ARTICLE

Risk, restorative justice and the Crown: a study of the prosecutor and institutionalisation in Canada

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Abstract

In Canada, restorative justice programmes have long been institutionalised in the criminal justice system. In Ontario, specifically, their use in criminal prosecutions is subject to the approval of Crown attorneys (prosecutors) who are motivated in part by risk logics and risk management. Such reliance on state support has been criticised for the ways in which it might subvert the goals of restorative justice. However, neither the functioning of these programmes nor those who refer cases to them have been subject to much empirical study in Canada. Thus, this study asks whether Crown attorneys' concerns for risk and its management impact their decision to refer cases to restorative justice programmes and with what consequences. Through in-depth interviews with prosecutors in Ontario, I demonstrate how they predicate the use of restorative justice on its ability to reduce the risk of recidivism to the detriment of victims' needs. The findings suggest that restorative justice becomes a tool for risk management when prosecutors are responsible for case referrals. They also suggest that Crown attorneys bear some responsibility for the dangers of institutionalisation. This work thus contributes to a greater understanding of the functioning of institutionalised restorative justice in Canada.

Keywords: restorative justice, institutionalisation, risk, prosecutor, Canada.

1 Introduction

In a courthouse in Ontario, Canada, a Crown attorney receives a criminal file and looks over its contents. They see the case facts, some of the characteristics of the

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accused and the charge: assault. This necessarily means there is a victim to the alleged crime. The prosecutor also notices that the accused has prior convictions for theft and mischief. Given that the charges and criminal history are not overly serious, they decide that the use of a restorative justice programme is appropriate. Motivating this decision more specifically, however, is the potential for contact with the victim to responsibilise the accused and to reduce future recidivism. We must ask, as proponents of restorative justice, whether this motivation is an acceptable one; if so, what might be the consequences? In this situation, the prosecutor[1] is screening a case for a restorative justice programme. However, this reliance on the state and the criminal justice system is criticised by some proponents of restorative justice, who believe that the practice is forced to sacrifice important elements of its philosophy while taking on more punitive aspects of the criminal justice system (Pavlich, 2005; Walgrave, 2019). Some have theorised that restorative justice is indeed limited when institutionalised in this manner (Jaccoud, 2007; Piché & Strimelle, 2007; Strimelle, 2007; Woolford & Ratner, 2003, 2008). Others have proposed more specifically that it is compromised by risk logics in the criminal justice system (Fox, 2015; Hannah-Moffat, 2005; O'Malley, 2006, 2017). The ways in which this compromise can occur in Canadian practice, however, are not often the subject of empirical study and require greater exploration (Morrison, 2016).

Moreover, across Canada, Crown attorneys wield tremendous power over the processing of criminal cases (Archibald, 1998; Labelle & Vanhamme, 2015). As some have proposed for restorative justice, Crowns too are influenced by risk logics and risk management (Gray, 2005; Marinos, 2006; Myers, 2009). In some jurisdictions such as the province of Ontario, one decision that is ultimately theirs alone is to allow the use of restorative justice programmes during criminal prosecution. Thus, to understand how restorative justice might be compromised in practice, it is necessary to look at the work of Crown attorneys. However, despite this important relationship between Crown attorneys and the use of restorative justice, Canadian studies targeting their work in a restorative justice context are few.

Furthermore, despite these diverse relationships between risk, risk management, restorative justice and Crown attorneys, it is unclear if and how Crowns' risk logics might impact the use of restorative justice in Canada. Through in-depth interviews with Crown attorneys in Ontario, I demonstrate that concerns for risk management guide participants' decisions in regard to the use of restorative justice in the prosecution of criminal files. Moreover, I highlight how they predicate the use of restorative justice on a reduced risk of recidivism, while the victim is considered only after this condition has been met; thereby, victims can become secondary to the offender. Such a usage implies that some forms of restorative justice must become a vehicle for risk management and thus public safety if it is to be considered usable by these gatekeepers. I will also show how this entails compromising on the importance of victims and their needs.

1 In Canada, the prosecutor is called the Crown attorney. Thus, 'Crown', 'Crown attorney' and 'prosecutor' are used interchangeably.

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I first discuss the literature concerning institutionalised restorative justice in Canada. I then go on to explore the work of prosecutors in the context of restorative justice as well the relationships the two maintain with risk and its management. I then present the methodology employed and introduce ethnomethodology, the theoretical framework guiding analysis. Finally, I present the results of this study and consider their consequences for restorative justice.

