ‘restorative justice’ acknowledged a connection between the concept of parental responsibility and the emergence of ‘restorative practices’ for juveniles. Alder and Wundersitz (1994), for example, claimed that in South Australia, the involvement of parents was a key feature of the ‘conferencing’ process, stating that “conferences are considered to provide a means of ensuring that families take more responsibility, and are held accountable for, their children’s behaviour” (p. 7). White (1994) was also concerned, early on, about the impact that shaming could have on the parents of a young offender. He warned that “this could lead to a shifting of the burden of responsibility on to parents...both in terms of the reason and blame for offending behaviour, and the administration of punishment” (p. 192). Hil (1998), furthermore, quite boldly claimed that “the notion of ‘parental responsibility’ is central” (pp. 107-108) to ‘family group conferencing’, and is “expressed in ritualistic form under the pretext of ‘reintegrative shaming’” (p. 108). McElrea (1993) likewise argued that “one of the great values of the family group conference is that it can also put the parents ‘on the mat’, particularly when people outside the nuclear family are present” (p. 6). Perhaps most significantly, given the influence of the text, is Braithwaite’s (1989) suggestion in *Crime, Shame and Reintegration* that shaming might be directed at families as well as individual offenders: “the effectiveness of shaming is often enhanced by shame being directed not only at the individual offender but also at her family” (p. 83).
This discourse of parental responsibility, however, seems to have almost disappeared from the ‘restorative justice’ field, and we seldom hear anything along these lines in more recent work on this topic. Even some of the small amount of research that looks at the role of the responsibility of parents seems to have stumbled upon this topic quite by accident. Prichard (2004), for example, acknowledges that it was only via observing ‘conferences’ for other purposes that the issue of parents of young offenders arose. Some of his observations of parents’ behaviour in ‘conferences’ – in particular, one father who declared ‘we’re not bad people’ – drew Prichard’s (2004) research into an area “quite unanticipated at the outset” (p. 176). Similarly, Maxwell and Morris’ (1999) return to their 1993 study seemingly accidentally unearthed this issue. As Prichard (2004) explains:

It was only when Maxwell and Morris (1999) returned to the same parents that they had interviewed in their 1993 study and asked them a different question – ‘were you made to feel like a bad parent during the conference?’ – that the stigmatisation of parents became apparent (pp. 186-187).

Indeed, Maxwell and Morris (1999) even comment in their study that “this is not a factor generally considered by advocates of ‘reintegrative shaming’” (p. 41), although they do not proceed to consider the issue in any detail themselves. What is important here is that both Prichard’s (2004) and Maxwell and Morris’ (1999) research questions were happened upon quite by chance, rather than being directed by the literature. This further
demonstrates the silenced nature of the discourse of parental responsibility in the ‘restorative justice’ field.

4.3 Parental Responsibility as a Discourse Informing ‘Restorative Justice’ for Juveniles

Despite the silenced nature of this discourse, however, parental responsibility appears to have informed the emergence of ‘restorative practices’ to some degree. One example of this is the United Kingdom’s *Crime and Disorder Act* (1998), which along with the *Youth Justice and Criminal Evidence Act* (1999), is frequently credited with formalising ‘restorative justice’ approaches in the United Kingdom (Dignan & Marsh, 2003, p. 109; Sherman, 2003, p. 15; B. Williams, 2005, p. 14; Zedner, 2002, pp. 442-443), although ‘restorative practices’ were certainly already in use before these laws were enacted (Masters, 2001, p. 3). Masters (2001, p. 50) and Antonopoulos and Winterdyk (2003, p. 386) describe these laws as the first attempts to legislate ‘restorative justice’ in England and Wales’ juvenile justice system. The focus on both parental responsibility and juveniles’ own responsibility for their criminal actions is undoubtedly a significant feature of this legislation. The infamous *No More Excuses* white paper (Home Office, 1997a), which represented the New Labour government’s intention to introduce some aspects of ‘restorative justice’ (Dignan & Marsh, 2003, p. 114; Masters, 2001, p. 9), makes this abundantly clear. It states:

> The Government is determined to reinforce the responsibility of young offenders – and their parents – for their delinquent
Parents of young offenders may not directly be to blame for the crimes of their children, but parents have to be responsible for providing their children with proper care and control (Home Office, 1997a, s. 4.2-4.6).

Furthermore, the Misspent Youth report (Audit Commission for Local Authorities and the National Health Service in England and Wales, 1996), on which ‘restorative justice’ for juveniles was partly premised (Davey, 2005), includes “inadequate parenting” (p. 4) as one of the problems that needs to be addressed if youth crime is to be curbed (see also Home Office, 1997b, para 19). The report clearly states: “children brought up in families with lax parental supervision and which [sic] live in poor neighbourhoods are more likely to become offenders. A growing number of children are experiencing these factors” (Audit Commission for Local Authorities and the National Health Service in England and Wales, 1996, p. 4). The Audit Commission (1996) thus lists “assistance with parenting skills” (p. 1) as the first of four preventative measures that should be implemented in order to prevent youth offending (see also Dignan & Marsh, 2003, p. 109).

The Home Office’s (1997c) consultation document on youth justice, which followed the Tackling Youth Crime: Reforming Youth Justice report (Home Office, 1996b), also stressed parental responsibility in relation to juvenile crime: “the parents of young offenders must also recognise their responsibility for the actions of their children. They have an important role to
play in preventing any further offending” (Taking Responsibility section, para 4).

According to Les Davey (interview, 28/9/05), in the British context, generations of poor parenting in some localities meant that by the 1990s, “something needed to be done” about the compounding problem of juvenile crime. In his view, resulting initiatives such as ‘parenting orders’ and ‘restorative’ elements of youth offending teams were not, however, designed to be imposed on parents in a punitive sense, but were to make parents “not responsible for [their] children, but responsible to them” (interview, 28/9/05).

The *Kansas Juvenile Justice Code* (2001), which Umbreit, Lightfoot and Fier (2001, p. 4) list as one of several statutes dealing comprehensively with ‘restorative justice’ in the United States of America, also explicitly links the discourse of parental responsibility with ‘restorative justice’. The *Code* (2001) states that in addition to a variety of other measures, the court may order the juvenile offender and the parents of the juvenile offender to: “(i) attend counseling sessions as the court directs; or (ii) participate in mediation as the court directs” (s. (b)(1)). This legislation even dictates that all counselling and ‘mediation’ ordered by the court shall be “assessed as expenses in the case” (s. (b)(3)) and thus paid for by the parent in question.

This legislation thus makes ‘conferencing’, in which the parents of a young offender must participate, a legal requirement. Given that under this *Code* (2001) participation “shall not be mandatory for the victim” (s. (b)(1)), and like
New Zealand’s original *Children, Young Persons and their Families Act* (1989), no provision is made for victims to bring support persons, the focus of the ‘conference’ on the juvenile and his or her family is clear. Furthermore, although parents ordered to attend a ‘conference’ or counselling sessions can request a court hearing, if the parent does not do so within ten days, “the order shall take effect at that time” (s. (b)(2)). It is unclear what might happen to parents who refuse to participate in any of these programs.

Yee (1998, p. 2) claims that changes to the juvenile justice system in Maryland have posited ‘restorative justice’ as the new overriding ‘purpose’ of this system. The approach to juvenile justice in this jurisdiction seems to embrace varied objectives, with Yee (1998) explaining that the system “asserts that public safety, offender accountability and competency are the cornerstones of juvenile justice, and makes parents of juveniles responsible for the child[‘]s behavior and accountable to the victim and community” (p. 2).

Maine’s new approach to juvenile justice seems to echo that of Maryland, with Yee (1998) claiming that “restorative justice was legislated in Maine as well, where an enactment allows for community resolution teams and orders service and restitution from juveniles and a young offender[‘]s parents” (p. 2). Additionally, Yee (1998) explains that this legislation, which “establishes and implements restorative justice” (p. 8), allows caseworkers “to impose community service as restitution on a juvenile and her or his parents” (p. 8).
Alabama’s *Juvenile Justice Act* (1997), Illinois’ *Juvenile Court Act* (1999), and Idaho’s *Juvenile Corrections Act* (1995), all of which S. O’Brien (2000) identifies as pieces of legislation that embody ‘restorative justice’ principles, also contain provisions aimed at responsibilising parents. In Alabama, the “preservation of the family and the integration of parental accountability” (s. 12-15-1.1(8)) are deemed paramount in dealing with juvenile crime, including the accountability of the juvenile, and enforcing restitution agreements to the juvenile’s victim(s). Under Illinois’ legislation, the “critical role families play in the rehabilitation of delinquent juveniles” is emphasised, and courts are given the power to “order the parents, guardian or legal custodian to take certain actions or to refrain from certain actions to serve public safety, to develop competency of the minor, and to promote accountability by the minor for his or her actions” (s. 5-110). Idaho’s legislation similarly stresses that parents of juvenile offenders are to participate in achieving its stated goals of accountability, community protection, and competency development among young offenders (s. 20-501).

According to Nuzum (n.d., Nebraska section, paras 2-5), furthermore, recent changes to incorporate ‘restorative justice’ values into Nebraska’s juvenile justice system aim to hold young offenders accountable, highlight their responsibility to victims and communities and emphasise parental involvement and accountability.

Lilles’ (2002) work indicates that Canadian ‘circle sentencing’ programs may also operate to responsibilise the parents of offenders:
As a result of circle discussions, parents may better understand how their behaviour has contributed to their child’s misconduct and what they can do as parents to assist their child. It is not uncommon for the offender’s sentencing plan to include attending a residential alcohol treatment program with his parents and sometimes with his entire family (Offenders section, para 4).

Another Canadian program based in the community of Sparwood also appears to stress the responsibilisation of parents. Under the Sparwood Youth Assistance Program, young offenders are first taken home to their parents by a police officer, and the parents are “allowed to deal with the youth” (Bouwman & Purdy, 1997, p. 21). In cases of more serious offending, or where “parents are unable or unwilling to deal with the matter” (Bouwman & Purdy, 1997, p. 21), a ‘conference’ is convened. According to the paperwork to be signed by young offenders in such cases, while their participation is voluntary, once they have agreed to take part, their own and their parents’ attendance is required (see Bouwman & Purdy, 1997, p. 25).

The Northern Territory’s pre-court diversion scheme, introduced by amendments to the Police Administration Act (1978) in 2000 (Daly & Hayes, 2001, p. 3; Waite, 2003, p. 97), also includes an element of parental responsibilisation. Superintendent of Northern Territory Police Graham Waite (2003, p. 98) explicitly connects the responsibilisation of parents with the
emergence of this scheme, which includes ‘family conferences’ and ‘victim offender conferences’ among other diversionary options. Waite (2003) lists as one of several “principles of the scheme” (p. 98) the encouragement of parental responsibility, and also claims:

The scheme recognises that parents and guardians have an important role to play in the effective diversion of juveniles and the prevention of reoffending. Parents and guardians are almost always the greatest influence on the child’s offending behaviour and the most important influence in behavioural change. The scheme encourages parents and guardians to take responsibility for the actions of their child (p. 99).

When interviewed for this research, Graham Waite (interview, 6/12/05) indicated that one method of encouraging parental responsibility via ‘family conferencing’ is to have parents co-sign young offenders’ outcome plans: “we will always get the parents to sign off on that agreement….it’s the symbolism of saying to parents, ‘you are taking some responsibility for having your child by signing this as well’”. For Waite (interview, 6/12/05), the involvement of parents is crucial to ‘restorative’ processes, as offending children ultimately return to the family environment: “if the parents aren’t maintaining the right sort of environment for the child, then that child probably won’t survive [as a law-abiding citizen]. So that’s why we tried family conferencing”.

South Australia’s *Young Offenders Act* (1993) contains comparatively few mentions of the role of parents or families in juvenile crime, merely listing the ‘preservation’ and ‘strengthening’ of a youth’s family, and the notion that youths should not be withdrawn from their families unless necessary, as guiding principles. Intriguingly, however, this legislation - which sets out that ‘family conferences’ are to be utilised in cases where a ‘minor offence’ has been committed by a juvenile – lists the following as the determinants of a ‘minor’ offence:

(a) the limited extent of the harm caused through the commission of the offence; and

(b) the character and antecedents of the alleged offender; and

(c) the improbability of the youth re-offending; and

(d) where relevant – *the attitude of the youth’s parents or guardians* [italics added] (s. 4).

There is no indication, however, of when the attitude of the parents might be deemed ‘relevant’, or indeed, as to why this would be taken into consideration at all. It is also interesting to note that under the South Australian scheme, sexual offences – including sexual assault - have often been deemed to be ‘minor’ enough offences to be dealt with by way of ‘family conferences’ (Daly, 2001, p. 67; McInnes, 1996, para 145; Thomas & Doig, 2004).
According to Wundersitz (1994), furthermore, the legislation that introduced ‘restorative justice’ for juveniles into South Australia was promoted to parliament on the grounds that it aimed, among other things, to encourage families “to play a greater role and to take more responsibility for their children’s behaviour” (p. 89).

Western Australia’s ‘family meetings’ also aim to “involve the parents and family in identifying appropriate outcomes and in supervising the sanctions imposed on young offenders” (Hakiaha, 1994, p. 106).

Although New South Wales’ ‘restorative justice’ legislation, like South Australia’s, does not emphasise the responsibilisation of parents, the discourse of familial and/or parental responsibility nonetheless played a role in its development. During parliamentary debate on the second reading of New South Wales’ Young Offenders Bill, for example, Dr Marlene Goldsmith (New South Wales Legislative Council, 1997a) quotes from a report by the Parliament of New South Wales Legislative Council Standing Committee on Social Issues (1992) which commends the New Zealand ‘restorative justice’ model, as it “acts to empower families to take responsibility for offending by their children, increase family responsibility and significantly reduce the number of young people in the criminal justice system” (p. 10484). Later in this debate, Reverend Fred Nile (New South Wales Legislative Council, 1997a) likewise comments in support of the ‘youth justice conferencing’ scheme that “there are too many dysfunctional families in our society. We must try to bring children from dysfunctional families back into a family
atmosphere or a family unit for their benefit and to assist parents to accept their responsibilities” (p. 10506).

Similarly, when the principles of Queensland’s *Juvenile Justice Act* (1992) were expanded in 2002, the notion of parental responsibility was reinforced. In a statement on the amendments to this legislation, the Queensland government (as cited in Jarred, 2002) stressed “the responsibility of parents for the supervision of their children” (p. 23). In Tasmania also, the *Youth Justice Act* (1997) stipulates that “guardians are to be encouraged to fulfil their responsibility for the care and supervision of the youth” (s. 5(1)).

Analysis of early reports relating to the instigation of the Wagga Wagga ‘restorative justice’ program - which provided the impetus for many other schemes both throughout Australia (Bargen, 1995; 1996) and internationally (Davey, 2005; O’Connell, 1994a, 1994b; n.d., p. 29; Wachtel, 1997) - suggests that the theme of parental responsibility was significant here also. O’Connell (n.d.) lists as one of a number of objectives in developing this scheme that “family and significant others were made accountable” (p. 36). As Moore and Forsythe (1995) claim, furthermore, when polling Wagga Wagga police officers about the possibility of implementing ‘restorative justice’ procedures, O’Connell found that all respondents complained that “families of young offenders frequently showed no apparent interest in their child(ren)” (p. 17). Elsewhere, O’Connell (1992b) states that respondents to this survey “unanimously agreed” that juvenile offenders’ parents “did not care and were not accountable” (p. 7).
McDonald and Ireland (1990) also make this clear in their attempt to promote the New Zealand ‘family group conferencing’ scheme as a viable option for Wagga Wagga:

One of the areas of emphasis of the [New Zealand Children, Young Persons and their Families] Act is to enable families to face their contribution to the offending and provide support to both the family and the young person to prevent offending in the future” (p. 13).

Additionally, McDonald and Ireland (1990, p. 14), in describing a small number of outcomes from New Zealand ‘family group conferences’, and praising these for their ‘creativity’, include the case of two male juveniles who stole and destroyed a car. As well as apologising to the victim and performing community service, the two youths also agreed as part of their outcome plans to compensate the victim the cost of the car. As McDonald and Ireland (1990, p. 14) report, however, this entailed the boys’ parents taking out bank loans to immediately pay this compensation.

Once ‘youth justice conferencing’ had been taken over from the Wagga Wagga police by Community Justice Centres in New South Wales (prior to its operation by the Department of Juvenile Justice under the Young Offenders Act (1997)), furthermore, parental responsibility was listed as a basic

Parental responsibility was, in turn, an important discourse in relation to the instigation of ‘restorative justice’ in New Zealand. Upon introducing New Zealand’s *Children, Young Persons and their Families Act* (1989) into Parliament, the then Minister for Social Welfare (as cited in Chaaya, 1998) described the first of four philosophical principles underlying the *Bill* as “a belief that greater emphasis is needed upon the responsibility of families for the care, protection and control of children and young persons” (p. 81). In recommending the scheme be introduced into New South Wales, the Parliament of New South Wales Legislative Council Standing Committee on Social Issues (1992) praised New Zealand’s legislation on the grounds that “one of the areas of emphasis of the Act is the provision which enables families to face their contribution to the offending behaviour” (p. 89). Both Marsh and Crow (1998, pp. 37-38) and McCold (1999a, Conferencing Models section, para 9), furthermore, list emphasising parental responsibility as one of the four underlying principles of ‘family group conferencing’ in New Zealand.

As stated previously, Doolan (2005) even claims that those involved in the process of developing New Zealand’s ‘conferencing’ legislation had never heard of restorative justice: “the law was about restoring to family networks control over the decision-making about their young people” (p. 1).
Indeed, at the level of representation at least, the new feature that distinguishes the *Children, Young Persons and their Families Act* (1989) from New Zealand’s previous legislation governing youth justice and child welfare – the *Children and Young Persons Act* (1974) - is the family.

4.3.1 ‘Restorative’ Processes as Responsibilising Mechanisms for Parents

In a variety of localities around the world, therefore, the responsibilisation of parents has acted to render ‘restorative practices’ a potentially viable policy direction for juvenile justice. A range of research indicates that ‘restorative’ processes for juveniles can indeed act as responsibilising mechanisms for the parents of young offenders. This further demonstrates the role that discourses of parental responsibilisation have played in the ‘restorative justice’ field. Levine, Eagle, Tuiavi’i and Roseveare’s (1998) case studies of New Zealand ‘family group conferences’ provide a number of examples of this occurring. In their case study of ‘John’, for example, we are told that the victim of ‘John’s’ burglary offence – an elderly and frail person – was unable to attend the ‘conference’ as it was held some distance away from the victim’s home. As a result of this, and also because ‘John’ had gained full-time employment in a different part of the country, ‘John’s’ parents “paid a personal visit to the victim’s home…. [and]….apologised to the victim” (Levine et al., 1998, p. 32). Similarly, in the case of ‘Paul’, who had been charged with assault with a weapon, possession of an offensive weapon and car theft, the extended family of the offender “decided that the mother would pay reparations to the victims” (Levine et al., 1998, p. 33). Levine et al. (1998)
even detail the case of 14-year-old ‘Hamish’, who had been charged with sodomy, indecent assault and possession of an offensive weapon. In this case, we are told, Hamish’s family “contributed money towards the victim’s family holiday” (p. 39).

Prichard (2004) observed some similar occurrences. He found that in three of the ‘conferences’ he witnessed, “victims stated that they did not want compensation from the youth because it was obvious the real source of the money would be the parents” (p. 204). Similarly, McKnight’s (1981) report on early ‘victim offender reconciliation’ programs found that in one case “the offender and the VORP worker arrived at the victim’s office and were told that the offender’s mother had paid him earlier that day” (p. 297). The Youth Justice Colation of New South Wales (1996, p. 10) also note one case in which a juvenile offender was to pay $500 in restitution as part of his outcome plan following a ‘conference’. The restitution was to be paid upfront by his mother, who he would later reimburse.

M. Lee’s (1995) research on police cautioning of juveniles in England and Wales had similar results. As one parent in her study said, “I think they [the police] tried to embarrass you, or make you feel ashamed of your son’s behaviour, as if you are the one who committed the crime” (as cited in M. Lee, 1995, p. 319). A police officer interviewed for the study also commented that parents’ attendance at cautions is important, because “you want to know what the parents think of the offence, and what they are going to do about it” (as cited in M. Lee, 1995, p. 318). M. Lee’s (1995) research thus
demonstrates that parents involved in police cautions at times experienced the process as degrading, belittling and blaming, despite that the purpose of a parent’s attendance is, in theory, to ensure that the caution is conducted in a fair manner (M. Lee, 1995, p. 316). This is significant in that it illustrates firstly that the responsibilisation of parents is not peculiar to practices whose aim is explicitly ‘restorative’, but may occur in other processes involving parents, and secondly, that whether or not the intent of a particular practice is to hold parents responsible does not necessarily correlate with whether the responsibilisation of parents occurs.

It is also important to recognise, as Prichard (2004, p. 202) does, that even where parents do not agree to personally recompense victims, they might still be affected materially. Parents may, for example, have to provide transport so that their child can attend a program or undertake work for the victim or community. Karp, Sweet, Kirshenbaum and Bazemore’s research (2004, p. 209) supports this contention; it found that parents usually help their child complete ‘restorative’ sanctions. Parents’ involvement in the outcome plan of a ‘conference’ is, according to Graham Waite (interview, 6/12/05), crucial:

There’s no point saying the child’s going to turn up to, say, recreational activities three times a week, yet mum and dad are never home, they’re on the grog, they won’t give the child money for a bus fare….the evaluation, or assessment, if you like, is as much about the parents as…it is about the
kids...you’re asking the child to do something, but they need
the support of adults to do that.

As such, it appears that ‘restorative conferences’ can operate indirectly, as
well as directly, as responsibilising mechanisms for parents.

A number of key figures in the ‘restorative justice’ field who I interviewed for
this research also acknowledged that ‘restorative’ procedures can result in
parents being responsibilised and/or blamed. Terry O’Connell (interview,
8/8/05), for example, admitted that he had witnessed parent-blaming “every
so often”:

The issue of parents feeling humiliated, blamed – and I’m only
talking of my own experience – let me say that...I have seen
processes that...through poor facilitation, allow it to happen big
time (Terry O’Connell, interview, 8/8/05).

When asked if he had seen any evidence of parents being blamed for their
child’s behaviour in ‘restorative’ processes, Ken Marslew (interview, 11/8/05)
also replied in the affirmative, somewhat cheekily acknowledging, “maybe it’s
true”.

A number of these interviewees made attempts to account for or rationalise
this parent-blaming behaviour. For O’Connell (interview, 8/8/05), feeling
blamed is almost portrayed as the result of parents’ own psychology:
Those sorts of reactions...it was very much to do with how some parents dealt with their own awful feelings of shame and humiliation....There are similarities between some parents in conferences...in spite of that their son or daughter has done something inappropriate, their own capacity to deal with that grief...is limited. And therefore they feel that they're being blamed.

Graham Waite (interview, 6/12/05) also commented that while in his experience, parents are “never” blamed for their child’s behaviour in a ‘conference’ in a direct sense, “I would say that some parents feel that way, although...they’re not meant to be that way”. Les Davey (interview, 28/9/05) similarly claimed that although victims do not usually act in a blaming fashion in ‘conferences’, parents may nonetheless feel blamed. Here, parent-blaming exists as an effect of parents’ psychological reactions in ‘conferences’, rather than the blaming nature of the ‘conferencing’ process itself. In one sense, therefore, both their child's behaviour and their sense of being blamed for this behaviour are constructed as the ‘fault’ of parents.

For Ken Marslew (interview, 11/8/05), blaming parents in ‘conference’ situations enables these parents an opportunity to improve their parenting skills:
Parents should be in these programs. I think parents actually have a responsibility....there's a real need for participation of parents in this so they can deal with their issues...A lot of parents will say “not my kid” and all of that sort of mentality....Being involved in the process will give them a chance to see a lot of things that they didn’t really get a grasp on, maybe get a better understanding of their child, get a better understanding of themselves.

A number of interviewees insisted that the engagement and responsibilisation of parents via 'restorative practices' could and should have a progressive and positive outcome. Ted Wachtel (interview, 25/5/05), for example, claimed that, “I do think they [parents] feel at times, if nothing else, that they are supported by other adults in the community in a conference”. Wachtel (interview, 25/5/05) went on to give the following example:

I remember specifically a conference...[involving]...two young boys from a family...[who]...were struggling with their kids in their teenage years. And I think the kids and some of their friends were driving the parents crazy. And all of a sudden the dynamics changed, because people weren’t blaming the parents, and I think the parents were bordering on, you know, hitting their kids out of desperation. And all of a sudden, people in the situation recognising how these people were struggling, came to their aid, and supported them and took a whole
different approach. All of a sudden the parents had support and understanding from the other adults [that] really helped them get a handle on their kids.

Terry O'Connell (interview, 8/8/05) also spoke of the role ‘restorative practices’ can play in affirming and assisting parents:

The idea of having parents, particularly those single parents… I deliberately targeted those who were important to them, for example, a neighbour, who could actually speak to the issue of what a good parent [they are], about the tremendous sacrifices, the hard yards that the parent did.

Terry O’Connell (interview, 8/8/05) furthermore suggested that ‘restorative’ procedures could act as a catalyst in building informal networks of support for parents with offending children, claiming that in his experience:

When you create the space for parents to share their stories with one another, it tended to build an informal network….When you create an experience when they can… normalise what’s happened… they identify with other parents, and therefore not only do they have a lot in common, but that was the bit that led to what I call the informal networks that developed.
For O’Connell (interview, 8/8/05), this ‘normalisation’ of parents’ experiences with difficult children is important because “what I found is the parents imagine that the problem was some other kid who led their kid astray”. In O’Connell’s view, therefore, ‘conferencing’ processes can be useful in terms of helping parents to accept, and respond constructively to, their child’s offending behaviour, in a supportive context. Contrast this view with Ken Marslew’s (interview, 11/8/05), who claimed, “it is almost mandatory that parents participate in the conference, because [of] that concept of ‘not my kid’. Bullshit – very much your kid”. Here, we can see that using ‘conferencing’ to make parents accept their child’s behaviour could operate in a constructive and supportive, or blaming and confrontational, manner.

Despite his claims that blaming parents “is not the purpose of conferencing”, Graham Waite (interview, 6/12/05) nonetheless admits that he is:

not averse to saying that if that parent feels blame for the child, then good on them….If they feel a bit of shame, if they feel a bit of blame, then I think that’s good, as long as it’s…done in a way which is not going to…you know, destroy any hope.

It is important to note here that ‘restorative justice’ conferences for juveniles are forums in which the behaviour of a juvenile’s parents can be subjected to scrutiny, evaluated and commented upon. This is not always done in a negative fashion; as K. Cook’s (2006, p. 115) research demonstrates, ‘conferences’ can include the positive reinforcement of a parent’s skills by
those present. Furthermore, facilitators may use these forums as catalysts for the development of relationships of support for parents of offending children. The very fact that it is deemed appropriate to consider parents’ roles, however, even where the intention is seemingly progressive, surely indicates the stigmatising and responsibilising potential of these practices.

4.3.2 Parents’ Experiences of ‘Restorative Practices’ as Responsibilising Mechanisms

An important issue to address in light of this is whether parents who participate in ‘restorative practices’ experience the process as a responsibilising one. This echoes Daly’s (1999) research, in which she argues that whether or not ‘conferencing’ entails punishment in theory is less relevant than whether young offenders themselves experience ‘conferencing’ as punishment. Prichard’s (2002; 2004) study of ‘conferencing’ in Tasmania aims to address this problem. Drawing on both psychological literature on ‘parental self-efficacy’ and his own observations of ‘conferences’, Prichard (2002, p. 331) argues that some parents of young offenders feel as though they are ‘on trial’ during ‘conferencing’ situations. Prichard’s (2002) observations of ‘conferences’ indicated to him that parents often exhibited behaviours compatible with the actions of individuals who feel that the conduct of the young offender in question is reflecting negatively on them also. Prichard (2002) groups these behaviours into four categories. Firstly, he observed a small number of parents apologising to the ‘conference’ group. This, he argues, is perhaps the “clearest evidence of a sense of personal responsibility” (p. 335), especially given that “no other supporter of a young
offender has offered any sort of apology in the 34 conferences observed [to date]” (p. 335). Secondly, generous commitments by parents to undertake work for the victim, or to help their child complete an outcome plan were witnessed by Prichard (2002). One father, for example, agreed to provide and install a security system in the shop damaged by his son free of charge (Prichard, 2002, p. 336). Prichard (2002) suggests that by agreeing to such commitments, “parents might be meeting their need to publicly atone for their responsibility by committing themselves to their child’s undertakings” (p. 336). Thirdly, a number of parents simply denied or minimised their child’s role in the offence, by arguing that other youths were more culpable, for example (Prichard, 2002, p. 337). Finally, a larger number of ‘conferences’ observed by Prichard (2002) included parents of young offenders ‘defending themselves’, apparently in an attempt to lessen their own blameworthiness. Such defences ranged from parents ‘tutting’ and rolling their eyes, to verbally attacking their child, to complaining about a lack of governmental support (Prichard, 2002, p. 336).

Although Prichard (2002, p. 343, endnote 11) admits that these categories are based entirely on his own interpretation, he notes that one ‘conference’ facilitator who has conducted over 300 ‘conferences’ agreed with his thoughts about parents feeling ‘on trial’, and had observed similar behaviours himself. Certainly, Prichard’s (2002) observations are supported by a range of other research. Wachtel’s (1997) reports of the Wagga Wagga-style ‘conferences’ he witnessed as part of his training to help him introduce ‘conferencing’ to North America contain numerous examples of parents of
juvenile offenders becoming distressed, apologising to the victims of their children’s offences, and appearing ashamed. Additionally, Crawford and Newburn’s (2003) research on ‘restorative justice’ for juveniles in the United Kingdom found that although most parents interviewed were very supportive of both referral orders and youth offender panels, some “felt that they were made to feel inappropriately ‘on trial’ for their child’s behaviour” (p. 181). One parent, for example, said: “one of the problems was that when they explained things they made us feel like we were being punished” (as cited in Crawford & Newburn, 2003, p. 165). Maxwell and Morris’ (1999, pp. 40-41) study also found that over one-fifth of parents felt that they had been ‘made to feel like a bad parent’ during their ‘conference’, and K. Cook (2006, p. 115) had a number of offenders’ mothers comment to her that during the ‘conference’ they felt that their parenting ability was being brought into question.

An infamous incident that occurred in Canberra, in which a ‘conference’ plan dictated that the offender – a 12-year-old boy caught shoplifting – should return to the shop wearing a t-shirt bearing the slogan ‘I am a Thief’ also supports Prichard’s (2002) observations. Although the ‘restorative justice’ literature includes many accounts of this incident (Blagg, 1998, p. 9; Braithwaite, 2003a, p. 10; Little, 1999, p. 206; Parkinson & Roche, 2004, p. 512; Roche, 2003b, p. 1; Strang, 2001b, p. 80), only Johnstone (2002) and Braithwaite (1999; 2002) acknowledge that this outcome plan was “enthusiastically crafted by the victim and the mother of the offender” (Braithwaite, 1999, p. 97; 2002, p. 160), or in Johnstone’s (2002) words, “eagerly pushed by the offender’s parents” (p. 58).
Wachtel’s (1997) work further indicates that parents ‘defending themselves’ by designing tough outcome plans for their children is a feature of some ‘conferencing’ processes: “often the families of the offenders urge the harshest consequences to demonstrate to the victims and their supporters the shame they feel” (p. 33) (see also Crawford & Newburn, 2003, p. 181). Indeed, the Parliament of New South Wales Legislative Council Standing Committee on Social Issues (1992) claim that while the New Zealand ‘family group conference’ scheme has resulted in a dramatic decrease in custodial sentences for juveniles, “penalties currently put into place by the family may be more severe or restrictive than former non custodial penalties” (p. 90). This indicates that parents who feel blamed for their child’s behaviour may attempt to inflict severe penalties upon their child in order to mitigate their own ‘guilt’. As such, the responsibilisation of parents may have the undesirable effect of imbalanced outcomes for young offenders, whereby those whose parents are absent from the ‘conference’ or do not feel ‘on trial’ may receive less harsh consequences than those whose parents feel blamed by the ‘conferencing’ process34.

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34 Daly’s (2001, pp. 77-78) discussion of her well-known South Australian Juvenile Justice (SAJJ) research project (Daly, Venables, McKenna, Mumford, & Christie-Johnston, 1998) might also be considered in this light. Daly’s (2001) research team found that approximately 5% of conferences involved arguments between the young person and a parent, 25% involved a crying participant, which was often the young person or a parent/supporter, and 9% involved one participant intimidating another, which was often a family member intimidating the young person. These behaviours might also be read as indicating that some parents will act in ways designed to lessen their own apparent culpability in juvenile justice ‘conferences’.
4.3.3 Parental Consent and Diversion via ‘Restorative Practices’

In addition to being responsibilised by ‘restorative’ processes, or experiencing these processes as blaming, parents of young offenders may sense or fear their responsibilising potential. While many ‘restorative justice’ schemes, in keeping with international treaties, require consent on the part of juvenile offenders (see Criminal Justice Review Group, 2000, p. 216), a number require the consent of the juvenile and/or his/her parent(s) in order to proceed to a ‘restorative’ procedure rather than to court. Amendments made in 2000 to the Northern Territory’s *Police Administration Act* (1978), for example, dictate that both the juvenile and a parent of the juvenile must consent to the youth being diverted: “a member of the Police Force must not divert a juvenile unless the juvenile and a parent of the juvenile consent to the juvenile being diverted” (s. 120J). The Act goes on to state:

If the juvenile or a parent of the juvenile does not consent to the juvenile being diverted, the member of the Police Force may charge the juvenile with the offence that the juvenile is believed on reasonable grounds to have committed and the juvenile may be prosecuted for the offence (s. 120J).

Western Australia’s *Young Offender’s Act* (1994) also requires parental consent to proceed with diversion, albeit in a less direct way. The Act states that:
Before it deals with a young person for an offence, a juvenile justice team is to give a responsible adult notice that it proposes to deal with the young person for the offence, and it can only proceed if a responsible adult is present and has indicated agreement with the proposal and a willingness to participate in the proceedings as the team sees fit (s. 30(1)).

Under section three of the Act, a ‘responsible adult’ is defined as a parent, guardian or other person having responsibility for the day-to-day care of the young person.

Similarly, Illinois’ Juvenile Court Act (1999), which introduced ‘formal station adjustments’ (diversionary measures) such as ‘mediation’ and restitution for young offenders, states:

A minor or the minor’s parent, guardian, or legal custodian, or both the minor and the minor’s parent, guardian or legal custodian, may refuse a formal station adjustment and have the matter reformed for court action (Part 3, s. (2)(f)).

It is fairly reasonable to assume, I would argue, that young people themselves will most often consent to being diverted by the police rather than being prosecuted for an offence, which may lead to conviction, sentencing and the offence appearing on their criminal record. It is possible, however, that parents won’t consent to their child being diverted if the child is
impossible to control, or if there is a prospect of the parent being held accountable (financially or otherwise) for the future actions of the child. Consider, for example, the case of Michigan family the Provenzinos, whose sixteen-year-old son, Alex, had been in trouble with the law for burglary and drug offences:

Although the Provenzinos were disturbed by Alex’s behavior, they supported his release from juvenile custody...fearing he would be mistreated in the youth facility where he was detained....It is unlikely that the Provenzinos expected to be the first parents tried and convicted of violating a 2-year-old St. Clair Shores ordinance that places an affirmative responsibility on parents to “…exercise reasonable control over their children”. On May 5, 1996, however, after a jury deliberated only 15 minutes, the Provenzinos were convicted of violating the parental accountability ordinance. They were each fined $100 and ordered to pay an additional $1,000 in court fees (National Criminal Justice Association, n.d., paras 1-2).

Here, it appears that the parents' willingness to have their child diverted from detention resulted in their being held accountable for his criminal actions. In addition to being fined, the parents’ story appeared in a number of media articles, including one in the New York Times (National Criminal Justice Association, n.d., endnote 72). This is a similar situation to that of Dermott, Arkansas, discussed previously in this Chapter, where parents are penalised
less harshly if they allow authorities to deal with their children, than if they attempt to do so themselves.

Ebenstein’s (2000) account of the Provenzino case states that, presumably prior to having their son released from detention, these parents had “resorted to asking the police to keep their son in a jail sin[c]e they could not control him” (p. 17). This occurred after the Provenzinos had tried a range of strategies in order to control their son, including arranging counselling and trying to separate him from the influence of his peers (Ebenstein, 2000, p. 17). What this case suggests is that parents will not always opt to have their children dealt with as leniently as possible; where parents are having difficulty controlling their offspring, allowing them to be dealt with harshly – even detained – may seem the better option. It stands to reason, furthermore, that this may be the case particularly if the parents feel that they are to come under scrutiny for their child’s future actions.

There are, of course, a wide range of other reasons why parents may not consent to the diversion of their children. Parents may feel, for example, that their child may be given a ‘fairer go’ in court, may disagree with certain diversionary options or may not wish to participate in programs that require their involvement, such as ‘family conferencing’. Waite’s (2002, p. 5) report of the Northern Territory’s juvenile justice scheme, for example, found that in 6% of all cases of apprehended juvenile offending, and 8% of cases of serious apprehended juvenile offending, diversionary measures – such as ‘family group conferencing’ - were declined. Waite’s (2002, p. 6) report also
indicates that while a higher percentage of non-indigenous youths were offered diversion, this was declined in a higher percentage of cases involving indigenous youths. Additionally, Waite (2002, p. 15) found that the rate of refusal was on the increase, having grown from 2.4% in the first year of the scheme’s operation to 11% in its second year. Unfortunately, Waite (2002) provides little detail in this report as to the role of parents in these decision-making processes, and accounts for this increase by claiming that “juveniles have found that diversion, particularly through a family or victim offender conference, is not a ‘let off’” (p. 15).

I asked Graham Waite why parents would decline a diversionary response to their child’s offending. While Waite (interview, 6/12/05) reinforced that this is not often the case, he suggested that parents would prefer their child to go to court because they perceive court as being either more or less lenient: “sometimes because the parents know that there will be fewer consequences in court. Sometimes the parents actually want harsher…consequences and they feel that going to court will shock their child more. I’ve had fathers do that” (interview, 6/12/05). The following anecdote told by Waite (interview, 6/12/05) illustrates that allowing parents to decide their child’s fate in this respect enables highly inconsistent outcomes in cases of juvenile crime:

We had one [case] in Tennant Creek where four kids there…went through and did about $20 000 worth of damage to the City Hall there, to the offices….Now, two of the kids [and their parents] agreed to go to diversion, [and as a result] they
got put on a [community] program for twelve months….The [parents of the] other pair have come in and said “you can go and get stuffed, I’m not putting my kids on this diversion stuff…forcing them to do this, there are other kids in town that are worse than my kids – they’re not doing it”. Well, those two kids went to court and got a good behaviour bond.

Waite’s (interview, 6/12/15) comments thus indicate the potential danger of allowing parents to make decisions of this nature, as well as the lengths to which parents may go to avoid participating in potentially responsibilising measures such as ‘family group conferencing’.

**4.4 Implications**

I have argued in this Chapter that the recent emphasis on holding parents responsible for the criminal acts of their offspring constitutes one potential ‘condition of emergence’ of ‘restorative justice’ for juveniles. As mentioned earlier, discourses of parental responsibility are by no means dominant either within the emergence of ‘restorative justice’ itself, or within approaches to juvenile justice more broadly. Indeed, the notion that juvenile offenders themselves ought to be held accountable for their conduct is by far the more prevailing of the two. As also suggested previously, these discourses do not inform ‘restorative’ procedures for juveniles in an even or universal manner; rather, they appear to have informed ‘restorative justice’ in a haphazard and fragmented way. In a number of instances, the notion of parental responsibility is explicitly omitted from ‘restorative’ programs for juveniles, as
McKnight (1981, p. 297), Umbreit and Zehr (1996, p. 27) and the Criminal Justice Review Group (2000, p. 207) indicate. Nonetheless, it is argued that silenced discourses around the responsibilisation of parents of juvenile offenders represent one potential ‘condition of emergence’ of ‘restorative justice’.

4.4.1 Some Caveats

In considering the implications of this, it is necessary first of all to emphasise that responsibilisation is only one of a myriad of potential effects that ‘restorative’ processes might have on parents. Indeed, as Prichard (2004, p. 190) points out, just as parents are often categorised as blameworthy alongside their children, they are also frequently categorised with victims, as the ‘offended against’ (see also Crawford & Newburn, 2003, pp. 181-182). As Karp et al.’s (2004, p. 213) research found, for example, parents are sometimes the recipients of juveniles’ apology letters. Zegers and Price’s (1994) comments on the involvement of families in New Zealand’s ‘family group conferencing’ scheme similarly demonstrate the ambiguity of the position of parents:

Through the family group conference, families are now central to the process. The young person’s actions reflect on the family members just as much as they do on the individual. Collectively, the family is encouraged to take responsibility for the young person’s behaviour….Instead of concentrating on the consequences of offending for the young person, the new
model seeks to deal with the consequences for the offender’s wider family. The young person is shamed both in the eyes of the victim and his or her family group. He or she cannot avoid their disapprobation. By directly involving the offender’s family in the proceedings, the family can also be examined. The family group conference encourages the family to address its own shortcomings at the same time as affirming the authority of the family to take responsibility for their young (p. 816).

Here, Zegers and Price (1994, p. 816) portray parents of young offenders firstly as partly to blame for their child’s offending, then as quasi-victims of the offence, and finally as at fault again.

It is reasonable to assume, of course, that whether or not parents are deemed to be contributors to, or victims of, their child’s offence, may rely substantially on parents’ own behaviour at a ‘conference’. Parents’ responses may depend on a vast range of factors, from the skill of the facilitator to the type of offence committed by their child, for instance. Certainly, much of the research assessing levels of participant satisfaction with ‘conferencing’ has shown high levels of parental satisfaction with, and support for, ‘restorative practices’. This Chapter does not aim to diminish alternative responses experienced by parents who have participated in conferencing, and acknowledges that for many, ‘restorative justice’ may present a supportive and positive experience. Additionally, it might be considered that an individual parent may experience ‘restorative’ processes in both positive and
negative ways; parents may feel as though they are being blamed during the conference, but experience the outcome plan as positive and supportive, for example. This seems to be the case in relation to Maxwell and Morris’ (1993; 1999) research, which found in 1993 that parents were mostly satisfied with ‘family group conferencing’, but found in 1999 that some parents felt responsibilised by the process.

In addition, it is important to acknowledge that an individual parent may experience their being held responsible in a positive way. This is the case firstly because in some instances, parents are undeniably at least partly responsible for their child’s offending; Prichard (2004, p. 198) witnessed one case, for example, where a mother drove her son to a department store in order to shoplift goods. In such cases, parents may view the focus on their own behaviour in a positive light if, for example, it results in help and support to overcome problems such as drug abuse. Secondly, taking some responsibility for the offence may be part of a parent’s way of dealing with the incident. Prichard (2004, pp. 194, 196) argues that acts such as apologising to, and agreeing to undertake work for, the victim may form part of a parent’s own “healing” (p. 194) and must therefore not be excluded from ‘restorative’ processes. Additionally, Prichard (2004, p. 194) suggests that such actions by parents should not be excluded as they may aid the victim’s restoration. This is a somewhat controversial suggestion – should parents have to apologise or perform reparation, for example, to appease an angry victim?
Acknowledgement that parents may contribute towards the offending behaviour of their children has also had a potentially positive impact in the Northern Territory, where as a result of governmental recognition that “families and friends often do not support these juveniles” (Waite, 2002, p. 11), a toll-free telephone service has been established to provide juveniles with access to “someone whom they can communicate with about their problems and get further advice and assistance with personal issues” (Waite, 2002, p. 11).

Nonetheless, there are some potentially important implications to consider in regards to the responsibilisation of parents via ‘restorative practices’. Although ‘restorative justice’ hardly represents a sinister attempt on the part of governments to punish parents of juvenile offenders, it may, like any strategy inclusive of parents, have ‘negative’ implications – or ‘dangers’ - as well as the ‘positive’ ones discussed above. The remainder of this section aims to outline some of these implications for the current practice of ‘restorative justice’ for juveniles.

4.4.2 Parents Versus Families: Parental Responsibilisation as a Challenge to Braithwaite’s Theory

That parents can experience a ‘restorative’ process as a responsibilising measure appears to challenge Braithwaite’s (1989) theory of ‘reintegrative shaming’ as it relates to offenders’ supporters. Braithwaite (1989) argues that the shame experienced by an offender’s supporters partially explains why shaming will be effective:
The effectiveness of shaming is often enhanced by shame being directed not only at the individual offender but also at her family, or her company if she is a corporate criminal. When a collectivity as well as an individual is shamed, collectivities are put on notice as to their responsibility to exercise informal control over their members, and the moralizing impact of shaming is multiplied…a shamed family or company will often transmit the shame to the individual offender in a manner which is reintegrative as possible (p. 83).

Prichard (2002) argues that Braithwaite's (1989) conceptualisation of parents is “one dimensional and simplistic” (p. 331) as it does not consider that parents have a unique relationship with the offending child (see also Blagg, 1997, p. 490). Braithwaite (1989) portrays parents as inherently similar to other offender supporters, without acknowledging that “unlike any other human relationship, a child represents to a large degree the product of his or her parents’ genes, parenting skills, lifestyle and values….the wrongdoings of a child reflect negatively upon the parents” (Prichard, 2002, p. 333). As such, Prichard (2002, p. 333) suggests that parents cannot be simplistically grouped with other offender supporters at a ‘conference’ – such as a youth worker or sports coach – upon whom the child’s behaviour does not reflect.

To this, I would add that while many ‘restorative justice’ initiatives, such as New Zealand's ‘family group conferencing’ scheme, aim to involve the
extended family members of a young offender (Doolan, 1990, p. 77), rather than focusing only on his/her parents, these participants will not always act in accord. Parents have legal and social obligations towards their children that are not shared by extended family members such as aunts, uncles or grandparents. Consider McElrea’s (1993) comments in this regard:

If the wider family is there (grandparents and/or aunts/uncles) and they hear that the young person was in trouble because he was out at three in the morning and was not expected to be home, then the family dynamics are under the spotlight and it can often be the grandparents that will say to the parents, “What have you been doing about this?” Thus problems within the family that have been related to the offending can come [to the] notice of the wider family (p. 6).

Perhaps this is why in New Zealand, “some families, usually for reasons of pride or privacy, require considerable encouragement and work before the conferences to involve people other than the young offender’s parents” (New South Wales Attorney-General’s Department, 1996, p. 20).