However, it is necessary to clarify the term 'restorative justice' employed in this work. This term holds different meanings for different people (Llewellyn & Howse, 1999; Johnstone, 2010, 2011; Marshall, 1996); furthermore, it 'encompasses a range of practices' (Sliva & Lambert, 2015: 79). Unsurprisingly, then, practices vary widely between Canada's provinces and territories, certain actors being key players in one region but not in another (Tomporowski, 2014; Tomporowski, Buck, Bargen & Binder, 2011). For example, in British Columbia, the practice is largely police driven, while other provinces have models where the Crown is much more involved in the use of restorative justice programmes (Morrison & Pawlychka, 2016).This study concentrates on those forms operating within the Canadian criminal justice system, used during criminal prosecution and thus subject to Crown oversight; consequently, this excludes some forms of restorative justice such as those employed in schools or administered by police forces.

Participants were familiar with and used these types of restorative justice programmes. While criminal files can be diverted to these programmes and avoid prosecution, prosecution may also continue. As such, it is appropriate to offer a definition used by the Department of Justice (2018), which states that

> Restorative justice is commonly defined as an approach to justice that focuses on addressing the harm caused by crime while holding the offender responsible for their actions, by providing an opportunity for the parties directly affected by the crime – victims, offenders and communities – to identify and address their needs in the aftermath of a crime … Restorative justice encourages meaningful engagement and accountability and provides an opportunity for healing, reparation and reintegration. Restorative justice processes take various forms and may take place at all stages of the criminal justice system.[2]

This definition specifically mentions a central tenet of restorative justice: the importance of the offender, victim and community (Llewellyn & Howse, 1999; Zehr, 1990). The goal is to address harm and to hold the offender responsible for it. Given that this description is defined by the federal government and that the use of restorative justice is referenced in law (Criminal Code, 1985), it is likely that this definition is closer to the understandings of prosecutors than those proposed and debated by the academic community. Furthermore, this definition

2 This definition is quite flexible and open to different manifestations of 'restorative justice'. However, references to restorative justice are made in the knowledge that some might disagree with such an appellation, particularly in the context of state-sponsored restorative justice.

is particularly useful in its specific mention of the criminal justice system as it is in this context that participants were familiar with these practices.

1.1 Institutionalised restorative justice in Canada

Restorative justice in Canada has long been a part of the criminal justice system (Clairmont & Kim, 2013; Commission du Droit du Canada, 2003; Roach, 2006; Tomporowski, 2014; Tomporowski et al., 2011). According to the Department of Justice (2018), there are over 300 programmes self-identifying as offering restorative justice services in the context of criminal justice in Canada. Several provinces have guidelines for prosecutors regarding the use of alternative measures such as restorative justice, though the use of such programmes is permitted countrywide under sections 716 and 717 of the *Criminal Code of Canada*. Despite allowing such practices in theory, Tomporowski and her colleagues (2011: 826) note that 'restorative justice is having difficulties "making further inroads into the [criminal] justice system"', some specifying further that it is 'impeded by both political and policy choices' (Ney, 2014: 166).

In practice, these institutionalised restorative justice programmes can be co-opted by the state as they rely on its funding, resources and referrals from court actors to operate (Jaccoud, 2007; Llewellyn & Morrison, 2018; Piché & Strimelle, 2007; Strimelle, 2007; Woolford & Ratner, 2003, 2008). As a result, they may compromise on goals or values espoused by restorative justice to gain legitimacy within these institutions (Woolford & Ratner, 2008). It can then become an '*innovation complémentaire*' rather than an '*innovation de substitution*' (Jaccoud, 2007: para. 24); in other words, it can become an addition to the system instead of changing or replacing the system as originally envisioned.

Institutionalisation is also criticised for the potential net-widening effect it can have, whereby minor crimes that would otherwise not be dealt with in the criminal justice system are handled through system-affiliated restorative justice programmes (Archibald & Llewellyn, 2006; Prichard, 2010; Wood & Suzuki, 2016). Although undertaken in jurisdictions outside of Canada, it has also been argued that operational criminal justice goals such as efficiency can be given priority over those of restorative justice or that victims can be used to achieve offender rehabilitation or desistance (Hoyle & Young, 2002; Umbreit, 1995; Walgrave, 2004; Zehr, 1995). Institutionalised restorative justice is also criticised for the ways in which it can be used to further punitive ends in the criminal justice system as well as other institutional goals (Piché & Strimelle, 2007; Wood & Suzuki, 2016). Furthermore, as a result of institutionalisation, foreign logics of risk management might also be injected into restorative justice programmes (O'Malley, 2006);[3] although not speaking of restorative justice specifically, Quirouette (2018) also discusses how such risk logics can seep into the practice of community justice agencies when institutionalised.