Thus although advocates such as Braithwaite (1989) espouse the participation of the wider family group in ‘restorative justice’ procedures, one can imagine that – due to being less responsible for the young offender’s behaviour – these extended family members may fare quite differently from

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35 Although under a 1985 Wisconsin statute, both parents and grandparents were made liable for a baby born to unmarried minors, with penalties including a $10 000 fine and a two-year gaol term (Geis & Binder, 1991, p. 313).
parents in these procedures. Indeed, when advocates speak of engaging and responsibilising ‘families’, I would argue that, in a majority of cases, we could substitute ‘parents’ for ‘families’. The procedures manual for ‘youth justice conferences’ operated by the New South Wales Department of Juvenile Justice (2003), for example, lists a young offender’s parents/carers, along with the young person, the victim and the referring police officer/other official as “key participants” (p. 30) at a ‘conference’. Extended family members, however, although “entitled to attend a conference [italics in original]” (p. 32), are classed as outside of this group (New South Wales Department of Juvenile Justice, 2003, pp. 32-33). Northern Ireland’s Criminal Justice Review Group (2000) similarly advise that in implementing ‘restorative justice’ programs for juveniles:

We would envisage the offender’s parents or guardian attending a conference in almost all circumstances….However, we do not believe that the concept of the extended family is such that people from this group should be able to attend youth conferences as of right (p. 209).

Thus, while young offenders “should have no veto on the attendance of parents or guardians” (Criminal Justice Review Group, 2000, p. 209), they have some say in regards to the attendance of extended family members: “it will be for the co-ordinator…to try to persuade the young person that any ‘significant other’ who might contribute to the production of a conference plan, should attend” (Criminal Justice Review Group, 2000, p. 209). These
principles were later reflected in the Justice (Northern Ireland) Act (2002), which provides under section 57(3A)(2-4) that a meeting does not constitute a youth ‘conference’ unless it is attended by a facilitator, the young offender, a police officer, and an appropriate adult, which it defines as a parent or guardian in most circumstances.

Of course, this might not be the case in some cultures, such as Maoridom, in which members of an offender’s hapu or iwi\textsuperscript{36} may have a greater social obligation towards him or her. Nonetheless, ‘restorative practices’ that aim to engage families might inadvertently result in the responsibilisation or blaming of parents. As a number of studies indicate, despite the intent to involve extended family members, often only the immediate family of a juvenile offender is present at a ‘conference’. A report by the New South Wales Attorney-General’s Department (2002, p. 30), for example, found that in that jurisdiction, immediate family members were present at ‘conferences’ in 85% of cases, while extended family members were present only 17% of the time. Early data on New Zealand’s ‘family group conferencing’ scheme similarly indicated that often, only a young offender and his or her parents were present at a ‘conference’ (Stewart, 1996, p. 67) (although see Renouf et al., 1990, p. 31).

Perhaps more significantly, Morris and Maxwell’s (1993) early report on ‘family group conferencing’ in New Zealand found that “whanau\textsuperscript{37} participated

\textsuperscript{36} ‘Iwi’ refers to an individual’s people or group of descent (New Zealand Ministry of Justice, 2002).

\textsuperscript{37} ‘Whanau’ refers to the kin group (New Zealand Ministry of Justice, 2002) or extended family (Biles & Vernon, 1992, p. xiv) of Maori.
in well over a half of cases involving Maori” (p. 87). We can ascertain from this figure that almost a half of ‘family group conferences’ involving Maori did not involve extended family members. Despite the rhetoric around involving the extended family or whanau, therefore, it appears that even in relation to Maori the potential exists for parents, more so than others, to be responsibilised via ‘restorative practices’.

This view was challenged, however, when I interviewed Mike Doolan, an author of New Zealand’s ‘family group conferencing’ legislation, for this research. Doolan (interview, 21/12/05) claimed that research detailing only the “straight physical count” of persons participating in ‘family group conferences’ fails to take into consideration the input of those who are involved in such processes in varying ways:

[Such research] makes a fundamental error in my view, by just relating family involvement to those who attend the meeting. All of our co-ordinators say “look…this is just not right. We have had extensive family contact…we’ve talked with people”….If an entitled person wishes to be there but can’t for some reason…then they’re entitled to have their views made known to the meeting….These people still feel connected to the conference, and sometimes they actually get jobs as a result of the conference….They have a part to play although they weren’t there at the time.
4.4.3 The Impact of Parents Feeling ‘On Trial’ on Juvenile Recidivism

Prichard’s (2002; 2004) work, which draws on a range of psychological literature, argues that making the parents of young offenders feel ‘on trial’ in ‘family conferences’ may result in higher rates of recidivism amongst juveniles. The psychological literature that has influenced his work suggests that parents’ sense of self worth is usually very closely attached to how they perceive their skills as a parent. While most parents perceive that they are good parents – that is, have a high level of ‘parental self-efficacy’ – a minority do not. It is in these cases that making parents feel responsible for their child’s behaviour may have serious repercussions, Prichard (2002) argues:

Directing shame in a conference at the very parents most in need of personal affirmation might rock their already weak confidence in their abilities. There is every reason to believe that the consequences of that will flow onto children in the form of worse parenting (p. 340).

This, Cahn (as cited in Ebenstein, 2000) argues, is the case in regards to initiatives that responsibilise parents more broadly:

Punishing the parents for their child’s delinquent acts might result in further deterioration of the parent-child relationship. This could result in parental abuse of the child, or increased violence between the parents. Instead of preventing violence, the[se types of] laws may foster it (pp. 20-21).
Importantly, as Prichard (2002, p. 340) acknowledges, ‘low parental self-efficacy’ is correlated to many of the same social issues as juvenile offending: economic strain, unemployment and lack of social support. It is therefore reasonable to suggest, as Prichard (2002, p. 340) does, that ‘conferences’ – indeed, criminal justice processes more broadly – may disproportionately engage parents with little confidence in their ability as parents. By implication, therefore, parents from disadvantaged socioeconomic backgrounds are more likely to firstly, be drawn into a ‘family conference’, and secondly, to bear the effects of being held responsible for their child’s conduct.

Prichard (2004) also believes that his argument may help explain Maxwell and Morris’ (1999) research findings. As mentioned previously, Maxwell and Morris’ (1999, pp. 40-41) study of the reoffending patterns of juveniles that participated in ‘restorative conferences’ during 1990 and 1991 also found that over one-fifth of parents felt that they had been ‘made to feel like a bad parent’ during the ‘conference’. Importantly, Maxwell and Morris (1999, p. 41) believe that this figure is related to reconviction rates of juveniles, since almost one-third of parents of ‘persistently reconvicted’ juveniles felt that they had been made to feel inadequate, compared with only 6% of the non-reconvicted group. Maxwell and Morris (1999, p. 43) thus conclude that “not being made to feel a bad parent” (p. 43) is an important factor if ‘family group conferencing’ is to result in a lower rate of recidivism amongst juveniles.
A potentially significant aspect of Maxwell and Morris’ (1999, p. 41) research findings that neither they nor Prichard (2002; 2004) consider in relation to the responsibilisation of parents is that those juveniles who were not reconvicted “were more likely to say they felt involved” (p. 41) in the conference. This finding has been adopted by the Youth Justice Board for England and Wales (2001, p. 4), who have incorporated it into their own principles for ‘restorative’ practice. Maxwell and Morris’ (1999, p. 41) study implies therefore, that the greater involvement a juvenile offender has in making decisions during his or her conference, the less likely he or she is to reoffend. This is a key finding in the context of this Chapter, given that parents who feel they are being blamed are potentially more likely to involve themselves in making decisions throughout a ‘conference’, by, for example, advocating a harsh penalty for their child (see Wachtel, 1997, p. 33). If Maxwell and Morris (1999) are correct in asserting that curbing recidivism relies, to some extent, on the heavy participation of young offenders, then it is possible that less overt participation and decision-making from parents would be beneficial in this regard. In this sense, the notion of confronting parents’ own role in the offending of their children might be considered counter-productive.

4.4.4 (De)professionalisation, ‘Restorative Justice’ and Responsibilisation

The involvement of parents and families in ‘restorative practices’ is often presented by advocates as a manifestation of the shift towards a more inclusive, depprofessionalised model of criminal justice (Braithwaite, 1996, p. 324; Kurki, 2003, p. 293; McLaughlin et al., 2003, p. 5; Morris & Maxwell, 1993, p. 76; Pranis, 2004, p. 153; Zehr, 1990, pp. 203-204). ‘Restorative
justice’ is thus portrayed as a site through which the control unjustly denied parents/families under the traditional criminal justice apparatus is returned (see, for example, Doolan, 2005, p. 2). This theme – the returning of conflicts ‘stolen’ by professionals to their rightful owners – makes up the main argument of Nils Christie’s (1977) highly regarded text “Conflicts As Property”.

In the ‘restorative justice’ field, this shift towards deprofessionalisation, and the engagement of parents, families and communities in crime control procedures, is viewed as intrinsically progressive. McElrea (1994) describes it as only “natural that the emphasis should be on families when dealing with children and young persons, because families are their natural community, the source of their relationships of dependence of interdependence” (p. 46).

Even scholars taking a critical approach to ‘restorative justice’, such as Ashworth (2002, p. 578; 2003, p. 164) and Roach (2000, p. 256) accept without challenge that ‘restorative justice’ does and should involve a move towards a model of justice less reliant on professionals. Best practice principles designed by the New Zealand Ministry of Justice (2004, p. 12) also stress the secondary role that experts should play, and even place quotation marks around the term ‘professionals’.

The naturalness of relying on parents to deal with their children’s behaviour can be challenged, however, when the structure of Aboriginal families is considered. According to Blagg (1997), “unique patterns of authority and socialization” (p. 489) exist within Aboriginal communities, which detach
“biological parenthood from child socialization, [and] discipline” (p. 489). As such, a child’s biological parents may have little authority in regards to their lawbreaking behaviour (Blagg, 1997, p. 489).

The deprofessionalisation of criminal justice – which, as I have argued here, partially informs the valorisation of ‘restorative justice’ – undoubtedly represents a laudable goal on the part of law- and policy-makers. To allow parents, families and communities greater autonomy in the management of juvenile crime might not be viewed as an approach aimed primarily at unfairly responsibilising populations, or embedded within calculating, economic rationalist motives. Instead, it can be fairly safely assumed that in supporting family- and community-centred approaches to juvenile crime, governments are attempting to achieve what they say they are attempting to achieve – the greater input of parents, families and communities in the resolution of juvenile crime (see, for example, Criminal Justice Review Group, 2000, p. 205).

Ironically, however, the concept in question here – deprofessionalisation – describes the effects of this shift on the criminal justice system. The effect on parents, families and communities is rather one of professionalisation, whereby these groups are increasingly entrusted with what has previously been the domain of the state – the prevention and control of crime. In Braithwaite’s (2004a) words:

Restorative justice involves a shift from passive responsibility…[in]…which offenders are held [responsible] by
professionals for something they have done in the past to citizens taking *active responsibility* for making things right into the future….restorative justice is about creating participatory spaces where active responsibility might be taken by offenders [and other participants] [italics in original] (p. 28).

Braithwaite (2004a) argues that ‘restorative justice’ – with its high levels of “civic participation” (p. 29) – is more likely to be effective than professionalised justice, since “uncles are more effective at supporting agreements [for an offender] to attend an anger management program…[for example]…than are judges” (p. 28). In other words, justice will be more effective when ordinary citizens take on the roles traditionally reserved for justice professionals.

Thus while parents and families were “largely impotent” (Zegers & Price, 1994, p. 816) (see also Youth Justice Coalition of New South Wales, 1990, pp. 37-38) under the traditional criminal justice system, they play a central role in ‘restorative justice’ initiatives for juveniles (Zegers & Price, 1994, p. 816). In this sense, perhaps Braithwaite’s (2004a) article “Restorative Justice and De-Professionalization” might have been more appropriately titled “Restorative Justice and Professionalisation” or perhaps even “Restorative Justice and Responsibilisation”.

Considered in this context, ‘restorative justice’ appears to operate as a neo-liberal strategy through which subjects are ‘governed at a distance’. Via the
rhetoric of deprofessionalisation, ‘restorative practices’ for juveniles have the potential to responsibilise their subjects – in this case, parents and families. Furthermore, they have the capacity to act as net-widening mechanisms through which parents are increasingly engaged by criminal justice apparatuses. In this light, one wonders where (de)professionalisation might end and responsibilisation might begin.

In part, this professionalisation/responsibilisation of parents in ‘restorative practices’ is enabled by the ‘truth’ claim that all parents have the best interests of their children at heart. Terry O’Connell (interview, 8/8/05) speaks of his “realisation that parents, regardless of life struggles, would want to do anything that could, that would help build and maintain healthy relationships with their sons and daughters”. O’Connell (interview, 8/8/05) also claimed that ‘conferences’ that don’t involve parents are less effective than those that do: “and I mean parents regardless of the nature of the relationship with the kid”. This rationalisation of the shift towards deprofessionalised ‘restorative justice’ is, of course, contradicted by the infamous ‘I am a Thief’ t-shirt ‘conference’, and the ‘conference’ of the street kid whose mother refused to participate, both described earlier. While perhaps most parents meet O’Connell’s standard, therefore, it can hardly be assumed that all do. Importantly, this is perhaps especially the case in regards to parents with offending children.

4.4.5 Gender, Parental Responsibilisation and ‘Restorative Justice’
As stated above, although Prichard (2004, p. 195) touches very briefly on the issue of gender in relation to the responsibilisation of parents in ‘restorative’ processes, he does not explore this issue in any detail. Indeed, much of the literature considering parental responsibility for juvenile acts stops short of addressing this issue. This section aims to detail some of the possible areas in which the gender of parents is relevant in regards to the responsibilising potential of ‘restorative practices’ for juveniles.

Interestingly, where legislation in this area is not gender neutral, it is the male figure that is identified with the role of both juvenile offender and parent. The United Kingdom’s *Youth Justice and Criminal Evidence Act* (1999), for example, refers to its hypothetical young offender as a ‘he’ throughout. The Northern Territory’s *Juvenile Justice Act* (1997) refers to a young offender’s parent as a male, declaring that if a parent fails to attend the court hearing of the juvenile in question, “the Court may direct that a warrant be issued to bring him before the Court” (s. 42). Conversely, where the implementation of ‘restorative practices’ is concerned, it is the role of women as the mothers of young offenders that is emphasised. Consider, for example, these two contrasting accounts of the first ‘conference’ in Wagga Wagga, instigated by Terry O’Connell:

The conference was conducted in two parts: the first involved asking the offenders, *in the presence of their families*, to name those who had been affected by their behaviour [italics added]
Not having any insight into how a New Zealand FGC would be conducted, I decided to exclude the victim from the initial stage of the caution process. In fact, the offenders were not aware of the intention to include the motor cycle owner in the caution process. Each offender was accompanied by their mother and using a whiteboard I recorded what each offender said in relation to who was affected [italics added] (O’Connell, n.d., p. 36).

Here, it is not so much the fact that only the young offenders’ mothers participated in the conference, but the way in which O’Connell appears to equate ‘families’ with ‘mothers’ as though these are tantamount, that is significant. O’Connell again equated mothers with parents when interviewed for this thesis. On his more recent work introducing ‘restorative practices’ into schools, O’Connell (interview, 18/3/04) stated:

The night before [last], we worked with 70 parents….the parents…came because they’re interested, [they] thought they were going to be given a whole lot of information...[but]...what they discovered was that they were taken on a journey which allowed them to understand where their particular parenting style fit in....They learned a tremendous amount from the night.
In fact, at least 20 of them said that they very much regret the fact that their husbands weren’t able to be there. Because it wasn’t, as they thought, about the school, it was about them – their responsibility.

The concept of utilising shame as an emotion, and shaming as a process by which to effect the management of juvenile crime, also appears to be highly gendered. As Lutz (1996) argues, since “qualities that define the emotional also define women” (p. 151), any discourse on an emotion – in this case, shame – is “at least implicitly, a discourse on gender” (Lutz, 1996, p. 151) also. Leibrich’s (1996, p. 294) study of the role of shame in the decisions of offenders to desist committing crimes also argues that shame is a gendered phenomenon. Following Lutz (1996) and Leibrich (1996), therefore, we should perhaps consider the role of shame and shaming in ‘restorative justice’, not only in relation to the impact it may have on families generally – as White (1994), cited earlier, suggests – but of its potentially gendered impact on families.

How, then, does this purportedly gendered emotion of shame and the process of shaming impact on parents in ‘family group conferences’ for young offenders? To a degree, it appears from the literature on this topic that the gendered nature of shame and shaming is seen by some proponents as being beneficial to the process of reforming the juvenile in question. According to Braithwaite and Mugford (1994), for example, in a ‘family group conference’: 
The shaft of shame fired by the victim in the direction of the offender might go right over the offender’s head, yet it might pierce like a spear through the heart of the offender’s mother, sitting behind him. It is very common for offenders’ mothers to start to sob when victims describe their suffering or loss. So while display of the victim’s suffering may fail to hit its intended mark, the anguish of the offender’s mother during the ceremony may succeed in bringing home to the offender the need to confront rather than deny an act of irresponsibility (p. 288) (see also Braithwaite, 1995b, p. 199).

Certainly, mothers feeling ashamed of their children’s behaviour is an element of the ‘conferences’ witnessed by Wachtel (1997). In one of these encounters – involving two brothers and another male friend caught vandalising a woman’s car – the reactions of the brothers’ parents, and the mother of the brothers’ friend, ‘Will’, are described by Wachtel (1997) as follows:

The parents of the two boys and Will’s mother were effusive in their apologies. Then both of the mothers also began to cry, insisting that they had not raised their children to behave like this....The conference ended and during the informal phase...the two mothers hugged and kissed Mary [the victim], repeatedly apologizing for what their children had done. The
father also expressed his deep disappointment with his sons (pp. 48-49).

Here, it appears that while the boys’ father is disappointed with *them*, the boys’ mothers are disappointed with *themselves*, apparently apologising on their own behalf. Furthermore, even the Home Office (2003, p. 40) relates the story of a mother of an offender crying and apologising to the victim's wife in its strategy on ‘restorative justice’.

O'Connell (n.d.) similarly argues that the notion that shame is experienced differently by men and women is an important part of the functioning of a ‘family group conference’. O'Connell’s Wagga Wagga model of ‘conferencing’ for juveniles was aligned some time after its inception with Silvan Tomkins’ psychological theory of ‘innate affects’ (O'Connell, 1998, Discovering Braithwaite and Nathanson section, para 4; n.d., p. 38). Tomkins’ ‘affect theory’ posits that there are nine ‘affects’ or types of emotion that are innate to human beings, ranging from positive affects like joy, to negative affects such as shame (Nathanson, 1992). Donald Nathanson (1992), who extended and advanced Tomkins’ theory after his death, argues that in relation to the affect of shame, a ‘compass’ exists, with four distinct responses. People experiencing shame will, according to Nathanson, undergo one of four responses: ‘attack self’ (for example, putting oneself down), ‘attack other’ (lashing out verbally or physically at others), ‘withdrawal’ (hiding from the problem), or ‘avoidance’ (denial or drug abuse) (see also Greentree, 2005;
O'Connell et al., 1999, p. 27). Consider, in light of this, O'Connell’s (n.d.) account of the role of an offender’s supporters at a ‘family group conference’:

The offender's group – parents, families and supporters – is then invited to speak. Each (of this group) will have been largely experiencing shame which has increased in intensity since the conference began. They too also have shared the ‘anticipatory’ anxiety of the offender and victims but are not likely at this point to have experienced positive affects because their own sense of shame is directly linked into their level of culpability, which comes from their relationship with the offender. Selection of who speaks first (out of this group) is therefore important in terms of the building and regularising of positive affectivity in the conference. The offender’s mother, or someone who is more ‘emotionally vulnerable’ is chosen, as their response is more likely to respond to shame in ways that promote positive affects for the victim (and supporters) (p. 74).

O'Connell (n.d.) goes on to describe the role of Nathanson’s (1992) ‘compass of shame’ in relation to a ‘family group conference’:

In revisiting Nathanson’s (1992) compass of shame, of the four polar responses, mothers are likely to engage in ‘attack self’ behaviour by describing herself [sic] as a ‘failed parent’ and ‘letting their son or daughter down’. Fathers, on the other hand,
tend to respond in an ‘attack other’ way in which they blame their son or daughter, or sometimes the victim. This difference can be explained in terms of how girls and boys are socialised. Girls are likely to respond in an emphatic \(^{38}\) way, whereas boys are likely to respond in rational terms (Masters 1997). Being ‘emotionally vulnerable’ means that the person is more likely to respond to questions emotionally (p. 74).

This same argument is made by O’Connell et al. (1999) in their handbook on ‘conference’ training. In their advice to future ‘conference’ facilitators, the authors suggest: “the first offender supporter the facilitator questions should have the strongest attachment to the offender and be most likely to exhibit the strongest emotional response. If the offender is a youth, this is usually the offender’s mother” (p. 63). This comment is delivered as though it were a given that women are naturally more emotional than men, and as though this is an unproblematic statement to make.

O’Connell (interview, 8/8/05) made a similar remark when I interviewed him for this research, claiming that during the development of the Wagga Wagga ‘restorative justice’ program, “mums tended to have a far greater impact than dads….I think it’s to do with the nurturing, caring role that mums have”. Les Davey (interview, 28/9/05) likewise explained mothers’ greater participation in ‘restorative’ procedures by reference to “that maternal thing between mother and child”. After flatly denying the possibility that the potential exists for

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\(^{38}\) Presumably, O’Connell (n.d., p. 74) means to say that girls are likely to respond in an empathic way.
mothers to be blamed more than fathers in ‘restorative justice’ procedures, Ken Marslew (interview, 11/8/05) remarked that “mums are more likely to have unconditional love [for their children], more likely than dads”.

Although these ‘truth’ claims – that women are more emotionally vulnerable, more likely to blame themselves for their children’s actions, and to have a greater love for their children than men – might be considered merely as outdated stereotypes, they demonstrate that the potential exists for strategies of responsibilisation to be directed disproportionately at the mothers of juvenile offenders. This is particularly concerning given that, in Australia at least, single parents are much more likely to be women than men, and mothers, more so than fathers, are involved in the tasks required of parenting\textsuperscript{39}. Furthermore, as Maxwell and Morris’ (1994) research on ‘family group conferencing’ in New Zealand revealed, ‘conferences’ are almost always held between 9am and 4pm on weekdays, apparently to suit police and Youth Justice Co-ordinators, who “seem to prefer to attend FGCs during normal working hours” (p. 22). This experience seems to be echoed in school ‘conferences’ in Northern Ireland, where “although…it’s preferable for both parents to attend the conference, usually only one parent does, often because the other has to work” (Mirsky, 2003b, p. 2). Other implications aside, both these pieces of research indicate that parents who are not engaged in paid work during the day – most often mothers – are potentially more likely to attend, and be expected to attend, their child’s ‘conference’.

\textsuperscript{39} The Australian Bureau of Statistics’ (2004) survey of family characteristics found that in families with dependent children in which only one parent was employed outside the home, the employed parent was the father of the children 89\% of the time. This demonstrates that in the vast majority of cases, it is mothers who act as full-time carers of children.
Daly’s (1996) study of ‘conferencing’ in Australia likewise found that “more mothers than fathers were present at conferences” (p. 13). Figures from this study show that of the ‘conferences’ observed by Daly (1996, p. 21) in South Australia and Canberra, mothers of young offenders were present without fathers 40% of the time, both parents were present 30% of the time, and fathers were present without mothers only 14% of the time. Trimboli’s (2000, p. 26) study of the New South Wales ‘youth justice conferencing’ scheme, although it did not report on the parental status of participants, found that while the majority of both offenders (82.2%) and victims (60.4%) present at ‘conferences’ were male, women made up the majority of offenders’ supporters (63.9%). Likewise, Prichard’s (2004, p. 200) study found that out of the 67 ‘conferences’ observed, 33 included mothers of young offenders, while only 15 included fathers. K. Cook’s (2006, p. 115) research on ‘restorative justice’ in both Australia and the United States of America also suggests that mothers are more frequently in attendance than fathers. Additionally, her research indicates that even when present, fathers usually act as “silent partners” (K. Cook, 2006, pp. 117-118) in ‘restorative’ procedures.