For this reason, Pavlich (2005) develops the term *imitor paradox,* whereby restorative justice programmes mimic objectives of the criminal justice system to continue operating. According to the author, restorative justice is forced to

3 This topic will be revisited shortly when discussing risk and restorative justice.

renounce or compromise its philosophies or risk being unused. For this reason, institutionalisation ought to be closely monitored and better understood. Nevertheless, although sometimes confirmed through empirical study (Hannem, 2011; Piché & Strimelle, 2007), there is a dearth of empirical data exploring the impacts of institutionalising restorative justice in the Canadian criminal justice system and the court system, more specifically.

1.2 The prosecution

In discussing how restorative justice programmes can be compromised within the criminal justice system, recall that decisions to use restorative justice are made by individual actors. Indeed, in Ontario, the Crown attorney ultimately permits the use of such programmes in the course of a prosecution, even though they do not provide the service themselves (Morrison, 2016);[4] in this sense they are considered 'gatekeepers' to restorative justice (Archibald, 1998; Clairmont & Kim, 2013; Grossman, 1970; Levenson, 1999). Given this gatekeeper role, it is imperative to discuss their work, particularly considering that some research demonstrates that gatekeepers such as police or judges can impede the use of restorative justice (Campbell et al., 2006; Shapland, Robinson & Sorsby, 2011).

In Canada, a single empirical study was found concerning Crown attorneys and their use of restorative justice. This is unsurprising for two reasons: (1) there is not a great deal of research on prosecutors' use of restorative justice or their rationales for such use in international settings (O'Mahony & Doak, 2017) and (2) there is a general 'lack of data … on restorative justice … in Canada' (Morrison, 2016: 214; Tomporowski et al., 2011).[5]

In this study, Clairmont and Kim (2013) evaluated the Nova Scotia Restorative Justice Program, a state-sponsored restorative justice programme. They discussed how there was a general knowledge of restorative justice and its uses among Crown attorneys in the province. Moreover, while prosecutors thought restorative justice was appropriate for young offenders who had committed minor offences, this was not the case for adults or serious offences. Nevertheless, the authors found significant variation between Crown attorneys regarding the appropriate uses of restorative justice. Thus, despite governmental support of the programme, attitudes varied among those involved in its use. As such, further research in other Canadian jurisdictions could offer further insight into prosecutors and their use of restorative justice.

1.3 Prosecutors and risk; restorative justice and risk

Given this dearth of understanding concerning prosecutors' use of restorative justice, I turn to their work more generally. These actors make decisions and conduct their work on the basis of a variety of factors, with different motivations and goals in mind (Labelle & Vanhamme, 2015). In Canada, one such motivation

4 It is for this reason that I refer to Crown attorneys 'using' restorative justice or 'referring' cases to restorative justice interchangeably.

5 Morrison (2016) and Tomporowski and her colleagues (2011) cite Nova Scotia as a notable exception to this lack of data in Canada. For example, see Archibald and Llewellyn (2006).

is risk management (Hannah-Moffat, 2016; Myers, 2009).[6] Risk management in this context specifically refers to managing an individual's risk of re-offence that threatens public safety (Gray, 2005). In this way, as in O'Malley (2006), risk here concerns a probability of harm. Indeed, prosecutors make evaluations as to whether an individual may recidivate in some way in the future. The Ontario Crown Attorney's Manual specifically highlights risk to public safety on many occasions as something Crown attorneys ought to consider and avoid in their decision-making (Ministry of the Attorney General, 2018).

The focal concerns theory also concludes that public safety is fundamental in prosecutor decision-making (Steffensmeier, Ulmer & Kramer, 1998).[7] Although this perspective was originally developed in order to analyse the sentencing decisions of judges, more recent research has applied it to prosecutors and their decisions in processing criminal cases (Hartley, Maddan & Spohn, 2007; O'Neil, Shermer & Johnson, 2010). These studies have shown that individuals who are considered more dangerous to society are treated more severely by prosecutors by being offered fewer and less enviable deals at sentencing.