In contrast, Pennell (2004) has stated that ‘family group conferences’ in North Carolina more often involve fathers than mothers, despite the fact that these are usually held during normal working hours. Although these ‘conferences’ are different in that they are convened to resolve child welfare, rather than juvenile justice matters, this does indicate that whether mothers or fathers attend ‘conferences’ more frequently is an issue that differs across localities.
and across various ‘restorative practices’. Nonetheless, a range of research seems to support Braithwaite’s (1999) claim that “there seems little doubt that women do more of the restoring than men in restorative justice processes” (p. 95). Indeed, Braithwaite (1999), refuting the criticism that women will be ‘disempowered’ in conferences, argues that “if we were to nominate one type of actor who is more likely to be influential in the outcome than any other, it might be the mother of the offender” (p. 94). As Cunha (1999, p. 311) points out, persons responsible for supervising outcomes plans are selected from those present at the ‘conference’; as mothers are often present without fathers, they are ultimately more likely to be responsible for these tasks. ‘Restorative’ procedures can thus result in mothers being required to act as “correctional officers at home” (K. Cook, 2006, p. 117).

While Braithwaite’s (1999, p. 94) above comments may satisfy critics concerned about women’s lack of participation in ‘restorative justice’ procedures, furthermore, they surely have the opposite impact for those concerned about the potentially gendered nature of the responsibilisation of parents. Moreover, if children from ‘broken homes’, and those being raised by single parents are more likely to become involved in crime, as many believe (see Cunha, 1999, p. 337; Figgis, 1999, p. 11; Graham, 2000, p. 1719; Home Office, 2000b, s. 2.4; Weatherburn & Lind, 1998, p. 2), it is again mothers – who are most likely to be that single parent – that will be burdened with accepting responsibility for their children’s behaviour. This issue was discussed in an interview I conducted with Terry O’Connell. After admitting
that “as a general rule, a majority of conferences that I have facilitated involve mothers”, O'Connell (interview, 8/8/05) explained that:

Logically, when you think about the risk factors of offending, and you take into account that there’s a strong correlation between difficult families and single-parent families, and invariably the mums...are the single parents.

O'Connell (interview, 8/8/05) described this as “the onerous responsibility that mothers in particular have” and acknowledged that “it’s really unfair...in terms of parental responsibility, [it is] unfair”. Additionally, he described his method of dealing with this ‘unfairness’ as follows:

I always sought to try and get support people for the mum....[Mothers] need to be affirmed, invariably...Even mums who are really struggling with...often huge responsibilities, issues of income et cetera et cetera and would be seen in normal circumstances as being those with parenting deficiencies, even those, the worst sort of mums do some really good things in terms of parenting....I always took the view that if we created a process that could involve those that could affirm and acknowledge and support the mum who invariably did the bulk of parenting, that in itself was a really important part of the whole process (Terry O'Connell, interview, 8/8/05).
Despite this recognition of, and attempt to minimise mothers’ ‘onerous responsibility’, however, there is no effort here to overcome – to transform – this ‘unfair’ status quo. Although Braithwaite (2003a, p. 1) champions the potential of ‘restorative justice’ to refigure unfair social relations such as patriarchy, therefore, this does not appear to be a priority among those actively involved in developing and delivering ‘restorative practices’. Furthermore, one wonders whether mothers should have to have an offending child to qualify for the social support and affirmation that O’Connell speaks of.

Graham Waite (interview, 6/12/05), who also acknowledged that there was “no doubt” that the Northern Territory’s ‘family conferences’ involve mothers more often than fathers, raised two-parent working families as an issue in addition to single-parent families. His comments on working mothers highlight the potentially gendered nature of this concern:

I had a talk to a couple of hundred people at a…conference here in Darwin some years ago, and as part of that I started talking about…single parents…but particularly single mother families and dual parents where they’re both working….And at the end of it, quite a number of women came down to me…and said “oh, look, this is just wonderful, I’m thinking about giving up work” (Graham Waite, interview, 6/12/05).
Although Waite (interview, 6/12/05) stressed in this situation that this was not the intended outcome of his approach, this anecdote does indicate that where parents – especially single parents or dual-parent working families – are targeted by crime control measures, women are likely to be burdened more so than men.

As Hil (1996b) argues, therefore, crime control measures that responsibilise parents – including ‘family conferences’ – may “prove calamitous” (p. 280) for families, and “especially for mothers who often end up holding households together” (p. 280). If we consider other measures aimed at responsibilising parents, such as the gaoling of those who ‘fail’ to send their children to school, we can see that it appears to be mothers who bear the brunt of these policies. Media reports of such cases (Mother jailed for girls’ truancy, 2002; Jailed truancy mother refused bail, 2002; Parents told to get in line, 2002)\(^{40}\) indicate that it is usually mothers – indeed, single mothers – of truants that have been convicted in this regard. Although prison sentences are reserved for only the most extreme cases (Bell & Jones, 2002, p. 31), this does seem to indicate that, as Davidson (1996) suggests, “letting fathers ‘off the hook’” (p. 27) is a “common occurrence” (p. 27) in relation to the application of parental responsibility initiatives. The United Kingdom’s ‘parenting orders’ have similarly been found to impact disproportionately on mothers and single parents (Audit Commission for Local Authorities and the National Health Service in England and Wales, 2004, p. 79).

\(^{40}\) See also Geis and Binder (1991, p. 314).
There is therefore a concern that the outcomes of some of these measures, as well as the processes, will unfairly penalise women as mothers of delinquent children. Webb-Pullman (2001) makes this criticism of ‘family group conferencing’, for example:

The research evidence suggests that women’s disadvantage in conferencing is not related to the lack of participation in the process, but the converse: women do more of the restoring than men. Thus the cost of the community empowerment embodied in conferencing is a gendered burden of care (p. 154).

Although Daly (1996, p. 13) reports that in her study of ‘conferencing’ women were not more involved in supervising juveniles’ outcome plans than men, her figures only show the gender of “victims or offender’s supporters” (p. 21) involved in supervising outcome agreements, without indicating the proportion of mothers and fathers within this group. Additionally, Daly (1996) appears to base her claim only on which ‘conference’ participants say they will supervise the young person’s outcome plan; her research does not attempt to follow up on whether or not this is achieved as intended. The fact that mothers might participate more frequently in their children’s ‘conferences’ thus raises, as Webb-Pullman (2001) argues, some important issues for consideration. It stands to reason, for example, that if mothers are more often present at ‘conferences’ than fathers, then women will do more of

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41 See also Daly (2000) and Daly and Stubbs (2006) for a further discussion of this research.
the ‘restoring’ than men, despite Daly’s (1996) argument. This is particularly the case if parents are to ‘manage’ ‘punish’ and/or ‘rehabilitate’ their offending children, as much ‘restorative justice’ legislation and policy dictates, or if families are to act as probation officers, as Zion (1997, p. 173) argues is the case in Native American justice, of which “restorative justice is the main goal” (Zion, 1997, p. 178).

Such concerns have prompted Doolan (2005) to declare that although he can see the value of ‘restorative’ measures for crime victims, he is less convinced of their value for families: “I suspect that in primarily restorative approaches, ‘family’ will mean Mum, and Mum will experience the blame – just like she has always done in traditional child welfare systems” (p. 3).

4.4.6 ‘Restorative Justice’, Parental Responsibilisation and Indigenous Parents

Another area that we might consider in this regard is the responsibilisation of indigenous parents. It is possible - given the valorisation in the ‘restorative justice’ field of some indigenous cultures’ beliefs about the ‘interconnectedness’ of communities (de Leon-Hartshorn, 2004) and the importance of kinship and the extended family – that a disproportionate responsibilisation of indigenous parents may result from ‘restorative practices’ for juveniles.

Queensland’s Juvenile Justice Act (1992) is a case in point. This law aims to “recognise the importance of families of children and communities, in
particular Aboriginal and Torres Strait Islander communities, in the provision of services designed to: (i) rehabilitate children who commit offences; and (ii) reintegrate children who commit offences into the community [italics added]" (s. 3). New South Wales’ Young Offenders Act (1997) also aimed to “provide opportunities for respected community members to participate in the juvenile justice system, ensuring Aboriginal and ethnic communities have the opportunity and responsibility to help their young people” (Youth Justice Advisory Committee, n.d., p. 3), and Western Australia’s ‘family meetings’ aim to “involve Aboriginal communities in managing offenders and assist Aboriginal families of offenders to take responsibility” (Hakiaha, 1994, p. 106). Similarly, many claim that New Zealand’s ‘restorative justice’ legislation was designed to enable Maori families to manage the offending of Maori juveniles (Serventy, 1996, pp. 11-12). Here, it appears that the greater need to improve the situation facing indigenous communities in relation to juvenile justice issues, and/or a belief in the importance of families and kinship within indigenous communities, introduces the possibility that indigenous parents may be disproportionately responsibilised. If ‘restorative justice’ practitioners consider indigenous families innately better able than non-indigenous families to resolve problems via the family network, as seems to be the case in New Zealand, perhaps indigenous families will be more often required to fulfil this expectation.

This has been the case with similar measures such as South Australia’s and Western Australia’s ‘youth curfews’. These initiatives, which aimed to clear young people from the streets and return them to the custody of a
responsible adult, overwhelmingly targeted Aboriginal youths (Koch, 2003; Millner, 2003; Rayner, 2003). In the Western Australian city of Northbridge, for example, 450 youths were removed from the streets over a 12-week period, more than 400 of whom were Aboriginal (Rayner, 2003, p. 9). It is thus something of an understatement to claim that such strategies have “the potential to negatively impact Aboriginal youth and their families” (Koch, 2003, p. 8).

This is also the case where a parent’s attitude will be taken into account by authorities when deciding whether to allow a young person’s offence to be dealt with by way of a ‘restorative’ procedure or court, as is the case in South Australia. This provision raises a myriad of issues, not the least of which is its potential to be mobilised discriminatively in regards to Aboriginal and Torres Strait Islander parents, whose approach to parenting may be considered to fall short of the Anglo Saxon standard. As Beresford and Omaji (1996) demonstrate, indigenous families are more likely to fail to control their offspring given the history of racist policies such as the forced removal of indigenous children: “children subjected to the policy of forced institutionalisation found that the ‘total institution’ had denied them the models of parenting and family life essential to the later task of raising their own children” (p. 35). It is also important to consider in light of this what might occur when multiple indices of disadvantage – parents’ ethnicity, gender and socioeconomic status, for example – intersect.
Consider also the situation in the Northern Territory, where parental responsibility exists as an explicit feature of the state-wide ‘restorative justice’ scheme (Waite, 2002), and almost one-quarter of the population are indigenous. About this program, we are told by its instigator that:

Empirical evidence from the operation of the scheme to date indicates that the greatest chance of success in effecting behavioural change with a juvenile lies with the family. Without family support, encouragement, affection, supervision and role modelling many of the juveniles are often overpowered by the environment in which they live, despite their best intentions. Unfortunately many of the parents and guardians of offending juveniles also lack life skills and suffer alcohol, drug or emotional problems. The highest rates of success in achieving behavioural change with juveniles involved in diversion are those diversion interventions and programs requiring family commitment, support and involvement in the process (Waite, 2002, p. 16).

Here, indigenous parents’ problems with drug and alcohol abuse are removed from the context of colonisation. Although drug and alcohol abuse and lack of parental supervision among indigenous communities have long been identified as repercussions of colonisation and racist government policies such as the forced removal of indigenous children, these are taken out of historical and cultural context and presented as generic parenting
problems. Focusing on drug and alcohol and parenting issues in this way, however, surely allows for the disproportionate responsibilisation of Aboriginal parents. Additionally, it creates the potential for the scheme to act as a net-widening process for indigenous parents. One wonders, moreover, whether indigenous parents should have to have a child commit a criminal offence before they are offered assistance with drug and alcohol and/or emotional problems.

4.4.7 ‘Restorative Justice’, the Responsibilisation of Parents and ‘Government at a Distance’

Like the offender-as-victim discourse discussed in the previous Chapter, the responsibilisation of parents constructs offenders in ‘restorative justice’ procedures as less than wholly responsible for their conduct. Although the shift towards parental responsibilisation reflects the broader move towards individual responsibility in crime control, it also masks a discontinuity within the ‘restorative justice’ project itself. As pointed out previously, the discourse of offender accountability is crucial to ‘restorative justice’. The first purpose of sentencing listed under New Zealand’s Sentencing Act (2002), for example, is “to hold the offender accountable for harm done to the victims and the community” (s. 7(1)(a)). Holding the offender accountable is also one of the New Zealand Ministry of Justice’s (2004, p. 14) best practice principles, and one of the Restorative Justice Network’s (2004, p. 24) ‘restorative justice’ values. Additionally, holding offenders accountable is a key element of ‘restorative justice’ strategies in all Australian jurisdictions (Restorative Justice Sub-Committee Of The ACT Sentencing Review Committee, 2003, p.
Where parents rather than young offenders are being responsibilised, however, offenders are again constructed as unwitting victims – this time of inadequate parenting (and possibly their parents’ psychology, as discussed below), rather than their own psychology or wider social disadvantage.

In this sense, therefore, the identification of parental responsibility as a discourse significant to the emergence of ‘restorative justice’ posits this phenomenon as both continuous and discontinuous with the dominant model of holding individuals accountable for criminal acts.

Nonetheless, the shift towards holding parents responsible for their children’s offending behaviour corresponds with broader shifts towards embracing a ‘new right’ or neo-classical philosophy of crime control, in which a move away from structural explanations of crime, and an increased focus on individual responsibility are paramount. This focus on parents’ behaviour, like the ‘psy’ discourses discussed in the previous Chapter, renders individuals and families, rather than social/structural circumstances, problematic. Through ‘restorative practices’, therefore, the state governs juvenile offenders ‘at a distance’ via their responsibilised parents rather than becoming directly involved.

This tendency to highlight individual deficiencies while disregarding issues related to wider social disadvantage is a feature of related juvenile justice practices that potentially involve responsibilising parents. M. Lee’s (1995) research on police cautioning in England and Wales, for example, found that
while young people were berated by police about what their future job prospects would be if they continued to offend, “the vision of employment prospects for young people who stayed out of trouble was blatantly inapplicable to the realities of contemporary economic development” (p. 325).

This ‘handing back’ of responsibility to parents has, therefore, often taken place without an equivalent increase in social support services for parents: “responsibilities have been devolved from the state to families, without providing them with additional resources” (M. Lee, 1995, p. 37). As Davidson (1996, pp. 24-25) argues, this has the potential to impact disproportionately on families from lower socioeconomic backgrounds (see also Audit Commission for Local Authorities and the National Health Service in England and Wales, 2004, p. 79). We might add to this that it also has the potential to disproportionately affect women as mothers, and parents from non-English-speaking and/or indigenous backgrounds. Certainly, this has been the case in New Zealand, where, according to Morris and Maxwell (1993), ‘family group conferences’ have increasingly responsibilised Maori families without providing corresponding social support:

If what was envisaged was the provision of resources to families in need of social services and the like, this did not occur...we observed situations in which families were clearly asking for but not receiving help....On occasion services were provided within iwi. This happened in the main without
While much ‘restorative justice’ legislation, including New Zealand’s *Children, Young Persons and their Families Act* (1989), stipulates that ‘restorative practices’ are to deal only with youth *justice* rather than *welfare* issues, this safeguard may not extend to parents. As Davidson (1996, p. 24) argues, many parents having difficulties with offending children would undoubtedly avail themselves of services such as parenting education classes, if these services were both available and affordable. Indeed, parents would be very likely to do so where provisions exist under which they may be held legally responsible for their children’s acts (Davidson, 1996, p. 24). Under the ‘restorative justice’ model, however, parents often have to wait until their child has both committed an offence and been apprehended for that offence, before access to these services is made available (or compulsory).

In this way, ‘restorative practices’ not only construct individual parents as the ‘problem’ in relation to juvenile crime, but often as the ‘solution’ also. For ‘restorative justice’ proponents, the solution to youth crime lies within the parents/family, rather than within relieving the social disadvantage that is correlated with this offending. Consider the following comments of the Parliament of New South Wales Legislative Council Standing Committee on Social Issues (1992), made in a bid to recommend New Zealand’s ‘family group conferencing’ system to New South Wales:
It was observed that offending mostly occurs in a familial, economic, social or environmental context that has an impact on the child or young person. One of the areas of emphasis of the Act is the provision which enables families to face their contribution to the offending behaviour (p. 89).

Here, while the broader context of youth offending is acknowledged, economic, social and environmental factors are disregarded in favour of a focus on the family. Thus although the ‘problem’ of juvenile crime is constructed in more general terms, the ‘solution’ again rests with the parents/family.

At times, the ‘cause’ of, and solution to, juvenile offending is even located within parents’ psychology; a range of ‘restorative’ laws and policy initiatives allow for parents to be ordered to attend counselling or other ‘psy’-based programs. Under Oregon’s State Juvenile Code (1998), for example, parents can be ordered to participate in educational and/or counselling programs designed to enhance their ability to supervise their children. Similar provisions exist under Kansas’ Juvenile Justice Code (2001), Alabama’s Juvenile Justice Act (1997), Idaho’s Juvenile Corrections Act (1995), New Zealand’s Children, Young Persons and their Families Act (1989), and the United Kingdom’s Crime and Disorder Act (1998). Illinois’ Juvenile Court Act (1999) can even require juvenile offenders and their parents to undergo drug or alcohol counselling, if a compulsory assessment identifies substance use in either party. This represents one site in which the two sets of discourses
explored so far in this thesis – those of the ‘psy’ ethos and parental responsibilisation respectively – intersect.

4.5 The Heterogeneity of ‘Restorative Practices’ and their Historical Roots

Exploring these two sets of discourses in relation to the emergence of ‘restorative justice’ begins to suggest the diversity of the historical roots of this phenomenon. The discourse of parental responsibilisation appears to be relevant to jurisdictions within Australia, New Zealand and the United Kingdom, more so than those within North America, demonstrating the geographical and pragmatic diversity of ‘restorative practices’. It could thus be suggested that while ‘psy’ and popularised therapeutic discourses play a more prominent role in North America, where they perhaps have greater acceptance, discourses of parental responsibility have had a greater impact on the emergence of ‘restorative justice’ in the United Kingdom and the Antipodes. In the latter jurisdictions, names of ‘restorative’ reforms are often prefixed with the words ‘family’ or ‘youth’, whereas elsewhere, the word ‘victim’ is more common in program names. In Australia and New Zealand in particular, the emergence of ‘restorative justice’ is correlated with child welfare reforms (or attempts to separate the domains of youth justice and child welfare) in a way that the emergence of ‘circle sentencing’ and ‘victim offender mediation/reconciliation/dialogue’ was clearly not.

In one sense, therefore, ‘victim offender mediation’ and ‘circle sentencing’, partly informed by ‘psy’ discourses, could be said to reflect a progressive,
‘bleeding heart’ politics, while ‘family group conferencing’, informed by discourses of parental and individual responsibilisation, might correspond more closely with a conservative, ‘get tough’ approach.

In Mike Doolan’s (interview, 21/12/05) view, ‘family group conferencing’ and ‘restorative justice’ are quite separate domains. As mentioned previously, Doolan (2005, p. 1) claims that during the development of New Zealand’s Children, Young Persons and their Families Act (1989), the authors had never heard of ‘restorative justice’. According to Doolan (interview, 21/12/05), the ‘restorative’ ethos was something that attached itself retrospectively to ‘family group conferencing’:

By the mid-1990s, the…restorative justice ethos…had really embedded itself in youth justice practice….And it really worried us, because what it did was move…youth justice practice in this country away from family empowerment towards victim restoration….I don’t like the fact that…[others in the field]…claim the New Zealand [model] was…one of the earlier restorative models. It certainly wasn’t, and it was never intended to be.

Of course, ‘restorative practices’ are not able to be categorised in such a discrete fashion; as this thesis has already suggested, various ‘restorative practices’ do not exist within concrete or tangible boundaries. Rather, there is a great deal of cross-pollination amongst these practices. Nonetheless, this
analysis of two contrasting sets of discourses illustrates both the heterogeneity of practices grouped together under the ‘restorative justice’ banner, and its divergent and fragmented historical roots.

4.5.1 Donzelot, Government through Families and ‘Restorative Justice’

This Chapter has thus argued that ‘restorative justice’, in some of its guises, is underpinned by discourses of parental responsibility. Parents’ goals and aims become aligned via ‘restorative practices’ with those of the state. The social norm of peaceful communities is thus achieved, to some extent, via government through the family.

This particular form of power – whereby social norms are achieved by means of government through the child-centred family, did not emerge concomitantly with ‘restorative justice’. Indeed, Donzelot’s (1980) highly-regarded text The Policing Of Families identified a shift in relations of power from government of the family to government through the family as having occurred at the end of the nineteenth century. Donzelot (1980) charted the way in which families were governed according to what he terms the ‘philanthropic poles’ of contract and tutelage. The contractual system corresponds with an “accelerated liberalization” (Donzelot, 1980, p. xxi) of relations between families and the state. Contractual relations are free relations between families and external agencies: “the family took the initiative to seek out suitable doctors, lawyers and other experts to help solve its problems” (Wigman, 1990, p. 258). The tutelary system describes those instances where families are drawn into relationships with external agencies, often
against their will, usually as a result of resisting the imposition of new social
norms while simultaneously facing a “difficulty in supplying their own needs”
(Donzelot, 1980, p. xxi).

According to Wigman (1990, p. 261), these relations operate in a ‘push-pull’
fashion; families are threatened (‘pushed’) with tutelary relations as they are
enticed (‘pulled’) by contractual relations. It is through this form of
governance, therefore, that families strive towards, reproduce and maintain
social norms.

‘Restorative justice’ – particularly where it is informed by discourses of
parental responsibilisation – is underpinned by this form of power in a
number of ways. This section will outline these, and thus begin to trace the
continuities of forms of power exercised in ‘restorative’ fora to those identified
by Donzelot (1980).

Firstly, as this Chapter has demonstrated, ‘restorative justice’ legislation in a
variety of jurisdictions can compel parents of juvenile offenders to participate
in ‘restorative’ processes and/or related therapeutic measures such as
counselling, parenting classes, or drug and alcohol rehabilitation. While these
measures seem directly coercive – in that they are supported by legislation –
ythey often feature an ‘appeal’-type clause which, theoretically, provides
parents with a formal source of resistance to them. Donzelot (1980) argues,
however, that techniques of normalisation aimed at juvenile offenders’
parents rarely result in appeal for two main reasons. Firstly, these techniques
exist externally to, but supported by, the penal register. That is, where these measures are not adhered to, “punishment in the strict sense” (Donzelot, 1980, p. 111) may be resorted to. Secondly, and perhaps more significantly in relation to Donzelot’s (1980) broader thesis, resistance to these therapeutic measures aimed at juveniles’ parents is rare because, in juvenile justice proceedings, it is precisely the behaviour of the juvenile and his/her parents that is the matter for the court (see also Rose, 1999, p. 131). The presenting problem – the juvenile’s unlawful act – is “eclipsed by the behaviour and the norm” (Donzelot, 1980, p. 111). Donzelot (1980) argues that families of children appealing judicial decisions are thus “ridiculously few in number” (p. 111); understandably, few parents will chance the penal measures that may be imposed if tutelary regulations are not adhered to.

It is important to note here that parents may resist forms of government imposed by ‘restorative justice’, often with few apparent consequences. The case of the mother of a 14-year-old girl who stormed out of a ‘conference’ (Braithwaite & Mugford, 1994, p. 289) is a case in point. ‘Restorative justice’ measures by no means deny parents agency. This is important to highlight in relation to Donzelot’s (1980) work, which is frequently criticised on the grounds that it appears to portray families as “passive receptacles of outside forces” (Wigman, 1990, p. 262) – an accusation that Wigman (1990) vehemently refutes (see also van Krieken, 1991, p. 20). The point to be made here is that while parents can (and sometimes do) resist ‘restorative’ governance, most do not. This is precisely the relevance of both Donzelot’s and Foucault’s works to this Chapter: subjects (parents) usually ‘willingly’
accept tutelary regulations (‘restorative justice’ and associated measures) and the social norms to which these regulations aspire.

Secondly, analysis of Donzelot’s (1980) text indicates that parents can become subject to tutelary regulations when they fail to accept contractual relations: this new form of power “obliged the family to retain and supervise its children if it did not wish to become an object of surveillance in its own right” (p. 85). The exercise of power in this way meant also that parents were to become sites of intervention where their children were in danger, dangerous, or “in danger of becoming dangerous” (Donzelot, 1980, p. 97). In a parallel development, juvenile offenders and their parents could become subject to ‘justice’ measures where they failed to meet ‘welfare’ norms – a development illustrated by Carrington’s (1991; 1993) more recent work in the area of juvenile justice.

‘Restorative justice’ might be considered a further manifestation of these power effects identified by Donzelot (1980). ‘Restorative practices’, as I have sought to demonstrate in this Chapter, are measures via which parents can become subject to normalising techniques as a result of their children’s wrongdoing. As I argued earlier, while ‘restorative’ fora are often intended to deal explicitly with ‘justice’ rather than ‘welfare’ issues, this principle appears not to extend to the families of young offenders. ‘Restorative’ measures that can result in parents undergoing various therapeutic measures, such as those already outlined in this Chapter, might therefore be considered manifestations of the form of governance outlined by Donzelot (1980).
Parents who fail to enter into contractual relations (such as attending parenting education classes), and thus fail to advance social norms, may be drawn into tutelary regulations via ‘restorative’ processes. As the work of Davidson (1996), cited earlier, demonstrates, many parents would avail themselves of such services if they were widely available and accessible. Those families who cannot or will not enter into contractual relations therefore become subject to tutelary regulations as a consequence of official responses to their children’s offending. One implication of this is, as Donzelot (1980) suggests, that families from lower socioeconomic backgrounds will be those most often subject to the tutelary system. As this thesis has aimed to suggest, this operation of power often characterises strategies of ‘restorative’ governance also.

Thirdly, and related to the above, Donzelot (1980) suggested that measures which characterise the tutelary register – those of the “educative social services” (p. 116) may reach further into, and have far greater impact upon, the lives of families than those associated with the penal register. In contrast to strictly penal measures, tutelary regulations are often indeterminate (Donzelot, 1980, p. 116). This enhanced exercise of power also characterises ‘restorative’ processes. This is demonstrated most clearly in this Chapter by the anecdote told by Graham Waite in which four youths were charged with damaging public property. In this case, the two youths sent to court were treated far more leniently than the two diverted from the court system via ‘restorative’ measures. In this example, the families that opted to participate in a ‘restorative’ procedure became subject to far greater
intervention. We can see, therefore, that in this instance at least, tutelary regulations - such as those resulting from ‘restorative’ fora – can penetrate far deeper into families’ lives than strictly penal measures.

In a number of ways, therefore, ‘restorative justice’ might be considered a representation of the continuity of the form of power identified by Donzelot (1980). Some elements of some ‘restorative practices’, at least, might be viewed as manifestations of government through the child-centred family. Importantly, and as demonstrated throughout this Chapter, this exercise of power relies on the alignment of familial aims with social norms (Donzelot, 1980; Rose, 1999, p. 132). The operation of power articulated in this Chapter is thus able to be traced to much earlier developments than those associated with ‘restorative justice’. Indeed, the operation of power on which ‘restorative’ initiatives partly build can be traced to the end of the nineteenth century (Donzelot, 1980), and can be seen to have underpinned a range of other juvenile justice measures (Carrington, 1991, 1993).

4.6 Conclusion

As stated at the outset of this thesis, ‘restorative justice’ initiatives have historically enjoyed widespread political backing. This continues to be the case; Mike Doolan (interview, 21/12/05) claims that in New Zealand, where a review of the Children, Young Persons and their Families Act (1989) is imminent, “everybody’s really clear, from the Minister downwards, that no one is to touch the family group conference”. The above discussion goes some way to explaining this widespread political support for ‘restorative’
measures by demonstrating the divergent underpinnings of this phenomenon. It is not enough, however, to suggest that ‘restorative justice’ appeals to liberals for one reason and conservatives for another, resulting in a “win-win” (Les Davey, interview, 28/9/05) political scenario. Rather, the problem to be addressed now is how the silenced discourses identified so far in this thesis operate to render ‘restorative practices’ politically attractive across diverse political terrains.

The following Chapter explores how these ‘game openings’ work to make ‘restorative practices’ seem legitimate – or ‘above politics’ – in the contemporary criminal justice landscape.
CHAPTER FIVE: AN ANALYTICS OF GOVERNMENT OF ‘RESTORATIVE JUSTICE’

The previous two Chapters proposed the beginnings of a history of discourse of ‘restorative justice’. To this end, these Chapters presented a series of ‘game openings’ that aimed to begin to account for the emergence and ascendancy of ‘restorative justice’. ‘Psy’ discourses and discourses of parental responsibilisation were thus posited as ‘surfaces of emergence’ of the ‘restorative justice’ phenomenon. This final Chapter seeks to add another layer to this analysis of ‘restorative justice’ by further addressing how it is that these discourses operate to render ‘restorative justice’ a seemingly natural and apolitical ‘common sense’ philosophy of crime control. I will posit ‘empowerment’ as a discursive construct via which discourses of parental responsibilisation and the ‘psy’ ethos – and, by extension, ‘restorative justice’ – are further valorised. Additionally, I seek in this Chapter to begin to analyse the multiple relationships between these discourses, the subjectivities they produce, and the ways in which these subject positions govern and are governed. In other words, this Chapter aims to discuss the relationships between ‘truth’, discourse and subjectivity as they relate to the ‘conditions of possibility’ of ‘restorative justice’ identified by this thesis – to “analyse the connection between ways of distinguishing true and false and ways of governing oneself and others” (Foucault, 1981a, p. 11).

In this Chapter, I argue that both ‘psy’ discourses and discourses of parental responsibilisation are, to some extent, in turn rationalised by reference to discourses of ‘empowerment’. Despite its status as an ill-defined and shifting
concept, the discourse of ‘empowerment’ is almost entirely ‘invisible’ in the ‘restorative justice’ field; it represents an unproblematic and widely accepted ‘truth’.

Accordingly, I argue that ‘empowerment’ represents a technology of governance through which subjects are exhorted to become active citizens, and through which individuals, families and communities are ‘governed at a distance’. ‘Restorative justice’, informed by discourses of ‘empowerment’, thus represents a strategy that is acceptable and even attractive to its subjects – a site at which the goals of the state and its subjects are closely aligned. Although ‘empowerment’ – and the discourses it partially informs and is informed by – by no means represents an intrinsically repressive technology of power, therefore, its covert and ‘invisible’ nature makes the practices it legitimates – in this case, ‘restorative practices’ – potentially ‘dangerous’. The nexus between the concept of ‘empowerment’, and the activity of subjects that this engenders, for example, renders the subjects of ‘restorative justice’ increasingly governable. This Chapter argues, therefore, that ‘empowerment’ discourses, despite appearing as apolitical and benign, reproduce and legitimate individual/psychological explanations for, and responses to crime, and have the potential to discriminatively impact upon marginalised populations.
5.1 The Discourse of ‘Empowerment’ and ‘Restorative Justice’

The discourse of ‘empowerment’ is fundamental to the ‘restorative justice’ ethos. The idea that all the key participant categories in ‘restorative justice’ – victims, offenders, parents, families and communities – need to be ‘empowered’ via participation in ‘restorative’ processes is reiterated almost constantly in the literature on this topic. Comments of this nature are too numerous to list, and anyone with even a passing knowledge of the field will be familiar with these claims. Umbreit’s (1989) comment that “victims and offenders should be empowered to work out the conflict between them and to participate directly in the justice process” (p. 101), however, is typical in this regard.

Importantly, the full gamut of ‘restorative justice’ authors – from evangelical supporters (see, for example, Dignan, 2005, p. 6; van Wormer, 2004), to “sympathetic doubters” (B. Hudson, 2003b, p. 207) and critics (Pavlich, 2002, p. 1) to government and non-government agencies (Home Office, 2003, pp. 9, 29; New South Wales Attorney-General's Department, 1996, pp. iii, v; New South Wales Department of Juvenile Justice, n.d., Appendix 1, s. 1.3; New Zealand Department for Courts, 2002, p. 11; New Zealand Ministry of Justice, 2004, p. 16; Restorative Justice Sub-Committee Of The ACT Sentencing Review Committee, 2003, p. 4; Youth Justice Coalition of New South Wales, 1996, p. 4) utilise discourses of ‘empowerment’ in their work. Even those scholars we might consider critical of ‘restorative justice’
unproblematically refer to the notion of ‘empowerment’ (see, for example, Ashworth, 2002, p. 578; Parkinson & Roche, 2004, p. 512).

Moreover, a good deal of ‘restorative justice’ policy and legislation incorporates the idea of ‘empowerment’ into rationalisations for the implementation of ‘restorative’ approaches to crime. New South Wales’ Young Offenders Act (1997), for example, includes among its principles “the need to empower families and victims in making decisions about a child’s offending behaviour” (s. 34(3)(d)). Victoria’s ‘family group conferencing’ scheme similarly aims to “harness the support of the wider family, the victim and other members of the community affected by the young person to empower the young person and their immediate family with respect to key decision making processes” (Mission Of St James And St John, 1995, p. 1). Good practice guidelines developed by the Youth Justice Board for England and Wales (2001, p. 1) similarly stress the role ‘restorative’ processes should play in ‘empowering’ participants, particularly victims. The New South Wales Department of Corrective Services ‘restorative justice’ scheme was likewise promoted on the grounds that it could “contribute to empowerment of a victim” (Booby, 1997, p. 16). Comments made during consultation on New South Wales’ ‘restorative justice’ program for juveniles also indicate that for many respondents, the ‘empowerment’ of victims, communities and other participants was deemed critical (see Blazejowska, 1996).

‘Empowerment’ discourses, like the popularised ‘psy’ discourses discussed in Chapter Three, are ‘invisible’ in the ‘restorative justice’ field in the sense that
they are so taken-for-granted that they are rarely considered, critiqued or challenged. Indeed, I have not come across a single source throughout my candidature as a doctoral student that questioned the notion of ‘empowerment’.

5.1.1 ‘Empowerment’ as a Discourse Underpinning the ‘Psy’ Ethos and the Responsibilisation of Parents

The two groups of discourses posited as ‘game openings’ by this genealogy of ‘restorative justice’ are, in turn, legitimated and rationalised via the notion of ‘empowerment’. Indeed, it might be argued that these discursive constructs both inform, and are informed by, discourses of ‘empowerment’ in a shifting and partial manner. To some extent at least, both the ‘psy’ ethos and the responsibilisation of parents depend upon the existence and widespread acceptance of the discourse of ‘empowerment’.

‘Empowerment’ is often used interchangeably with popularised ‘psy’ discourses such as ‘healing’ or ‘closure’, for example. The Restorative Justice Consortium (2004) lists the following as the values underpinning ‘restorative practices’: “Empowerment, Honesty, Respect, Engagement, Voluntarism, Healing, Restoration, Personal Accountability, Inclusiveness, Collaboration, and Problem-solving” (p. 2). van Wormer (2004, p. 107) similarly lists face-to-face communication, truth telling, personal ‘empowerment’ and ‘healing’ as the common principles of ‘restorative’ procedures. Additionally, concepts such as ‘healing’ and ‘closure’ are often depicted as being connected to, or reliant upon, ‘empowerment’. Zehr (2003)
argues that for crime victims, “what is needed for healing is an experience of empowerment” (p. 70). Barton (2003) claims that ‘restorative justice’ facilitators must guide participants “through an empowering process of consultation, discussion, venting, and negotiation that will bring them to the point where reconciliation and healing…can easily and naturally happen” (p. 33). When interviewed for this research, Rhonda Booby (interview, 12/9/05), the former Director of New South Wales’ Department of Corrective Services Restorative Justice Unit, also argued that there is a link between ‘empowerment’, and, in this case, ‘closure’:

The idea of closure and the idea of empowerment are linked…. [It is]…. empowerment to be able to tell a person how they’ve affected a victim’s life. And…offenders who want to do this are people who, for some reason or another, feel the need to say sorry….To be given that opportunity also allows them to close the door and get on with their lives, and I think that getting on with your life is the empowerment part of it.

Like ‘healing’ and ‘closure’, therefore, the discourse of ‘empowerment’ is at least partly embedded within, and legitimated by, the ‘psy’ ethos.

The discourse of parental responsibilisation is, perhaps even more so, dependent upon the notion of ‘empowerment’. Indeed, the discursive constructs of ‘empowerment’ and responsibilisation, which I have disentangled until this point in the thesis for analytical purposes, are not
nearly so discrete. Consider, for example, Braithwaite’s (1995a) claim that the “political feasibility of the family group conference is that it empowers families and sharpens family responsibilities [italics added]” (p. 7), and O’Connell et al.’s (1999) description of New Zealand’s youth ‘conferencing’ scheme as a “bold experiment in empowering families to take greater responsibility for their own children [italics added]” (p. 21). Levine et al. (1998) similarly claim that a “key element of preparing family members was impressing upon them their responsibilities in the FGC, reminding the families that part of the legislation is about getting families to take and accept that responsibility: literally empowering them [italics added]” (p. 5). Hakiaha’s (1994) comparison of ‘restorative’ changes to juvenile justice in Western Australia with the existing approach perhaps best highlights the blurred boundaries between ‘empowerment’ and responsibilisation:

The juvenile justice system as it currently operates tends to disempower parents by placing responsibility for determining appropriate outcomes in the hands of professionals….By contrast, the juvenile justice teams, particularly through their use of the family meeting, give responsibility back to parents (pp. 106-107).

Additionally, much ‘restorative justice’ legislation for juveniles contains overlapping notions of ‘empowerment’ and responsibilisation. Both Tasmania’s Youth Justice Act (1997) and Western Australia’s Young Offender’s Act (1994), for example, emphasise the importance of ‘enhancing’
and ‘reinforcing’ parents’ responsibilities towards their children. Western Australia’s legislation states that “responsible adults should be encouraged to fulfil their responsibility for the care and supervision of young persons, and supported in their efforts to do so” (s. 7). Similarly, one of the principles of Queensland’s Juvenile Justice Act (1992) is that “a parent of a child should be encouraged to fulfil the parent’s responsibility for the care and supervision of the child, and supported in the parent’s efforts to fulfil this responsibility” (s. 4).

It is thus almost impossible to establish the parameters around these concepts – to ascertain where and how we might distinguish ‘empowerment’ from responsibilisation, despite a number of attempts to do so (Figgis, 1999, p. 11). Thus although Doolan (interview, 21/12/05) claims that from a programmer’s perspective, “the two concepts are antithetical…if you have parental responsibility motives going into family group conferences, it’s unlikely you’ll get empowering outcomes”, in practice, the two seemingly exist in a mutually dependant relationship.

**5.2 The Meaning of ‘Empowerment’**

It is worth considering, before continuing, what ‘empowerment’ might actually mean. Despite the frequent reference to this concept, it is rarely defined by those in the ‘restorative justice’ field. Rather, ‘empowerment’ is used as though it has a fixed and universal meaning that everyone understands and accepts. Additionally, as mentioned earlier, the idea of ‘empowerment’ is drawn upon in an entirely unproblematic and taken-for-granted fashion. As
Young (as cited in Hannah-Moffat, 2001) puts it, “empowerment is like democracy: everyone is for it, but rarely do they mean the same thing by it” (p. 169) (see also Adams, 2003, p. 8; Lupton & Nixon, 1999, p. 8; Parsloe, 1996b, p. xvii). Even Braithwaite’s (2003a, pp. 9-10) attempts to articulate a set of principles or standards for the ‘restorative justice’ project, both of which list ‘empowerment’ as a key ‘restorative’ value, fail to define this concept.

In the ‘restorative justice’ literature, only Barton (2003), whose work centres on this notion of ‘empowerment’, attempts an explicit definition42. For Barton (2003), ‘empowerment’ is the process whereby “key participants…[are]…encouraged to speak their minds and make their own decisions” (p. VII). Barton’s (2003, p. VII) definition thus aligns the notion of ‘empowerment’ with the discourse of ‘talking about it’.

I asked some of the key figures I interviewed for this research how they would define ‘empowerment’. Again, a number seemed taken aback by this line of questioning, and appeared not to have considered the meaning of this concept before. What was striking about the responses of interviewees is that all but one defined ‘empowerment’ in relation to ‘restorative justice’, claiming, for example, that ‘empowerment’ amounts to victims being able to “state their case” or “be heard” by ‘their’ offender (Les Davey, interview, 28/9/05). Ken Marslew (interview, 11/8/05) defined ‘empowerment’ in the following terms:

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42 Although see also Lupton and Nixon (1999) for a detailed consideration of ‘empowerment’ in relation to ‘family group conferencing’ in the child welfare context.
Once you think of being a victim, there’s no empowerment there – there’s blame – it’s everybody else’s fault why I am the way I am, when in fact empowerment is about okay, this has happened, how do I deal with this in a positive way?

Indeed, Mark Yantzi’s (interview, 22/9/05) response to the question ‘How do you define what ‘empowerment’ is?’ wholly equates ‘empowerment’ with ‘restorative justice’:

I mean, I think, in many ways, we have, we do, ah, we have panel sessions sometimes where we take along several men who have sexually offended and – who are part of our program – and several wom-, men and women who have been sexually abused. And they sit together on a panel and talk about their experiences. And, and, oftentimes, they really can relate to each others’ stories. Because they both – victims and offenders – feel the, society’s view that they’re weird, or something’s wrong with them.

In Yantzi’s (interview, 22/9/05) view, then, ‘empowerment’ appears to be conceptualised not as an aspect, goal or outcome or ‘restorative justice’, but ‘restorative justice’ in and of itself.

In one sense, the direct relationship between ‘empowerment’ and ‘restorative justice’ that these experts spoke of is not terribly surprising, given
the context of the interviews. It is nonetheless intriguing, given that ‘empowerment’ most certainly exists outside of the ‘restorative justice’ framework, and is used to rationalise a wide range of social programs (Cruikshank, 1993, p. 333; Pollack, 2000, p. 78; Rose, 1996c, p. 348). It appears, however, that little consideration has been given to the meaning of ‘empowerment’, its bearing on ‘restorative justice’, or its powerful status as a discourse through which ‘restorative practices’ are justified.

Only Mike Doolan (interview, 21/12/05) appeared to have given the topic any thought. After acknowledging that his ideas stem from the work of his colleagues Lupton and Nixon (1999), he defined ‘empowerment’ in the following terms:

> People in power, like us, have a responsibility to create environments in which other people can become powerful….If I create the environment in which other people can become powerful, then I don’t need to exercise that power….So empowering practice for me is not transferring power or giving power away, it’s creating environments in which other people can exercise the power that they have, and that is really the core of family group conferencing (Mike Doolan, interview, 21/12/05).

For Doolan (interview, 21/12/05), therefore, ‘empowerment’ is the goal of ‘family group conferencing’ rather than something that occurs during a
‘restorative’ process. That is, whether or not a process can be deemed ‘empowering’ can only be established by its capacity to equip participants to deal effectively with future events or problems:

The joy that our co-ordinators have is when families say...“we’re going to have a family group conference, but you don’t need to come”....If it’s really good empowering practice...what it does is equip that individual for future events, you know, that’s the key thing for me....The important thing is not around the event of a family group conference, it is that that event positions a family to take charge....Later down the track, I’d be interested to know, well how long did that plan work? Because if it only lasted...a day or two, you know, the warm feeling only survived for a fortnight, then they weren’t empowered at all. They just had a process that was nice at the time but ineffective in the long run (Mike Doolan, interview, 21/12/05).

5.2.1 ‘Restorative Justice’, ‘Empowerment’ and Active Bodies

Without proposing a concrete definition, I want to suggest that in the ‘restorative justice’ realm and elsewhere, ‘empowerment’ might be understood as being linked to the activity of its targets. Analysis of the archive of ‘restorative justice’ suggests that the discourse of ‘empowerment’ is directly linked to the engagement, participation and activity of its key subjects – victims, offenders, parents, families and communities. The
The ‘problem’ with the dominant criminal justice system that ‘restorative justice’ purports to ‘solve’ is, on one level, the lack of participation/activity of its subjects – particularly offenders, victims, parents and families. The court system is dysfunctional, we are told, largely because of its failure to engage these groups; the trouble with court is that offenders are passive and victims are absent. Offenders’ lack of engagement with the criminal justice system is, in particular, constructed as problematic. One respondent interviewed for this research, for example, described offenders’ passivity in court as follows:

In court...young people are not always – in general not – expected to speak at all....They can drift off wherever they like, until the magistrate makes the order, and even then they’ll ask the solicitor, “what did they say....what do I have to do? Am I going into a boy’s home” (Confidential interviewee, 27/5/04)?

Stewart (1993) similarly champions New Zealand’s ‘family group conferences’ on the grounds that young offenders are often so removed from court proceedings that “on enquiring from them what had happened [in court] we often received the information that they had been ‘astonished and discharged’ (admonished and discharged)” (p. 45).
In this context, ‘accountability’ is posited by proponents of ‘restorative justice’ as the mechanism through which offenders’ lack of engagement with criminal justice processes ought to be countered. The discourse of accountability – which, as mentioned previously, is fundamental to ‘restorative justice’ in many of its guises – is thus premised on this perceived problem. In a rare attempt to define accountability, Zehr (1990) suggests that it requires “an intrinsic link between the act and the consequences” (p. 40) (see also Zehr, 2003, pp. 69-70). One could argue, therefore, that accountability is predicated on the idea of offenders engaging with criminal justice procedures in an active manner. This, perhaps, is the difference between serving a prison term and completing a ‘restorative’ outcome plan: while prison is imposed upon an offender, and potentially endured passively by him/her, ‘restorative’ consequences demand the active engagement and participation of the offender (see Zehr, 1990, p. 40; 2003, p. 70). As van Wormer (2004) puts it:

Unlike standard criminal justice practices…[‘restorative practices’]…are empowering….At its heart, restorative justice builds on active involvement by offenders in their rehabilitation; this process of accepting responsibility for one’s actions and making amends to the victim and the community can be empowering for all concerned (p. 117).

Consider in relation to this the way in which Morris and Young (2000) contrast ‘restorative justice’ with a court appearance:
Restorative justice processes require more than the presence of the offender: they require their inclusion. They are expected to directly participate in the process, to speak about their offending and matters associated with it, to interact with the victim, to express their remorse about what has occurred, to apologise for what they have done, and to contribute to decisions about the eventual outcome. From all this, offenders are expected to have a better understanding of their offending and its consequences, to become accountable for the offending in ways which they understand and to contribute to making amends to the victim (pp. 17-18) (Parkinson & Roche, 2004, p. 510; Tauri & Morris, 2003, p. 44; Youth Justice Advisory Committee, n.d., p. 3).