More recent qualitative work has also shown a preoccupation with risk in the decision-making of prosecutors (Sylvestre, Bellot & Blomley, 2017; Valverde, Levi & Moore, 2005; Vanhamme, 2016). Sylvestre and her colleagues (2017) discuss how Crowns attempt to ensure society is protected from offender recidivism. They further state that prosecutors considered it their responsibility to ensure that dangerous individuals are not released into society, where they may commit further crime and victimise others. In this way prosecutors evaluate and predict the risk an individual might pose to society.

Thus, it is clear that there is a measure of risk management influencing prosecutors in their work. Some authors have theorised that risk might also impact the practice of restorative justice in the criminal justice system (Fox, 2015; Hannah-Moffat, 2005; Hannem, 2011; McAlinden, 2011; O'Malley, 1999, 2006, 2017). Indeed, they theorise that restorative justice could become a means of addressing the risk presented by offenders.

The link between restorative justice and risk management, however, is more indirect than the relationship between prosecutors and risk management. Specifically, researchers have studied the rehabilitative potential of restorative justice and its ability to reduce recidivism (Bazemore & O'Brien, 2012; Ward, Fox & Garber, 2014).[8] It is theorised that reduced recidivism can be achieved through a process of responsibilisation in a restorative justice programme (Dignan, 2005; Morris, 2002: 606; Ward et al., 2014). Accordingly, there has been a significant amount of research on the impacts of restorative justice on recidivism (Maruna,

6 Although Myers (2009) speaks primarily of a different type of risk, she acknowledges that risk of reoffence is a part of Crown decision-making.

7 As this perspective has largely been developed outside of Canada, prosecutors are not called Crown attorneys. As such, the term is not employed here.

8 Despite the volume of literature on the subject, such a combination is contentious (Daly, 2016; Robinson & Shapland, 2008; Ward, Fox & Garber, 2015; Ward & Langlands, 2009).

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2016; Robinson & Shapland, 2008).[9] Although findings are mixed, restorative justice has shown potential in specific circumstances to modestly reduce recidivism (Bonta, Jesseman, Rugge & Cormier, 2006; Latimer, Dowden & Muise, 2005; Llewellyn, Archibald, Clairmon & Crocker, 2013; O'Mahony & Doak, 2017; Piggott & Wood, 2018; Sherman, Strang, Mayo-Wilson, Woods & Ariel, 2015; Wong, Bouchard, Gravel, Bouchard & Morselli, 2016). It is through these concerns that restorative justice can be linked to risk and risk management (O'Malley, 2006; Shapland, 2014).

Specifically, responsibilisation can be considered a form of rehabilitation. Gray (2009: 451), citing O'Malley (2001: 96), explains that 'responsibilization (sic.) has become the "new rehabilitation" of the risk era'. This statement highlights the malleability of rehabilitation as a concept. Goodman, Page and Phelps (2017: 91) go so far as to state that '"rehabilitation" has no single, static meaning … the term is a "conceptual shell" that gets filled in specific ways at particular times and places'. Currently, then, the husk of rehabilitation is filled with concerns for the responsibilisation of the offender. Thus, to responsibilise is to rehabilitate, which can impact recidivism and benefit public safety.

In these ways, seeking to responsibilise offenders through restorative justice may become a means of managing their criminogenic risk in the future.[10] Indeed, Hannah-Moffat (2005: 30) explains that 'rehabilitation has been revived as a central feature of risk/need management and penal control'. Rehabilitation, then, is a way of addressing the individual risks and needs of an offender that influence their likelihood of committing future offences as offenders are considered to be an embodiment of risk (Fox, 2015; Ward & Maruna, 2007).

Thus, there is a theoretical link between restorative justice and risk management. Indeed, restorative justice might provide rehabilitation (responsibilisation), which may reduce recidivism. Despite these arguments, further empirical research would serve to test the link between restorative justice and risk management.

2 Current study

There is a lack of empirical data on the use of restorative justice in Canada (Morrison, 2016). Meanwhile, it is clear that the institutionalisation of restorative justice can cause it to compromise, change and reorient its own goals to benefit the system (Woolford & Ratner, 2008). For example, it has been theorised that restorative justice can be used for risk management (Fox, 2015; O'Malley, 2006, 2008, 2017); this is achieved through the rehabilitation that these practices might promote, which may then reduce future recidivism and

9 Llewellyn, Archibald, Clairmont and Crocker note that many restorative justice programmes and their evaluations centre on recidivism even though reduced recidivism has been explicitly excluded as a goal of restorative justice (2013: 307).