In ‘restorative justice’ procedures, furthermore, passive behaviour on the part of offenders is frowned upon: “the process is not restorative if key participants are required to remain silent or passive” (Davey, 2000, p. 25). Behaviours such as remaining silent and/or staring at the floor during a ‘conference’ are deemed inappropriate and inimical to the purpose of ‘restorative practices’ (see, for example, Umbreit & Greenwood, 1997, p. 5). In a pilot ‘conferencing’ scheme in the Northern Territory, a “low level of interest in offence proceedings” (D. Fry, 1997, p. 68) on the part of offenders was even considered grounds to deny the offender a diversionary option and, presumably, proceed directly to court (D. Fry, 1997, p. 68). A review of New
South Wales’ ‘conference’ convenor training program even highlights the importance of convenors learning to recognise “non-productive/defensive/destructive behaviours” (New South Wales Department of Juvenile Justice, n.d., Appendix 1, s. 6.2) on the part of participants. Additionally, offenders’ outcome plans are usually of the active variety, requiring the offender to undertake work for the victim or community, write apology letters and/or participate in therapy or training, for example. The focus is thus on what offenders need to do in order to ‘put things right’ rather than what might be done to the offender.

This is how a number of ‘restorative justice’ supporters distinguish ‘restorative’ from retributive or rehabilitative approaches: while retributive measures inflict punishment on offenders (‘to’), and rehabilitative measures seek to help offenders (‘for’), ‘restorative justice’ approaches aim to work with participants (McCold & Wachtel, 2002, p. 113; 2003; O’Connell et al., 1999, p. 78; Wachtel, 2004). According to Cunneen and White (2002), while a ‘justice’ approach to juvenile justice is “something that is done to you [italics in original]” (p. 358), and a ‘welfare’ approach is “something that is done for you [italics in original]” (p. 359), ‘restorative justice’ is “something that is done by you [italics in original]” (p. 360). This notion was also contained in Albert Eglash’s (1958b) early work on ‘creative restitution’ in prisons: “restitution is something an inmate does, not something done for him, or to him” (p. 20).

I would argue, therefore, that ‘restorative justice’, (in)formed by discourses of ‘empowerment’, promotes activity and produces active bodies. In advocates’
narratives, ‘empowerment’ is usually premised on the participation of subjects. One cannot be ‘empowered’, it seems, unless they act; one cannot be passively ‘empowered’ or have ‘empowerment’ bestowed upon them (although see section 5.2.2 below). To be ‘empowered’ is to act. As Morris and Maxwell (1993) argue in favour of victim participation in ‘family group conferences’, “by providing victims with information and facilitating their participation in the process, the system will increase victim satisfaction….It is this participation which empowers [italics added]” (p. 77) (see also Zehr & Mika, 2003, p. 42). The “Declaration of Leuven”, developed by a coalition of well known ‘restorative justice’ advocates also champions the ‘restorative’ approach on the grounds that it “stresses the responsibilities of the parties to find a constructive solution to the crime conflict” (International Network for Research on Restorative Justice for Juveniles, 2003, p. 478). Cunha’s (1999) words, furthermore, demonstrate the nexus between ‘empowerment’, popularised ‘psy’ discourses and activity in proponents’ narratives:

For victims to heal, they need to be empowered, they need to participate, and they need to be listened to in the process. That is, “[j]ustice cannot simply be done to and for them,”…[(Zehr, 1990, p. 194)]… but must involve them (p. 297).

5.2.2 Imposing ‘Empowerment’?

Of course, that one of the aims of ‘restorative justice’ is to increase the participation of offenders, victims and others in the justice process probably comes as no surprise to those familiar with the field. Increased engagement
and participation is entirely taken-for-granted as an ideal that ‘restorative practices’ should strive to achieve (see Home Office, 2002b, p. 125). The Offenders Aid and Rehabilitation Services of South Australia (2000), for example, claim that they adopted a ‘restorative justice’ approach because “the Centre believes that it is critical for the community to become more involved in justice issues. The justice system...is still too remote, and people tend to feel alienated from it. This is particularly poignant for victims” (About the Centre for Restorative Justice section, para 14). Similarly, the development of the United Kingdom’s Crime and Disorder Act (1998) was described by the then Home Secretary Jack Straw as “the culmination of a long-held ambition to empower local people to take control of the fight against crime” (as cited in K. Williams, 2001, p. 552). According to Straw (as cited in K. Williams, 2001), individuals in local communities should be “invited to participate actively in the process of tackling local problems, not just passively consulted about them” (pp. 552-553).

The increased involvement of key players in the justice process is thus often construed as a strategy from which all participants will benefit (Department of Health and Human Services Tasmania, 2001a, p. 3; Home Office, 2003, p. 50; Youth Justice Board for England and Wales, 2001, p. 1). As argued earlier, ‘restorative justice’ advocates take it for granted that all victims desire increased involvement in the criminal justice system, despite a body of research to the contrary. Ken Marslew (interview, 11/8/05) even believes that offenders have a right to this increased engagement with criminal justice processes, declaring that young offenders should have “the right to get an
understanding of the consequences of their actions”. For another interviewee, victims also must have “the right to participate where possible” (Confidential interviewee, 27/5/04).

Of course, my portrayal of ‘empowerment’ as premised on activity might be challenged. For some ‘restorative justice’ proponents, part of ‘empowering’ victims, for example, involves offering them the choice of whether or not to take part in a ‘restorative’ procedure: “it is the voluntary exercise of choices, including the choice of participation, that leads to victims and offenders feeling empowered” (Umbreit, 1999, p. 217; see also Umbreit & Greenwood, 1997, p. 4). In this sense, a victim’s choice not to participate – and thus to not become actively involved - might also be seen as ‘empowerment’. In this light, consider the following remarks by Terry O’Connell (interview, 8/8/05), made while reflecting on the high rates of victim participation his ‘restorative justice’ program in Wagga Wagga had enjoyed:

Somebody asked me why did I have such high levels of victim participation, and I never really thought about it, until I started to realise that others really struggled [to achieve high levels of victim involvement], and I realised that at an intuitive level, the engagement process for me was part of a much bigger journey – that the idea of conferencing itself was both an end point and a beginning point. And that that engagement process was offered to everyone, even where they weren’t ultimately going to participate....that restorative processes shouldn’t...be
offered only to those who actually agree to participate in a process called a conference.

Here, ‘empowerment’ is apparently imposed even on those potential participants who choose not to become involved in a ‘restorative’ process. If we compare O’Connell’s thoughts with comments made about him by Ted Wachtel, with whom he has worked closely, however, the idea of choice as ‘empowerment’ appears somewhat less convincing. Describing his impressions of the first ‘conference’ he had witnessed, which was facilitated by O’Connell, Wachtel (interview, 25/5/05) remarked:

Terry never turns down…[the opportunity to facilitate a conference]…so…we arranged it, he talked everybody into it, which I always found remarkable – his ability to persuade – which I later learned he does by just getting people to start talking about what happened.

In O’Connell’s account of his method of engaging victims in ‘restorative’ processes, as well as Wachtel’s, there appears to be less choice on the part of potential participants than we might expect. Participants are to be ‘empowered’ whether they choose to become involved or not. Indeed, it appears that ‘restorative justice’ is almost deemed to be good for participants whether they know it or not. This is particularly interesting in light of Rhonda Booby’s (interview, 12/9/05) admission that while ‘restorative justice’ program staff view participants’ involvement through the guise of ‘empowerment’,
participants themselves do not, in her experience, view it in this way. All this seems to indicate that ‘empowerment’ can, to some extent at least, be imposed upon potential subjects of ‘restorative justice’.

My conceptualisation of ‘empowerment’ as linked to the activity of subjects is thus in itself neither absolute nor universal. Nonetheless, in the context of this thesis, this conceptualisation offers a new ‘lens’ through which to view ‘empowering’ ‘restorative practices’. What is more significant than recognising the potential for ‘empowerment’ to be imposed on the subjects of ‘restorative justice’, moreover, is recognising that ‘empowerment’ is often readily adopted as a goal by key participant cohorts of ‘restorative practices’ themselves. This will be expanded on in the following section.

5.3 ‘Restorative Justice’, ‘Empowerment’ and Government through Will

‘Empowerment’, then, is a discursive construct through which ‘restorative justice’ is rationalised as an accepted approach to crime control. Moreover, as I argued above, ‘empowerment’ informs, and is informed by, both ‘psy’ and parental responsibilisation discourses, albeit in a partial and shifting way. Exploring the discourse of ‘empowerment’ thus adds another layer to the history of discourse presented in this thesis. How, though, does an analysis of ‘empowerment’ address the problem of the emergence of ‘restorative justice’ beyond this existing analysis? I will make two – at times overlapping – arguments in this regard. Firstly, I will argue in this section that unlike other paradigms of criminal justice, ‘restorative justice’, based on ‘empowerment’
discourses, is a site at which goals of participants and goals of the state are aligned; via ‘empowerment’, subjects are governed through their will in ‘restorative justice’ fora. Secondly, I will argue that the discourse of ‘empowerment’ legitimates ‘restorative justice’ due to its status as an essentially unproblematic and apolitical technique of power.

In contrast to responsibilisation, rehabilitation and retribution, ‘empowerment’ represents a strategy that is attractive to the subjects of ‘restorative justice’. ‘Restorative practices’, underpinned by discourses of ‘empowerment’, are sites at which the goals of the state and those of its subjects are aligned. As Cruikshank (1993, pp. 330-331) argues, while provisions exist through which subjects can be coerced into ‘empowerment’, just as often, it is something that is willingly aspired to. In the sections that follow, I will explore how this might be the case in relation to parental responsibilisation and the ‘psy’ ethos respectively.

5.3.1 Governing Parents through their Will

The discourse of parental responsibility can be viewed in a different light when we consider that often, increased authority and control over their children is precisely what parents themselves want (see Rose, 1999, p. 205). The idea that parents need to be ‘empowered’ to control their children presumably stems from the idea that parents have been ‘dISEMPowerEEd’ in this regard. Certainly, there has been a considerable outcry in recent years about the erosion of parents’ legal rights over their children. Laws that allow teenagers to leave home without parental consent or criminalise the physical
discipline of children, as well as privacy legislation that permits adolescents to access medical services or welfare payments without their parents' consent, have been condemned in this regard (see, for example, Burgess, 2004; Healey, 1995; Kearney & Tinkler, 2001; Strohfeldt, 2001; Sweetman, 1999).

This perceived erosion of parental authority – a common topic of current affairs television programs – might help explain the high levels of parental participation in ‘restorative’ procedures. Research data indicates that parents usually participate in ‘conferences’ when they are convened (Karp et al., 2004, p. 202). Maxwell and Morris (1994, p. 24) found in their study of the New Zealand model of ‘family group conferencing’, for example, that parents or carers were present at 98% of ‘conferences’. This figure was higher than that for any other participant group, including young offenders themselves, who were present 96% of the time (Maxwell & Morris, 1994, p. 24). In New Zealand, where ‘family group conferencing’ does not occur in the context of diversion, but is mandatory in most cases of juvenile offending, it appears that there is little discernable resistance by parents when it comes to participating in ‘restorative justice’ processes. In their review of the first year of operation of the New Zealand scheme, Renouf et al. (1990) found that “families appear to be responding positively to the opportunity to deal with the offending behaviour of their young people” (p. 40). According to the New South Wales Attorney-General’s Department (2002, p. 3), furthermore, ‘youth justice conferences’ usually involve parents when they are convened; there again seems to be little resistance on the part of parents. Even more punitive
strategies aimed at parents, such as the United Kingdom’s ‘parenting orders’ are usually undertaken voluntarily by parents wanting help with their child’s behaviour (Audit Commission for Local Authorities and the National Health Service in England and Wales, 2004, p. 79).

Importantly, research indicates that parents are not only usually present at ‘conferences’, but that they are often actively engaged within these processes. Maxwell and Morris (1994) found in their study of New Zealand ‘conferences’, for example, that in terms of articulating outcome plans, parents “were much more likely than their children to identify themselves as the decision-makers” (p. 32). This indicates that rather than merely being acted upon, the active participation of parents is integral to the operation of ‘family group conferences’. In addition, McCold’s (1999b) study of four ‘community conferencing’ projects in Virginia found that although juvenile offenders reported that “kids may open up better without parents present” (Data Collection section, para 4), parents themselves commented on the importance of parental responsibility (Data Collection section, para 5). Although the meaning of these comments is not considered by McCold (1999b), this does hint at the possibility that, as suggested in the previous Chapter, being responsibilised might be a welcome experience for some parents. Karp et al. (2004), who researched Vermont’s ‘restorative’ panels for juveniles, likewise found that although they were “curious to see if parents…would perceive the panels as something that they and their child needed to defend against” (p. 210), parents viewed the program very
favourably. ‘Restorative justice’ thus represents a strategy that exploits the aligned goals of governing bodies and their subjects – in this case, parents.

This view is compatible with Terry O’Connell’s (interview, 8/8/05) account of the role of parents in the famous Wagga Wagga ‘restorative justice’ program. I asked Terry O’Connell how parents approached to participate in this somewhat radical ‘restorative justice’ program reacted to the idea. Surprisingly, he claimed: “when I look back…I cannot recall any real issues” (interview, 8/8/05). O’Connell (interview, 8/8/05) explained parents’ willingness to take part in the following terms:

My focus was principally on what I call respectful engagement, where offenders and their families felt that they were genuinely going to be given an opportunity to voice [their views] and participate. And it wasn’t something we were doing to them, but something that was happening with them….The testament of that was the significant number of parents who followed up on other issues subsequent to their son or daughter participating in a [‘restorative’] process.

It appears, therefore, that rather than being an overtly coercive tactic to responsibilise parents, ‘restorative justice’ might be considered a strategy of governance that is in fact aligned with the aims of parents. Most parents, it is fairly safe to assume, want their children to be law-abiding and to stay out of
trouble. Thus although some ‘restorative justice’ initiatives such as the Kansas Juvenile Justice Code (2001), Tasmania’s ‘community conferences’ (Department of Health and Human Services Tasmania, 2001b, p. 16), Canada’s Sparwood Youth Assistance Program (Bouwman & Purdy, 1997, p. 25), and the United Kingdom’s referral orders (Youth Justice Board for England and Wales, 2001, p. 10) can actually require parents to attend their child’s ‘conference’, this is not usually the case. Rather, it appears that parents do not need a great deal of incentive to attend, participate in, and abide by the outcomes of, ‘restorative’ processes for juveniles. That is, parents will participate in their own ‘empowerment’ without blatant coercion. Involving parents in juvenile crime control might therefore be seen to satisfy both the parents of young offenders – who feel as though they have been ‘disempowered’, and have had their rights as parents encroached upon - and governments - who want parents to take greater responsibility for the actions of their children. ‘Family group conferencing’ can thus be seen as a technique of governance that is “thinkable and practicable both to its practitioners and to those upon whom it…[is]…practised” (Gordon, 1991, p. 3) - a context in which parents are governed via their will. Certainly, unlike overtly punitive measures such as gaoling the parents of truants, ‘restorative conferencing’ aims to be agreeable to the parents of juvenile offenders.

Although it is possible that in indigenous communities, having children that break the law may be seen as either an inevitability, or as a ‘rite of passage’. As one Aboriginal man (as cited in Beresford & Omaji, 1996) says: “hurt and pain in the Aboriginal race has been handed down through the generations so that drug and alcohol problems, petrol and glue-sniffing, crime and truancy are ways of ‘hitting back’ at white bureaucracy” (p. 43). According to Ogilvie and Van Zyl (2001), there is “no real stigma” (p. 4) connected to having a criminal record in many indigenous communities, and “the limited negative implications in terms of employment, shame, peer rejection and so on that do exist are largely irrelevant” (p. 4). Importantly, this challenges Braithwaite’s (1989) theory of ‘reintegrative shaming’ which is premised on the conception that there is a widespread consensus that criminal acts are morally wrong.
The following extract from Hodgson’s (2002) newspaper article “Parents to carry can under Libs” is a case in point. The article reports on the Victorian Liberal Party’s Flexibility in Sentencing policy, which aimed to hold parents responsible for their children’s crimes via a range of measures, including ‘restorative’ measures. Hodgson (2002) lists the following as elements of this policy:

Mothers and fathers could be required to appear in court to give undertakings and could face fines if they fail to control their children. They could also be forced to supervise their children’s sentences and dob them in if they fail to carry out court-ordered community work. Parents who do not abide by court orders could be in contempt of court. Parents could also be subpoenaed to court hearings to answer questions about their child’s criminal behaviour (p. 29).

Victoria’s then Shadow Attorney-General Robert Dean claimed that this policy was not designed to blame parents for the conduct of their offspring, admitting that some children are simply impossible to control, and declaring that those parents who had lost control of their children would be relieved to have the power of the judicial system behind them (Hodgson, 2002, p. 29). Despite the clear focus on responsibilising parents that this policy exhibits, therefore, the comments made by the then Shadow Attorney-General on its
potential impact indicate the overlapping of this discourse with that of ‘empowering’ parents with extra ‘rights’ to assist in their parenting.

The website of Queensland group Parents Lobbying Empowerment Against Systematic Exclusion (n.d.) provides a further example. This group was established by parents of difficult and/or offending teenagers, in order to “challenge the imbalance in the present legislation relating to children and families” and to “reinstate the sanctity of the family unit” (Parents Lobbying Empowerment Against Systematic Exclusion, n.d., Objectives section, para 1). The group’s website contains links to articles that, as well as lamenting the erosion of parental power, seem to condemn parents for their lack of control over their children’s actions. It is something of a paradox that this group - which strongly advocates that parents who are desperately trying to discipline their children are unable to do so because of legislation restricting their rights – should include these articles, which effectively advocate the opposite stance – that parents who carelessly allow their children out ‘on the streets’ and do not attempt to discipline them should be held accountable (see, for example, articles by Hay & Maher, 1998; Lawrence, 1998). In a similar occurrence, New South Wales’ highly punitive Children (Parental Responsibility) Act (1994), discussed in detail later in this Chapter, was welcomed by enthusiastic parents who had felt that they had no authority to control their children (Horin, 1995, p. 24).

In ‘restorative justice’ fora, parents are therefore governed and/or governing according to competing ‘truth’ claims. As discussed previously, parents of
young offenders may be constructed variously as victims of their child’s offending, or co-offenders who are partly responsible for the law-breaking behaviour of their child. Parents are governed/ing through the subjectivities of ‘parent as co-offender’ (whereby parents are held accountable for their child’s conduct in various ways, based on discourses of parental responsibility), and ‘parent as victim’ (whereby parents gain the sympathies of other participants, based on the ‘truth’ claim that parents are not sufficiently authorised and/or resourced to effectively discipline their children). In the latter scenario at least, therefore, parents may be governed through their will in ‘restorative’ procedures.

5.3.2 The ‘Psy’ Ethos and Governing Victims through their Will

As described earlier, victims often attend ‘restorative justice’ programs out of a sense of social duty and/or to help ‘their’ offender (Beckett et al., 2005, p. 9; Goodes, 1995, p. 10; T. Marshall & Merry, 1990, pp. 158-159, 184; Wemmers & Cyr, 2004, p. 267). For Braithwaite and Mugford (1994), “public virtue” (p. 292), or “playing your part in getting this young person back on track” (p. 292) is one discourse through which ‘conference’ co-ordinators might engage victims as participants. In fact, this sentiment even exists in Queensland’s ‘community conferencing’ legislation, the Juvenile Justice Act (1992). This Act states “the victim may benefit by the opportunity....to encourage the child’s sense of responsibility” (s. 30(4)(c)). It appears, therefore, that in a relatively short space of time, the role of crime victims in the criminal justice system has changed from being restricted to witness-related activities only, to becoming the beneficiaries of measures such as
compensation and restitution, to – in the case of ‘restorative justice’ - being called upon to participate in negotiations with the offender. In this sense, therefore, the role of the victim has shifted from that of passive recipient to active, ‘empowered’ participant at least partly via the offender-as-victim discourse.

While victims have traditionally been constructed as individuals whom the state has failed to protect, under ‘restorative’ processes they are conceptualised as having a social duty to direct offenders towards adopting law-abiding lifestyles. Indeed, to participate in such a way is constructed as an ‘empowering’ choice for victims. This is the case not only in theory (Braithwaite, 1995a, p. 6; Braithwaite & Mugford, 1994, p. 292), but in practise also. Consider Hughes and Schneider’s (1989) survey of ‘victim offender mediation’ programs in the United States of America, for example. Hughes and Schneider (1989, p. 228) found that in jurisdictions where ‘restorative justice’ programs had *not* been established, authorities had failed to do so for a variety of reasons, including lack of resources and lack of information about this type of program. Respondents to the survey who had not established ‘restorative’ programs also dismissed a number of explanations for their jurisdiction’s lack of programs:

Rejected as reasons were lack of need, opposition to such a program, and the philosophical issues of mediation not protecting the interests of victims and offenders and the inability of victims and offenders to reach a good
understanding. The idea that the victim should not be required to confront the offender, however, received minimal support [italics added] (Hughes & Schneider, 1989, pp. 228-229).

In other words, even where programs bringing together victims and offenders had not been initiated, there existed widespread support for the notion that crime victims have a social responsibility to ‘confront’ offenders.

This is further evidenced by the manner in which some ‘restorative justice’ programs include or exclude victims based on their perceived ability and/or willingness to positively impact upon the offender. Drawing on his earlier work with Susan Merry (T. Marshall & Merry, 1990), T. Marshall (1996) claims that in the past, and particularly in cases of minor crimes where “victims’ needs for reparation or a meeting with the offender are often very low” (p. 23), some facilitators gave into “the temptation of ‘schooling’ victims to pretend more anger than they really felt, in order to have more impact on the offender, and even pressurising them to take part as if they ‘owed’ such an opportunity to the offender” (p. 23) (see also T. Marshall, 1998, p. 17)44.

Conversely, Hughes and Schneider (1989) report that a number of ‘victim offender mediation’ programs they surveyed excluded “overly angry victims” (p. 221), presumably as involving highly vengeful victims would be counterproductive to the programs’ aims. Operating principles designed by the New South Wales Department of Corrective Services (n.d.) similarly allow

44 As Reeves and Mulley (2000, p. 139) argue, this may be more likely to be the case where police officers assume the task of eliciting victim’s consent.
for the exclusion of “victims who are only concerned with vengeance” (p. 5), along with the “intellectually impaired and the psychiatrically disturbed” (p. 5). According to D. Fry (1997, p. 64), Western Australia’s youth ‘conferencing’ program can also exclude victims deemed to have an ‘unreasonable attitude’. Good practice guidelines designed by the Youth Justice Board for England and Wales (2001) also allow for victims to be excluded “where [the] victim is likely to be unable to participate in a constructive manner” (p. 7). McKnight’s (1981, p. 293) report on ‘victim offender reconciliation’ projects also reveals that in contrast with being coached to be more angry, victims were encouraged not to express too much anger towards young offenders. McKnight (1981) appears to personally support this notion that victims should not express anger towards offenders. She claims that in most of the cases she witnessed, apologies were accepted by the victims, “but one victim was extremely vindictive and another was uncooperative” (p. 294). Moreover, when recounting the varied responses of the victims of nine separate break, enter and theft offences committed by two male juveniles, ‘Jim’ and ‘Bob’, McKnight (1981) claims that at a second meeting with one victim:

Jim and Bob paid the victim in cash. It is interesting that at the first meeting the victim treated me [McKnight, as the facilitator] with as much hostility as he treated the offenders. When the victim received the cash payment he spoke pleasantly to me and thanked me, instead of the offenders. It appeared that in this case the meetings had little or no positive effect on the victim. The impact appeared to be the money (p. 295).
Here, McKnight (1981) clearly articulates that while ‘restorative justice’ processes are often promoted to victims on the grounds that they might receive material reparation (T. Marshall, 1996, p. 26) - particularly in nations such as the United States of America, where victims do not have the benefit of a nationally funded health service to support them in the aftermath of a crime (T. Marshall & Merry, 1990, p. 174) - in some cases, victims are expected to impact constructively on the offender also. As T. Marshall (1996) states, victims’ wishes to receive restitution may become subordinated to aims considered more important by program staff:

A basic ambiguity of aims was encountered in mediation between promoting a productive emotional exchange or reconciliation and ensuring that adequate material reparation was achieved. While the projects rightly felt that the former was crucial to achieving their full potential, and was indeed that which made what they had to offer most distinct from the traditional criminal justice system, they could at times be led to more perfunctory about material reparation, whereas this was important to victims, if only as a symbol of the offender’s repentance (p. 26).

In one sense, therefore, crime victims are discursively constructed as ‘legitimate’ or ‘illegitimate’ depending upon their willingness to adhere to the offender-as-victim discourse and to perform their ‘social duty’ of participating
in ‘restorative justice’ programs in order to assist young offenders, and – by extension – the community more broadly. This is further reflected by the manner in which McKnight (1981) constructs those victims who fulfil their ‘social responsibility’ by acting out of interest for the offender in positive terms. She relates, for example, that while victims were able to choose the location of meetings with ‘their’ offender, victims often selected a location that they felt “might be easier for him [the offender]” (p. 293).

The role of socially responsible citizen is, of course, not always a subjectivity imposed upon unwilling or unwitting victims of crime. On the contrary, it is one that victims often readily accept. Davis, Boucherat and Watson’s (1988, pp. 129-130) report on a number of reparation schemes run by the Home Office argues that in many cases, reparation is promoted to victims – often quite explicitly – as a means of reforming and diverting offenders. Nonetheless, they claim that:

Many victims need very little persuading, despite realising that any meeting will be geared primarily to offender interests. In some instances their perception of the offender was not very different from that of the mediators, that is, as a vulnerable, disadvantaged youngster, in need of a helping hand. [The scheme in] Exeter, for example, informed us that some corporate victims regarded their participation as a form of public service….most of the victims who agreed to accept ‘reparation’ entered into these arrangements with their eyes
open, principally in the hope that they would promote learning or attitude change in the young offender….Victims therefore need to be mature, socially responsible citizens, interested in the welfare of ‘their’ offender (p. 130).

We might consider, therefore, that crime victims adopt varying subjectivities (the ‘angry victim’, the ‘helper’) based on their own – and programs’ – underlying beliefs about offending behaviour. In this sense, victims are governed – and governing – according to competing ‘truth’ claims. In the above discussion, we can clearly see the way in which victims are governed/ing through the subjectivities of the ‘angry victim’ (whereby victims are schooled into being overtly vindictive, based on the ‘truth’ claim that young offenders ought to be harshly confronted with the full impact of their behaviour in order to be reformed), and ‘the helper’ (whereby victims are excluded for being ‘too angry’ or ‘uncooperative’ and are called upon to gently direct the offender to obey the law, based on the ‘truth’ claim that offenders are disadvantaged and are ‘victims’ themselves). As such, victims, like parents, are governed through their will in ‘restorative’ processes; as stated by Davis et al. (1988, p. 130) above, victims’ desires are often closely aligned with those of programmers. In this sense, victims govern themselves according to their adherence to, or rejection of, the offender-as-victim discourse.

We might consider, therefore, that discourses of ‘empowerment’ operate to construct ‘restorative practices’ as desirable to crime victims. In her work on
‘restorative justice’ and ‘empowerment’, for example, van Wormer (2004) describes the ‘empowerment’ of victims via ‘restorative’ processes in the following terms: “of special relevance to victimization is the gaining of a sense of personal power, assuming responsibility for recovery and change which may entail helping others” (p. 108). Here, helping one’s offender is constructed as an ‘empowering’ process through which crime victims might seek their ‘recovery’.

5.3.3 ‘Healing’ and ‘Forgiveness’ as Social Duties

In the ‘restorative justice’ field, the ‘helping victim’ is constructed not only as assisting the offender in the manner discussed above, but as helping him or herself also. Consider, for example, the following comments by ‘restorative justice’ proponent Burt Galaway (as cited in McCold, 1998). Here, Galaway is responding to the Delphi process conducted by Paul McCold, which aimed to find a consensual definition of ‘restorative justice’ among proponents of the concept. Responding to the prompt “victims have a social obligation to respond constructively toward their own healing” (McCold, 1998, p. 36), Galaway (as cited in McCold, 1998) claimed:

I think we need to deal directly with the matter of victim responsibility for solutions that contribute to peaceful communities. This is delicate but I do not think we can live with a situation where victims are permitted to be passive bystanders in the healing process or, worse, are encouraged to harbor and nurse vengeance and hatred. Do we not expect
repentance, forgiveness, and reparation? Does not this process involve some duties on the part of victims? And do not victim organizations have some responsibilities in the area (p. 36)?

For Galaway (as cited in McCold, 1998, p. 36), therefore, ‘healing’ can be viewed as a social responsibility that victims should pursue not only for the sake of the offender, but for their own benefit and, by extension, the benefit of the community more broadly. In this manner, ‘healing’ potentially becomes a social obligation for victims of crime.

‘Forgiveness’ is constructed in a similar fashion in the ‘restorative justice’ field. Until recently, the dominant Western conceptualisation of ‘forgiveness’ was premised on the Judeo-Christian notion that to forgive was to assist in the reformation of the wrongdoer (Lamb, 1996, p. 160). More recently, however, ‘forgiveness’ has come to be understood through therapeutic discourses, through which it is constructed as a primarily self-interested act, practised by wronged parties in order to positively impact upon their own psychology: “as we give the gift of forgiveness we ourselves are healed” (International Forgiveness Institute, n.d., What it is section, para 3). Hope (1987) describes this as the “healing paradox of forgiveness” (p. 240) – that by “deciding to absolve what are perceived as wrongs committed against one, a person is able to let go of resentment and be free from bitterness” (p. 240). As such, Hope (1987) argues, ‘forgiveness’ is “a key part of the psychological healing process” (p. 240).
This discourse is evident in ‘restorative justice’ texts also (see, for example, Minow, 1998, p. 970; Zehr, 2003, p. 69). Notably, Zehr (1990, p. 45), who sees ‘repentance’ and ‘forgiveness’ as the necessary preconditions for ‘healing’, echoes this discourse when he claims:

Forgiveness is letting go of the power the offense and the offender have over a person. It means no longer letting that offense and offender dominate. Without this experience of forgiveness, without this closure, the wound festers, the violation takes over our consciousness, our lives. It, and the offender, are in control. Real forgiveness, then, is an act of empowerment and healing. It allows one to move from victim to survivor (p. 47).

Sandy MacGregor’s story is a case in point. MacGregor (as cited in P. Kidd, 2002), who met with the killer of his three daughters inside a New South Wales prison in 2001 to forgive him in person, did so “not for him, but for me….If he got some good out of it then that was his good fortune” (pp. 25-27). MacGregor (1996) explains:

I’ve now learned that by pushing down emotions, not expressing them, having the ‘stiff upper lip’, not talking about events, goes a long way to causing post traumatic stress….I could [have] become lost for the rest of my life in a quagmire of
hatred and bitterness. I valued my life too much to allow that to happen....For me to let go the inclination to hate, was the process that I knew I needed to go through (pp. 34-38).

Like ‘healing’, ‘forgiveness’ can also be thought of in terms of becoming a social responsibility through which victims are governed. As ‘forgiveness’ is constructed as a technology through which the “undesirable consequences” (Butler, as cited in Murphy, 1988, p. 15) of resentment may be by-passed, the ‘forgiver’ becomes a subjectivity through which peaceful communities are produced and maintained. Consider Gehm’s (1992) comments on the role of ‘restorative practices’ in this process:

Forgiveness...is gaining recognition as a powerful therapeutic tool on the individual level, releasing persons from the control of others or of unpleasant past events. Victim-offender reconciliation and other programs that empower the victim to become involved in sanctions that repair rather than revenge would seem to hold out considerable promise for releasing victim and community (and offender) from the destructive effects of unresolved or ineffectively released anger (p. 548).

Here, the will of individual victims (personal ‘healing’ through practising ‘forgiveness’) is again aligned with the will of the state (avoiding the potentially ‘anti-social consequences’ of victims’ anger on the offender and the community). ‘Healing’ and ‘forgiveness’ can thus be seen as twin
technologies of governance; if ‘healing’ is reliant upon ‘forgiveness’, as Zehr (1990, pp. 45, 51) and Henderson (as cited in Sarnoff, 2001, p. 36) argue, and ‘healing’ is a social duty, then ‘forgiveness’ likewise becomes a responsibility for victims of crime. Indeed, crime victims have often felt this pressure to ‘forgive’ ‘their’ offender (Yantzi, 1998, p. 126; 2001, p. 279), particularly from the church (Zehr, 1990, pp. 48-49). This may be more likely to be the case where ‘forgiveness’ is constructed as ‘empowerment’, which Zehr (1990) claims, “some [crime victims] are able to find…through an act of Christian forgiveness” (p. 52).

5.3.4 ‘Restorative Justice’ and Grassroots Community Action

The preceding sections have sought to demonstrate that ‘empowerment’ – via the discursive antecedents of ‘restorative justice’ examined in this thesis – is something often willingly adopted by participants. ‘Empowerment’ – and, by extension, ‘restorative justice’ – is a site at which subjects are governed in accordance with their own goals and aims. It is important to acknowledge in addition to this that ‘restorative justice’ initiatives have often come about as a result of grassroots community action. Although this is not always the case, with ‘restorative’ measures being championed by a diverse range of groups, from governmental to non-profit agencies (S. O’Brien, 2000, p. 9; Pranis, 2004, p. 144), there are numerous examples of this occurring. The Wagga Wagga scheme, which was implemented after extensive community consultation and a two-day community forum (Terry O’Connell, interview, 18/3/04), is one example. Furthermore, ‘restorative justice’ programs have often emerged and functioned in communities prior to being legislated and
formally governed by the state. In fact, many programs are currently managed by church or community groups without the financial or other support of governments. Victoria’s program for juveniles, for example, is operated by church group the Mission of St James and St John (Mission Of St James And St John, 1995), and although it has been in operation for a number of years, has not been legislated (see also Pranis, 2004, p. 151). Indeed, expert Les Davey (interview, 28/9/05) believes that in the British context, this aspect of ‘restorative justice’ will ultimately allow it to continue to flourish, despite what he perceives as the beginnings of resistance from the Home Office.

This indicates that rather than being imposed on communities by governments, ‘restorative justice’ programs are often developed in a bottom-up fashion by community members or groups. This clearly shows that in many instances, ‘restorative justice’ is something that participant cohorts want for themselves. The targets of ‘restorative justice’ are thus, in this sense at least, acting as self-governing subjects. Again, therefore, ‘empowerment’ is not something done to subjects but something willingly adopted by them. As Cruikshank (1993) argues, technologies of subjectivity such as ‘empowerment’ are rarely imposed directly by governments: “they emerge from the social sciences, pressure groups, social work discourses, [and/or] therapeutic social service programs” (p. 340) (see also Rose, 1996a). This has certainly been the case with many ‘restorative’ initiatives.
5.4 Destabilising ‘Empowerment’ Discourses

I have argued in this Chapter that the concept of ‘empowerment’ acts as a ‘condition of possibility’ of ‘restorative justice’. ‘Empowerment’ not only operates as a rationality informing ‘restorative practices’, but also as a mutually legitimising rationality of the other discursive constructs explored in this thesis – ‘psy’ knowledges and the responsibilisation of parents. We might also consider how discourses of ‘empowerment’ have come to occupy such an unassailable position in contemporary Western cultures. If ‘restorative justice’ is partly legitimised through its embeddedness within ‘empowerment’ discourses, how is it that ‘empowerment’ itself has become a taken-for-granted rationality of contemporary social policy? This section begins to address this problem, and in doing so, aims to further account for, and destabilise, the recent emergence of ‘restorative justice’.

5.4.1 ‘Empowerment’ and Citizens’ Rights

Adams (2003) sees the emergence of ‘empowerment’ as a consequence of the growing suspicion of, and ambivalence towards, the reign of expert knowledges within social service provision. Since the 1960s, Adams (2003) claims, there has been a tendency “for professional power to be viewed more critically” (p. 20). Mike Doolan (interview, 21/12/05) expressed a similar view. For him, the shift towards engaging ‘client’ populations in ‘empowering’ decision-making processes is a symptom of a broader shift in the government of populations of various domains – not only those of the criminal justice apparatus. Doolan (interview, 21/12/05) thus sees the emergence of ‘empowering’ ‘restorative practices’ as a manifestation of the
broader tendency for liberal governments and their agencies to consult with those populations with whom they are dealing. Doolan (interview, 21/12/05) accounts for the ascendancy of ‘restorative practices’ such as ‘family group conferencing’ as follows:

I think the reason is what’s happened in the last 30 or 40 years with citizens’ rights generally, if you look at the movement in adult services, for example, medical services, services around children with disabilities…. [et cetera]…. They have been transformed in the last 30 years by… governments recognising that they can no longer decide for people, that people have a right to be consulted…. Young people who offend are one of the last… groups of the public services to start coming into line with what is a very important citizens’ rights movement around the world.

For these scholars, therefore, the emergence and acceptance of ‘empowerment’ can be considered a result of progressive and inclusive shifts in the management of social service ‘clients’.

5.4.2 ‘Empowerment’ and the Demise of the Welfare State

Lupton and Nixon’s (1999) far more detailed exploration of the rise of ‘empowerment’ suggests, in contrast, a less progressive rationale for its ascendancy. As Lupton and Nixon (1999) demonstrate, the pervasiveness of ‘empowerment’ is due primarily to its “hybrid political ancestry” (p. 8) – its
attractiveness across the political spectrum (see also Parsloe, 1996a, pp. 1-2).

Part of this appeal, they acknowledge, is related to the growing dissatisfaction with professional service providers (Lupton & Nixon, 1999, p. 16). To explain the appeal of ‘empowerment’ beyond this, however, Lupton and Nixon (1999, p. 10) argue that the perceived failure of the welfare state is a necessary starting point. The expectation of the founders of the welfare state – that the need for public support would diminish as economic prosperity increased – began to appear misguided during the 1960s (Lupton & Nixon, 1999, pp. 10-11). Greater community and public participation in service provision began to emerge in this context – in which welfare provision came to be viewed as both costly and inefficient, and as helping to create “an increasingly passive and demanding citizenry” (Lupton & Nixon, 1999, p. 11). The emergence of ‘empowerment’ and/or ‘partnership’ discourses thus comprised part of the attempt to “make a virtue out of the political necessity of cutting social expenditure” (Lupton & Nixon, 1999, p. 11).

In this context, Lupton and Nixon (1999, pp. 12-13) argue, community groups committed to collective action, and ascribing to the belief that ‘disempowerment’ could be explained by structural disadvantage rather than individual pathology, began to emerge.

Importantly, however, dissatisfaction with the welfare state also resulted in calls for ‘empowerment’ from New Right quarters (Lupton & Nixon, 1999, pp.
The push for ‘empowerment’ from the New Right stemmed from the belief that recipients of welfare – which represented unnecessary reliance on and interference by the state – ought to be “given the same rights as their counterparts in the private market” (Lupton & Nixon, 1999, p. 14). New Right calls for “market-based empowerment” (Lupton & Nixon, 1999, p. 14) were thus derived “not from any right to support or assistance, but from the more negative right to be free from unnecessary dependence on, or interference by, the State” (Lupton & Nixon, 1999, p. 14).

As has been suggested already in this Chapter, therefore, the widespread acceptance of ‘empowerment’ – on which ‘restorative justice’ is partly justified – is itself rooted in neo-liberal rationalities of ‘government at a distance’. ‘Empowerment’ discourses, as Cruikshank (1993), Lupton and Nixon (1999) and Rose (1996c) all suggest, are at least partly predicated on the return of personal responsibility and the rise of the self-governing subject. As Cruikshank (1993) demonstrates, and as I will argue below, such apparently benign technologies of subjectivity can impact disproportionately on disadvantaged groups and individuals – on those deemed in greatest need of ‘empowerment’.

5.5 The Trouble with ‘Empowerment’

Penal history yields plenty of examples of apparently benign policies resulting in repressive controls (Ashworth, 2002, p. 590).
A number of supporters of ‘restorative justice’ have commented that ‘restorative justice’ is somehow above or beyond traditional legal and/or sociopolitical dichotomies. McElrea (1993), for example, claims that ‘restorative justice’ “does not easily fit within the old parameters – liberal/conservative, justice/welfare, punishment/rehabilitation, justice/mercy. It cannot be described in those terms because it requires a new way of thinking” (p. 13). When I asked Ken Marslew (interview, 11/8/05) why he thought ‘restorative justice’ has cross-party political support in many jurisdictions, he replied: “because I think it is above politics. If we are genuinely concerned in communities, this process is above politics. And if you are a thinking person who cares about people, this has to be the direction you would go”.

We might also consider ‘empowerment’ as a discourse that is ‘above politics’. As a number of authors have demonstrated, ‘empowerment’ is used to rationalise a diverse range of social programs (Cruikshank, 1993, p. 333; Rose, 1996c, p. 348), targeting populations as varied as pregnant teenagers and welfare recipients (Pollack, 2000, p. 78). As Hannah-Moffat (2001) puts it, “bureaucrats and feminist reformers alike uncritically champion empowerment” (p. 168) (see also Adams, 2003, p. 8; Lupton & Nixon, 1999, p. 8). In relation to ‘restorative justice’, ‘empowerment’ seems apolitical perhaps partly because all key participant cohorts – victims, offenders, parents, families, communities and indigenous communities – are deemed in need of ‘empowerment’. Whereas traditionally, victims’ groups have been
aligned with conservative politics, and offender issues have been the domain of liberals, for example, the discourse of ‘empowerment’ appears to traverse these boundaries.

‘Empowerment’ is thus ‘invisible’; it is accepted – within the ‘restorative justice’ field and elsewhere – as an intrinsically progressive, even apolitical, strategy of governance. The unproblematic status of ‘empowerment’, however, is precisely the problem with it; that is, the apolitical façade of ‘empowerment’ renders covert the discourses that inform and enable it. Potential ‘dangers’ linked to these discourses make the practices they legitimate – in this case, ‘restorative practices’ – potentially ‘dangerous’ by extension. The remainder of this Chapter seeks to draw out some of the potential ‘dangers’ of discourses of ‘empowerment’ in the ‘restorative justice’ field in this regard.

5.5.1 The Depoliticisation and Individualisation of ‘Empowerment’

‘Empowerment’ has shifting and multiple meanings (Adams, 2003, p. 5; Hannah-Moffat, 2001, p. 168; 2002, p. 218, note 6; Lupton & Nixon, 1999, p. 8; Pollack, 2000, p. 76). While the term was originally used during the 1960s and 1970s to describe progressive social change (Hannah-Moffat, 2002, p. 218, note 6), ‘empowerment’ has been “gradually depoliticized or deradicalized” (Hannah-Moffat, 2001, p. 168) and appears to have taken on an individualistic or psychological meaning in more recent times. In Pollack’s (2000) words, despite various understandings of the term, “most models of empowerment prioritize an individualistic or psychological notion of
empowerment, thereby minimizing the importance of social influences and oppression” (p. 76). Thus although the discourse of ‘empowerment’ may seem benign or even progressive in the criminal justice arena, it masks the shift from social to individual explanations for, and/or responses to crime that is integral to it\textsuperscript{45}. Zehr’s (2003) words unwittingly illustrate this shift:

Offenders also need an experience of empowerment. For many offenders, crime is a way of asserting power, of asserting self-identity….Crime, for many, is a way of saying “I am somebody”. My friend, an armed robber, who grew up Black and poor, then spent 17 years in prison for his robberies, said it more clearly than most: “At least when I had a shotgun in my hand I was somebody” (p. 70).

Here, although the structural context of offending is acknowledged, Zehr (2003) inadvertently privileges the individual/psychological repercussions for which the offender needs to be ‘empowered’. Discourses of ‘empowerment’, as well as the ‘psy’ and parental responsibilisation discourses they inform and are informed by, therefore further legitimate the shift towards individual responsibility that ‘restorative practices’ often exemplify. This can result in outcomes quite opposed to those intended. As Pollack (2000) argues, “individualizing social issues can result in blaming individuals for problems

\textsuperscript{45} Blagg (1997, p. 484; 2002, p. 191) demonstrates that like ‘healing’, ‘empowerment’ might also have a meaning outside of this primarily individualistic sense, particularly as it relates to indigenous communities, for whom ‘empowerment’ may represent an element of decolonisation. Without wanting to detract from this use of the term, however, the vast majority of ‘restorative justice’ exponents use the discourse of ‘empowerment’ as it relates to individuals.
that arise from being oppressed in various ways” (p. 77). Thus rather than being ‘empowered’ by ‘restorative’ initiatives, disadvantaged groups may become further marginalised.

5.5.2 ‘Empowerment’ and the Increasing Governability of Subjects

The activity/participation that ‘restorative justice’ demands via the discourse of ‘empowerment’ also renders its subjects increasingly governable. Although the ‘impotency’ of parents and victims in the traditional court process is regarded as unenlightened and even unnatural by ‘restorative justice’ supporters, their involvement in ‘restorative practices’ opens up the possibility of increased responsibilisation, among other potentially negative consequences. As Cruikshank (1993) demonstrates, by ‘willingly’ adopting goals such as ‘empowerment’ or ‘healing’, subjects make themselves increasingly able to be governed.

‘Empowerment’ might thus be considered a technique of neo-liberal governance – it exorts individuals, families and communities to seek solutions to social problems such as crime independently of the state. ‘Empowerment’ is a technology of governance through which subjects are exhorted to become active citizens; in this sense, the traditional welfarist mentality – already under attack in most industrialised nations (Garland, 1997b, p. 184; Rose, 1996c, p. 327) - is replaced by self-governing subjects, ‘willingly’ seeking ‘empowerment’.
One respondent to the Attorney-General's Department’s consultation on New South Wales’ ‘youth justice conferencing’ scheme (as cited in Blazejowska, 1996), for example, claimed that if such processes aim to ‘empower’ all parties, “then much may be gained by allowing the conference to take place whether or not an admission of guilt is made” (p. 9). Here, the concept of ‘empowerment’ is deemed so intrinsically progressive that requiring young people to take part in a ‘conference’ designed to facilitate their ‘empowerment’ might go ahead without regard to due process. This further demonstrates both the apolitical nature of ‘empowerment’ discourses, and their potential to render the subjects of ‘restorative justice’ increasingly governable.

This, of course, is not necessarily the intended result of ‘restorative’ initiatives. Consider, for example, how Mike Doolan (interview, 21/12/05) responds to claims that ‘family group conferencing’ in New Zealand represents a responsibilising, neo-liberal strategy of governance:

In the early days of the… *Children, Young Persons and their Families Act* …family group conferences were seen by…some reporters as…just another example of neo-liberal philosophy – the state divesting itself of responsibility and putting it back on families who are really poor and can’t cope….I have to say that as a person who was part of the policy process, that horrified me, because…I would hate to be associated with any such
program. Resource savings and what have you were never part of the discussion.