10 Although the term *criminogenic need* can be quite complex, it is sufficient for the purposes of this article to use it in referring to the variety of factors considered to impact the possibility that an individual will offend in the future (Hannah-Moffat, 2005).

protect public safety (Fox, 2015; Ward & Maruna, 2007). However, such a linkage between risk management logics and restorative justice requires greater empirical evidence, particularly in the Canadian context.

The literature also points to the importance of prosecutors in restorative justice in the light of their role as gatekeeper; specifically, in some situations they possess the ability to direct the use of restorative justice in the prosecution of criminal files. However, their work with restorative justice is rarely explored. It has also been shown that risk management plays a role in their decision-making (Hannah-Moffat, 2016; Logan, 2000; Myers, 2009). Despite this, it is unknown whether risk and its management impact them in the context of restorative justice. Indeed, Hannah-Moffat (2016: 247) states that 'despite awareness of these policy shifts to risk-based penal management, few researchers have examined how they are received by, and affect, individuals working in various penal systems'.

It is thus evident that the interplay between Crown attorneys, risk management and restorative justice ought to be investigated further in order to better understand the use of restorative justice in Canada's criminal courts. Consequently, this study seeks to answer the following research question: Do Crown attorneys' concerns for risk management influence their decision to refer criminal files to restorative justice programmes? If so, how and with what consequences?

2.1 Theoretical framework

This work employed ethnomethodology to investigate the practices of Crown attorneys and their decisions concerning restorative justice.[11] This framework focuses on the regular actions of a group's members. It has often been used in research concerning the criminal justice system and its actors such as judges, prosecutors, police, juries, as well as their decision-making practices such as plea bargaining (Labelle & Vanhamme, 2015; Lynch, 1982; Maynard, 1984; Pollner, 1979; Vanhamme, 2016).

Ethnomethodology considers reality, that which is experienced and acted upon, to be a practical accomplishment in that, through one's actions, members demonstrate appropriate behaviour that simultaneously reinforces this appropriateness (Garfinkel, 1967). In this way, a unique world where members of a group interact is constructed and reconstructed with every action performed. Actions, understood as encompassing most any conduct, whether verbal or physical, are undertaken by members with knowledge of what is and is not acceptable in their specific context.

This framework has several key terms. For the purposes of this discussion, two will be discussed: reflexivity and accountability. According to ethnomethodology's programme, the reflexive and accountable nature of

11 It is acknowledged that there are different perspectives and approaches in the ethnomethodological tradition (Hester & Elgin, 1992; Pollner, 2012). Using Hester and Elgin's (1992: 215) typology, this study follows a tradition whereby the elaboration of mundane reasoning and 'its constituent "facts" and features' is the objective.

members' actions allow for conclusions to be made regarding the order and social world of prosecutors while investigating their practices. To say that members are reflexive refers to the naturalness of their actions and

> to the practices that at once describe and constitute a social framework … [It] refers to the equivalence between describing and producing an action, between its comprehension and the expression of this comprehension. 'Doing' an interaction is telling it (Coulon, 1995: 23).

Thus, this reflexive nature of actions allows for the continual creation and reinforcement of order in one's world.

Equally important is the accountable nature of members' actions, which is 'visibly-rational-and-reportable' in that members' actions are undertaken knowing what is required of them and that members ought to fulfil those obligations (Garfinkel, 1967: vii). Consequently, individuals act in a manner that demonstrates their competency as members of their group. Specifically, this means employing justifications considered legitimate by the group to which one belongs.

2.2 Methodology

This study undertook in-depth interviews with ten Crown attorneys.[12] Through contacts in the criminal justice system, potential participants were contacted and asked to forward the invitation to any individuals meeting the eligibility criteria. In order to participate, individuals were required to have practised law as a Crown attorney in Canada and also have decided to allow or disallow the use of a restorative justice programme during the prosecution of a criminal file in their role as Crown attorney. While participants had practical experience in deciding whether to allow its use in criminal prosecutions, no participants except for one had ever taken part in these programmes themselves.

Participating Crown attorneys originated from four sites throughout Ontario, Canada. Three participants had retired as Crowns, although two of them still practised as judges at the time of data collection. Two of these retired prosecutors had only recently retired from their position and were still familiar with the goings-on of their former workplaces. Another had been retired for over 15 years but still practised as a judge in the jurisdiction at the time of the study. Two sites had populations of between 75,000 and 100,000; while not rural, they were not large metropolitan areas. The other two sites from which participants were sampled had populations of over 700,000 and are larger urban centres.[13]

Interviewing in the ethnomethodological tradition takes on a specific character compared with conducting interviews with another theoretical framework. Baker (2011: 20) states that

12 It should be noted that ethnomethodology is not a methodology. Rather, it is the *study* of methods. Thus, different methodologies can be used with this theoretical framework.

13 Please note that more specific information has not been given in order to protect the anonymity of research participants.

> ethnomethodologists study interviews as instances of settings like other interactional events … [and] are seen as … events that members make happen thoroughly inside and as part of the social worlds being talked about, rather than as 'outside' … those social worlds.

In this way, Baker makes clear that interviews in the ethnomethodological sense do not seek to *collect* data, but rather to *create* it: what is being said by the participant makes real those rationales and explanations.

Transcripts were coded with the following questions in mind: (1) What was said? (2) What argument(s) arose? and (3) What was at issue in these arguments? The words that were said, as well as the way in which they were said, form the basis of the ethnomethodological analysis in an interview context. In the choice of voicing specific concerns over others, using one word as opposed to another, it was possible to decipher the content of these arguments. Finally, given the arguments presented and the manner of their presentation, it was a matter of organising what was revealed about the world of Crown attorneys, as well as what is or is not appropriate for members of the prosecution.

3 Results

This section discusses the intermingling of risk logics and restorative justice in the context of Crown attorney decision-making. It discusses (1) when restorative justice is considered appropriate, (2) when restorative justice is not considered appropriate and (3) the secondary place of the victim in these decisions. Excerpts from interviews used were chosen for their representativeness of those interviewed, except in cases of great discrepancy; in such an event, I make this explicit.

3.1 When is restorative justice appropriate?[14]

Simply put, all participants opined that restorative justice could protect society:

> You're making society safer by having somebody take responsibility for what they've done and make reparations … and come away from the system feeling like they've been treated fairly too you know? (Shelby[15])

Another participant admitted to having some fear about the possibility of recidivism should a more punitive approach not be taken. Nevertheless, she confessed:

14 While highlighting the importance of public safety in the world of Crown attorneys, it must be mentioned that participants were well-versed in the benefits that restorative justice could bring to victims and, in fact, were quite supportive of these benefits. However, as will be discussed shortly, these benefits alone were not sufficient ground to allow the use of restorative justice.

15 Pseudonyms were used to protect the identity of participants.

> At the macro level, the protection of the public is probably better served by an increased use of restorative justice. But in each particular case it's worrisome. (Claudia)

Thus, in the estimation of participants, restorative justice had the potential to protect society by reducing offenders' criminogenic risk. A causal relation is made explicit between the restorative justice process and a safer community. In Shelby's quote, she specifically mentions responsibilisation as accomplishing this task. This was a theme addressed by four participants. For example, speaking about an accused's ignorance of the harm caused by their actions, another participant explained what restorative justice can accomplish:

> Sometimes the acts are based on a lack of understanding. [Offenders] know the acts are wrong, but they don't know how people feel … This understanding can be something that is accomplished if it goes through [a restorative justice programme] … This will also serve to protect other [people] down the road … I think you can protect the public by better informing and making more responsible citizens. (Shannon)

In this way, the Crown links educating offenders and making them responsible citizens through restorative justice; for several participants, this will ultimately protect the public from future harm. This concern for responsibilising and creating responsible citizens is a hallmark of risk management (O'Malley, 2001: 96). Indeed, Crowns employ this responsibilisation strategy to lessen the risk of harming the public later.

Those that did not directly mention responsibilisation of the offender through restorative justice did still pair it with rehabilitation. They described the importance of rehabilitation that can be achieved through restorative justice programmes and how this can reduce recidivism. While elaborating reasons for using restorative justice programmes, another Crown stated that:

> *Anything we do* and the tools we use to sentence people *ultimately it is about reducing recidivism*, right? … Why do we want to rehabilitate them? So they don't become recidivists. … So anything that I think will help reduce recidivism is valuable and protects Canadian society. (Nick, emphasis added)

In this way, he was explicit that he uses these programmes because he thinks they can rehabilitate offenders and reduce offending in the future. Nick went so far as to say that *anything* Crowns do is about reducing recidivism and that rehabilitation is one manner to do this. He continued on to laud restorative justice for its ability to reduce recidivism even more:

> [I]f [restorative justice] reduces recidivism, if it gives the accused insight into his behaviour, if it puts a human face on the victim so he thinks twice about doing it the next time, then it does help protect Canadian society. (Nick)

Here Nick continued to show his belief in restorative justice and its ability to protect society by causing the offender to reflect on themselves and think about what they have done. In this way, a sense of morality and responsibility is being instilled in the offender through restorative justice. However, these affirmations were conditional on several factors, namely *if* restorative justice reduces recidivism.