Doolan’s (interview, 21/12/05) account thus exemplifies the non-conspirational nature of power identified by Foucault (1980), as well as the potential for unintended effects of the operation of power. Although the increasing governability of subjects is not always the intention of ‘restorative’ programs or those who initiate them, as Doolan’s (interview, 21/12/05) comments demonstrate, it nevertheless exists as a potential consequence of programs’ implementation or programmers’ actions.

5.5.3 Implications of ‘Empowering’ the ‘Disempowered’

If ‘empowering’ strategies are aimed at the ‘disempowered’, and there is no clear distinction between ‘empowerment’ and responsibilisation, as discussed previously, then it stands to reason that those deemed in need of ‘empowerment’ will be most vulnerable to responsibilising strategies also. In other words, parents from non-English-speaking backgrounds, indigenous parents, single parents or parents from disadvantaged or low socioeconomic areas - presumably those that will be deemed in need of ‘empowerment’ - will perhaps also be those that bear the brunt of punitive, responsibilising strategies. As argued above, this may occur even where this is not the intention of particular ‘restorative practices’. The discourse of ‘empowerment’, however, may extend the potential for disadvantaged populations to be responsibilised, due to its seemingly apolitical nature.
Consider as an example of this the introduction of New South Wales’ *Children (Parental Responsibility) Act* (1994). Although this Act has since been subject to a number of revisions, when first introduced it gave police the power to remove an unsupervised child from a public place and return them to their parent’s home if they suspected a crime may be committed (M. Swain, 1997, p. 12). Additionally, the Act made it an offence for parents to contribute to a child’s offending (an offence which carried a penalty of a $1000 fine), gave courts the power to require parents to be present at their child’s criminal proceedings, and the power to compel a child convicted of an offence, and his or her parents, to attend counselling (M. Swain, 1997, p. 11).

In response to a great deal of disquiet over this legislation, however, it was decided that rather than implement this law across New South Wales, two localities would initially be chosen for a trial run. The two areas selected were Gosford and Orange, which according to the then Minister for Police (as cited in M. Swain, 1997), were chosen because both had “an acknowledged juvenile problem” (p. 7). Both areas are also widely known as relatively disadvantaged, low socioeconomic areas, particularly in the case of Orange, a country town. In other words, the localities in which parents are, for varying reasons, having difficulty controlling their children, are the first to be ‘offered’ the ‘empowering’ strategy of having their roaming children returned to them at home. Importantly, however, these same parents will be the first to be held responsible for their children’s behaviour by way of fines – which, in all probability, they cannot afford – as well as a range of other measures. After the trial of this legislation, furthermore, plans were announced to extend it
Throughout rural New South Wales (M. Swain, 1997, p. 3). The laws were thought suitable for country areas because of the short distances police would have to travel in returning children to their homes, and because in many cases, police would know the young people and families involved (M. Swain, 1997, p. 9). This could also have meant, of course, that indigenous families and families from low socioeconomic areas would have endured the impact of this legislation disproportionately (M. Swain, 1997, pp. 26-27).

In relation to ‘restorative justice’, moreover, one can see that a piece of legislation such as New Zealand’s Children, Young Persons and their Families Act (1989), which many claim was designed to ‘empower’ Maori families to manage the offending of Maori young people (Morris & Maxwell, 1993, pp. 74-75; Serventy, 1996, pp. 11-12), might also result in the disproportionate responsibilisation of Maori parents and families. The same might be said about other localities in which ‘restorative practices’ target indigenous populations. McInnes’ (1996) account of the development of ‘family conferencing’ in South Australia, for example, clearly demonstrates the emphasis on ‘empowering’ Aboriginal families:

The view was taken that if participation and empowerment was needed by Aboriginal families trying to cope with children who had become young offenders as recommended by the Select Committee, then it was probably also needed by the families of non-Aboriginal children (para 56).
That consideration was only later given to non-indigenous families indicates the intention of some ‘restorative’ programs to ‘empower’ those deemed ‘disempowered’ – in this case, Aboriginal families in South Australia. Again, therefore, while this may be a laudable goal, it opens up possibilities for such groups to be unfairly targeted, and perhaps responsibilised for the criminal activity of their young people.

5.5.4 Resisting ‘Restorative Justice’

It is also important to consider what might become of those who resist ‘empowerment’ – those whose subjectivities fall outside of those favourable or advantageous to ‘restorative justice’. As discussed above, ‘restorative justice’ constructs various subjectivities via discourses such as those explored in this thesis. While some of these subjectivities – the forgiving victim, remorseful offender or active parent, for example – are celebrated, others are not. As Hannah-Moffat (2001) demonstrates in relation to imprisoned women in Canada, ‘empowerment’ discourses can operate to produce illegitimate subjectivities such as the ‘unempowerable’ or ‘difficult’ subject. What then, might become of those who resist ‘empowerment’ via ‘restorative justice’? This is especially important to consider given what some research indicates about the relationship between ‘effective’ ‘restorative practices’ and rates of recidivism. Analysis of Morris and Maxwell’s early data, for example, suggested to Morris and Young (2000) that:

Those offenders who apologised to victims were three times less likely to be reconvicted four years later than those who
had not apologised and that those offenders who participated in conferences with victims were more than four times less likely to be reconvicted four years later than those where no victims had been present (p. 19).

Here, the subjectivities of apologetic offenders and active, ‘empowered’ victims are clearly linked. If the presence of victims and apologies by offenders are deemed necessary to reduce recidivism – the hallmark of a successful intervention – it stands to reason that these will be encouraged by ‘restorative practices’. Opposing subjectivities – such as unapologetic offenders or ‘uncooperative’ victims might thus be marginalised or excluded from ‘restorative practices’.

If we take the Kansas Juvenile Justice Code (2001) as a further example, we can see that the production of ‘empowered’ and active parents – those who are willing to participate in and even pay for their own and their child’s ‘mediation’ and/or counselling – is clearly the intention. Despite not having committed a criminal offence, parents must employ legal representation and request a court hearing if they wish to challenge the court’s decree that they participate in such ‘empowering’ programs. Here, those who refuse the ‘empowering’ strategy of a ‘restorative justice’ procedure are effectively criminalised. This demonstrates that in some instances, there will be harsh consequences for those whose subjectivities are inimical to the ‘restorative’ paradigm.
This is particularly important to address in localities such as South Australia and the Northern Territory (Commonwealth Attorney-General's Department, 2002, p. 11), where parents’ attitudes are taken into account in deciding how a juvenile’s crime is to be dealt with, and in New Zealand, where under the Sentencing Act (2002), the court must consider “the response of the...offender’s family, whanau, or family group to the offending” (s. 10(1)(c)), even in cases of adult offending. Which attitudes, for example, will be deemed acceptable in order for an offence to be responded to by way of a ‘family group conference’ as opposed to court? Are parents expected to be cooperative? Remorseful? Self-blaming? What if this is not the case? It seems that there is potential here for this provision to be mobilised discriminatively against those parents whose subjectivities are deemed adverse to ‘restorative’ aims. Perhaps this is especially the case in regards to Aboriginal and Torres Strait Islander parents, whose approach to parenting may be considered to fall short of the Anglo Saxon standard (Beresford & Omaji, 1996, p. 35).

5.5.5 ‘Empowerment’: Benefit or Burden?

Finally, in the ‘restorative justice’ field, ‘empowerment’ through participation and decision-making is deemed inherently beneficial for the subjects of ‘restorative practices’. Just as this participation renders subjects increasingly governable, however, it produces increasingly governing subjects. That is, in ‘restorative’ procedures, key players such as parents and victims are now to make decisions that would once have been made by professionals. New Zealand’s Parole Act (2002) even dictates that offenders must “be advised
how they may participate in decision-making that directly concerns them” (s. 7(2)(b)) (see also New South Wales Attorney-General's Department, 1996, p. iv). Additionally, these participants are called upon to provide services that would previously have been provided by the state. Although this participation and decision-making is almost always constructed as progressive and beneficial to the subjects of ‘restorative justice’, however, one wonders whether the potential exists for this level of involvement to become burdensome for key players.

The idea that participants will always benefit from having participated in decision-making, for example, might be challenged in this context. Let us firstly consider Morris and Maxwell’s (1993) report of ‘family group conferencing’ in New Zealand in this regard. Morris and Maxwell (1993) claim that “agreed outcomes should satisfy participants more than enforced outcomes” (p. 86). This sentiment is frequently reiterated in the field, with Zehr and Mika (2003), for example, claiming that in ‘restorative’ processes, “mutual agreement takes precedence over imposed outcomes” (p. 42). A program director I interviewed for this thesis similarly commented that “if you participate in decisions about your own life, you’re much more likely to be happy with them” (Confidential interviewee, 27/5/04) (see also Parsloe, 1996a, p. 2). Morris and Maxwell (1993, p. 86) go on to state that the vast majority of all ‘family group conference’ outcomes – and 95% of their own sample – are indeed reached by consensus among participants. Somewhat bizarrely, however, Morris and Maxwell (1993, p. 86) make these claims after admitting that only about half of victims are satisfied with outcomes of ‘family
group conferences’. This in itself would suggest that, where victims are concerned at least, agreeing to an outcome and being satisfied with it are two quite separate things. We cannot assume, therefore, that participating in decision-making or agreeing to an outcome plan increases participants’ satisfaction with that outcome. As Morris and Maxwell (1993, p. 86) concede, victims may be dissatisfied with an outcome because of their unrealistic expectations about the amount of reparation they might receive. It stands to reason, therefore, that victims may be more satisfied if courts were to award higher amounts of reparation from offenders. Thus although Morris and Maxwell (1993) suggest that this conundrum – victims saying they agreed to an outcome plan, but half of these being dissatisfied with that plan – might mean that “victim agreement is being coerced” (p. 86), it might also indicate that there is no intrinsic link between participating in decision-making and being satisfied with the ensuing decision. In light of this, decision-making might not represent a benefit to all participants. Where participants are expected to take part in proceedings, but do not benefit from this participation, ‘restorative practices’ might rather be considered a burden.

In many ‘restorative justice’ encounters involving juveniles, furthermore, it is the family, rather than the state, that is positioned as ‘expert’, and entrusted with decision-making. This is particularly emphasised in New Zealand, where families are given ‘family time’ during a ‘conference’ to develop - independently of the co-ordinator and any other professionals present – an outcome plan for the young person (O’Connell et al., 1999, p. 22; P. Swain &
Ban, 1997, p. 37). It again seems reasonable to suggest that this may, in some instances at least, be burdensome on parents and families.

Indeed, even choices offered to participants in the name of ‘empowerment’ might not be intrinsically beneficial to these parties. Although it is argued that “presenting choices to the parties whenever possible (i.e. when to meet, where to meet, etc.) maximizes their opportunities to feel empowered” (Victim-Offender Mediation Association, n.d., p. 2), these choices, previously made by state agencies, may be experienced differently by participants. It is conceivable that for some individuals, having to act in a capacity previously reserved for professionals might be experienced as burdensome – an issue that Northern Ireland’s Criminal Justice Review Group (2000, p. 208) cautioned legislators about in their advice on implementing ‘restorative justice’.

Certainly, there is evidence to suggest that victims of crime often feel burdened by the responsibility involved in making decisions following an offence. A number of victims in R. Hill’s (2002, p. 278) study, for example, claimed that these decisions should remain the responsibility of the police. According to R. Hill (2002), these victims “seem to be communicating their wish to remain the recipients of an ‘expert service’ rather than accept the new responsibilities which…are implicit in restorative justice” (p. 278). Wemmers and Cyr (2004) similarly report that when asked about victims’ role in sentencing, “the majority of victims clearly felt that decision-making power should remain in the hands of authorities” (p. 268). This is perhaps
unsurprising; some years ago, as Director of Britain’s National Association of Victim Support Schemes, Helen Reeves (1989) argued that while there is certainly evidence to suggest that victims feel neglected by the criminal justice system, there is “no evidence that victims would like the responsibility of deciding what should happen to the offender” (p. 47) (see also Reeves, 1984, p. 3). It appears, therefore, that ‘empowering’ decision-making roles are not universally welcomed by victims of crime. It seems reasonable to suggest that this may also be the case for other participant groups, such as parents and families.

We might thus consider ‘empowerment’ through lay decision-making a strategy of ‘government at a distance’. Although the notion that “governments should step out wherever possible and allow people to make their own decisions” (Confidential interviewee, 27/5/04) is considered progressive by supporters of ‘restorative justice’, it may have unintended consequences for the parties involved. In forfeiting decision-making power to the subjects of ‘restorative practices’, governments must also forfeit responsibility for the outcomes of those decisions. Participants in ‘restorative justice’ procedures thus hold considerable responsibilities. This level of responsibility might not always be considered advantageous to these parties. Instead, it is possible that this increased level of responsibilisation will burden those involved.

5.6 Conclusion

I have argued in this Chapter that the discourse of ‘empowerment’ operates to further legitimise the two discursive constructs already posited as
‘conditions of emergence’ of ‘restorative justice’ in this thesis. The status of ‘empowerment’ as an apolitical concept enhances its credibility, and works to render ‘restorative practices’ palatable across the political spectrum. This, it was argued, adds a piece to the ‘restorative justice’ puzzle, albeit a partial and shifting one, and begins to account for the ascendency of ‘restorative justice’. In the short Conclusion that follows, I consider the significance of the ‘game openings’ suggested by this, and the preceding Chapters.
SOME CONCLUDING THOUGHTS

This thesis has aimed to address how ‘restorative justice’ has recently emerged as an accepted response to crime in a range of Western jurisdictions. To this end, the thesis sought to propose a number of ‘game openings’ about the emergence of this phenomenon. Following the genealogical framework instigated by Foucault, and developed by his followers, this thesis sought to suggest some potential ‘conditions of possibility’ of ‘restorative justice’.

I therefore argued, firstly, that the emergence of ‘restorative justice’ – or, at least, some ‘restorative practices’ – is reliant upon the credence enjoyed by popularised discourses of the ‘psy’ ethos. ‘Restorative justice’, in this sense, was able to come about as a legitimate crime control rationality due to the ascendancy of the ‘psy’ disciplines and their credibility.

Following this, I argued in this thesis that discourses of parental responsibilisation likewise operate as ‘conditions of existence’ of some – perhaps other – ‘restorative practices’. Although seldom remarked upon, archival analysis indicated that the responsibilisation of parents was, in some cases, an influential discourse in the development and rationalisation of ‘restorative practices’ such as ‘family group conferencing’.

Finally, this thesis posited the discourse of ‘empowerment’ as a ‘condition of emergence’ of ‘restorative justice’ via which both the ‘psy’ ethos and the
responsibilisation of parents further render ‘restorative practices’ an acceptable approach to offending. Although apparently benign, and championed universally by exponents of ‘restorative justice’, the ‘invisible’ discourse of ‘empowerment’, like the other silenced discourses discussed in this thesis, render ‘restorative practices’ potentially ‘dangerous’.

These three sometimes interrelated discursive constructs were themselves, in turn, identified as historical contingencies. The ‘conditions of emergence’ that underpin ‘restorative practices’ do so in a partial and shifting manner, and are themselves not universal, stable or monolithic. This thesis therefore began to address how these rationalities – the ‘psy’ disciplines, the responsibilisation of parents, and ‘empowerment’ – came to occupy unassailable positions of authority in the contemporary cultural climate. This consideration of the enabling discourses of ‘restorative justice’ sought to further destabilise the ‘restorative justice’ project by highlighting the contingent nature of some of the rationalities that sustain it.

This move towards a history of discourse of ‘restorative justice’ sought to depict ‘restorative practices’ as having diverse and divergent historical roots. In contrast to advocates’ historical narratives, this genealogy of ‘restorative justice’ indicates that rather than simply having been ‘waiting to happen’, ‘restorative justice’ was able to emerge at a particular moment in history due partly to its embeddedness within a range of valorised discourses. At the same time, widely-revered functionalist accounts of the origins of ‘restorative practices’ were challenged by this evolving genealogy. This, then, is how we
might conceptualise the operation of power in relation to ‘restorative justice’: power operates via the legitimisation of some discourses – those of the ‘psy’ sciences, for example, while contemporaneously silencing or marginalising others. This is perhaps the most significant contribution of this thesis: the identification and exploration of silenced discourses in the ‘restorative justice’ archive, which operates to interrupt the ‘truth’ claims on which ‘restorative practices’ are rationalised.

‘Restorative justice’, I have aimed to demonstrate here, is therefore not the inevitable, natural or commonsensical phenomenon it is often depicted as by exponents of this approach to criminal offending. Rather, ‘restorative justice’ might be considered an effect of a number of historical contingencies, some of which this thesis has been able to explore.

This thesis presents the beginnings of a genealogy; it is by no means complete, and perhaps could never be complete. It has suggested only the beginnings of a history of discourse of ‘restorative justice’. I must stress, additionally, that the ‘conditions of emergence’ identified by this thesis do not enable ‘restorative practices’ in a direct cause-and-effect manner. Rather, they make ‘restorative practices’ a possible approach to criminal justice in the contemporary climate.

The ‘Dangers’ of ‘Restorative Justice’
This thesis also sought to begin to address some of the implications of the history of discourse it presented. As such, it argued that perhaps the greatest
‘danger’ we might consider in this regard is that the silenced discourses examined in this thesis act primarily to individualise and/or psychologise offending behaviour. The potential of this to impact negatively on the often already marginalised and disadvantaged ‘clients’ of the criminal justice system is considerable. The concerns of some critics of ‘restorative justice’ – that such processes will unfairly disadvantage these marginalised groups – are thus validated, from a historical perspective, by this research.

Of particular relevance here is the suggestion of this research that the ‘conditions of possibility’ of ‘restorative justice’ identified by this thesis are embedded within neo-liberal techniques of governance. ‘Restorative practices’ operate to govern individuals, families and/or communities ‘at a distance’. Individuals and groups are exhorted to address social problems – in this case, crime – independently of the state. Although the potential consequences of this – the responsibilisation of vulnerable populations, for example - may not be the intention of politicians, legislators or policy-makers, it may nonetheless occur. As such, this research suggests that those already disadvantaged individuals, families and communities that some critics feared would bear the brunt of ‘restorative’ initiatives may indeed be unfairly and disproportionately impacted.

This is especially important to consider when we take into account that ‘restorative practices’ further represent a manifestation of government through subjects. In the main, ‘restorative’ processes aim to be attractive to their target populations and participants, as well as to those in positions of
authority in the criminal justice arena. Rather than relying on direct coercion or force, that is, ‘restorative’ initiatives engage and govern subjects in line with their own goals and aims. Accordingly, potentially ‘dangerous’ ‘restorative practices’ are often readily engaged in by the ‘clients’ of criminal justice.

There are thus a number of problems raised by this research that future enquiry might consider. Such research might address, for example, whether the individualising/psychologising effects of ‘restorative practices’ impact discriminatively on women and girls, indigenous people, or those from a non-English-speaking and/or low socioeconomic background. More specifically, a feminist analysis of the ‘findings’ of this research would generate interesting and important theoretical insights. Indeed, at the ‘conclusion’ of this research, this is the direction in which I feel pulled. The interrelated sets of discourses I have articulated in this thesis – the ‘psy’ ethos, the responsibilisation of parents and ‘empowerment’ – it could be argued, are more pertinent in relation to the female subjects of ‘restorative’ processes. As noted in the relevant Chapters, both therapy and the ‘psy’ sciences, and the domain of parenting are highly gendered, and ‘empowerment’ strategies are aimed at the ‘disempowered’. As such, the discourses I have identified as partially enabling the emergence of ‘restorative justice’ might be fruitfully scrutinised from feminist perspectives.

Although I have taken the approach of identifying some of the potential implications of this genealogy, like Foucault (1977) and Donzelot (1980), I do
not intend to suggest to practitioners how these might be incorporated or interpreted in regards to practice. Indeed, I feel neither compelled nor qualified to make such suggestions. Nonetheless, it is important to stress that this thesis should not be taken as a denunciation of ‘restorative justice’; I would by no means wish more punitive measures to replace ‘restorative’ ones based on my critique. As B. Hudson (2006) has argued, ‘restorative practices’ embody the characteristics many criminologists would like to see inform the criminal justice system more so than traditional justice practices.

This research aimed to destabilise the legitimacy and naturalness of ‘restorative justice’, and to raise questions previously not considered in relation to its operation and prevalence. As a genealogist, however, I have also sought to be mindful of my own contribution towards shaping power/knowledge. As such, I am aware that I, as much as other authors critiqued in this thesis, have rewritten the history of ‘restorative justice’. Indeed, in one sense, this was my aim. Having done so, however, I urge the reader to consider this work a critical account of the emergence of ‘restorative justice’ rather than a justification for existing, repressive criminal justice measures.

This thesis has looked at the ‘big picture’ of ‘restorative justice’ – an approach suggested by a number of scholars (Maruna, 2003, p. 252; Phoenix, 2004, pp. 438-439). While much research on ‘restorative justice’ is far more narrowly conceptualised, I have asked a ‘big’ question and addressed it in a necessarily limited way. Future research seeking to add to,
or set out from, this genealogy might, however, approach the topic in a more contextually- or geographically-specific manner. There would be much to gain by considering genealogies of ‘restorative justice’ in particular, localised contexts, for example. The greater depth and detail that could be considered in such a project would no doubt complement this thesis also.

This research is neither final nor fixed. Additionally, it does not exist outside of the field of which it offers a critique. Rather than reading this thesis as a grand narrative on the emergence of ‘restorative justice’, therefore, I invite the reader to view it as a small, perhaps significant, contribution to the field of ‘restorative justice’, and to the broader critical criminological project.
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## Appendix A: Persons Interviewed

<table>
<thead>
<tr>
<th>Name</th>
<th>Date(s) Interviewed</th>
<th>Work Location</th>
<th>Position</th>
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<tbody>
<tr>
<td>Terry O’Connell</td>
<td>18/3/04 8/8/05</td>
<td>New South Wales, Australia</td>
<td>Director, Real Justice Australia and Instigator of Wagga Wagga Enhanced Cautioning program</td>
</tr>
<tr>
<td>Ted Wachtel</td>
<td>25/5/05</td>
<td>Pennsylvania, United States of America</td>
<td>Director, Real Justice United States of America, and Director, International Institute For Restorative Practices</td>
</tr>
<tr>
<td>Rhonda Booby</td>
<td>12/9/05</td>
<td>New South Wales, Australia</td>
<td>Former Director, New South Wales Department of Corrective Services Restorative Justice Unit</td>
</tr>
<tr>
<td>Ken Marslew</td>
<td>11/8/05</td>
<td>New South Wales, Australia</td>
<td>Director, Enough Is Enough Anti-Violence Movement Inc.</td>
</tr>
<tr>
<td>Graham Waite</td>
<td>6/12/05</td>
<td>Northern Territory, Australia</td>
<td>Superintendent of Police and former Manager of Pre-court Diversion Scheme</td>
</tr>
<tr>
<td>Name</td>
<td>Date</td>
<td>Location</td>
<td>Role and Additional Information</td>
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<td>--------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Mike Doolan</td>
<td>21/12/05</td>
<td>Christchurch, New Zealand</td>
<td>Senior Adjunct Fellow, University of Canterbury, and an author of the <em>Children, Young Persons and their Families Act (NZ)</em></td>
</tr>
<tr>
<td>Mark Yantzi</td>
<td>22/9/05</td>
<td>Ontario, Canada</td>
<td>Director, Community Justice Initiatives, and Probation Officer in the famous ‘Kitchener Experiment’</td>
</tr>
<tr>
<td>Les Davey</td>
<td>28/9/05</td>
<td>London, England</td>
<td>Director, Real Justice United Kingdom</td>
</tr>
<tr>
<td>Confidential</td>
<td>27/5/04</td>
<td>Australia</td>
<td>Program Director</td>
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