Participants demonstrate that if restorative justice programmes can work towards these goals, it can be considered to protect society and is therefore valuable. Stated otherwise, if it can address the risk of future harm posed by individuals, then it is useful for the Crown in their duty to protect society. Left unsaid, however, is that if it does *not* reduce recidivism, then restorative justice does not help protect society and is perhaps not as valuable. It is in these situations that the place of restorative justice becomes clearer and the precarity of its position in the criminal justice system is brought into focus.

3.2 When is restorative justice not appropriate?

While highlighting restorative justice as a means of increasing public safety showcases its role in risk management, those times when restorative justice is not appropriate demonstrate its place for Crown attorneys. It was made clear that if participants judged the safety of the victim or the public to be at issue owing to the use of restorative justice, it would not be allowed to proceed:

> That is a very significant duty we have, to protect society … To ensure the protection of the public. So a restorative justice process is not going to be available in certain situations when it can't be done in such a way that the public is going to be protected right? (Claudia)

> You can't do something where you think ultimately- Well, you certainly can't do something where you think the victim is going to be in jeopardy (laughs). (Xavier)

Participants were explicit that they would simply not allow a restorative justice process to occur should they judge the risk of harm to either the victim or society to be too great. In this way participants gauge the risk and act accordingly, managing the risk posed by the offender. Should it be below their personal threshold, restorative justice may proceed; if it is too high, it will not. This point was reinforced when Xavier laughed at the incredulity of a situation where a victim would be put at risk owing to the use of restorative justice. Indeed, you 'certainly can't' do that, he stated. Another participant expressed this sentiment slightly differently but added a caveat to the use of restorative justice. Jay stated that:

> Frankly there are some bad people out there who have no interest in being accountable or being bound by the court, who pose an ongoing danger to the community and to individual members of the public. I don't see any use for restorative justice for those people. (Jay)

Once more, public safety cannot be put at risk in the decision to make use of a restorative justice programme. Those who 'pose an ongoing risk to the community' are one group where the use of restorative justice is inappropriate.

Jay also vocalised a sentiment broached occasionally by a few other participants: those who will not take an active role in holding themselves accountable and being responsibilised are not acceptable participants in restorative justice programmes. By not being responsibilised or held accountable, the offenders are considered an unmanageable risk, as individuals who may cause harm to society. As such, restorative justice is not an appropriate course of action.

In this way, participants continue to highlight the importance of protecting both victims and society; moreover, making use of restorative justice must not contravene this obligation. While in some cases restorative justice can manage offenders' risk, there are situations where Crowns do not feel this possible. These situations are not acceptable uses of restorative justice; it is not a powerful enough tool. Personal judgment concerning risk to public safety is then the overriding concern for Crown attorneys. As will be discussed in more depth shortly, this concern can override victims' desires to use restorative justice.

3.3 Victims as a secondary concern

As just explored, the majority of participants were explicit that restorative justice processes could not be used in particular situations; however, they also clarified that this could be the case despite the desire of the victim(s). In this way the victim's needs and desires for restorative justice are secondary to other logics guiding the prosecution. This participant discussed her thought process when she receives a case:

> Could restoring this relationship have a beneficial impact on the community and affect community safety going forward? Because that is a responsibility of the Crown … to always have an eye to public safety … I consider, you know, the nature of the charge. Then I consider whether or not the complainant would be interested. (Abby)

Abby thus details how community safety was her first concern and how she then proceeds to thoughts of the victim. Thus, the Crown's first thought is about benefitting community safety when deciding to send a case to a restorative justice programme. Once she determines this, her thoughts proceed to the victim. This is not to say that Crowns should not think about public safety but rather to highlight how thoughts of the victim follow only afterwards; moreover, as demonstrated earlier, should the participant determine that 'restoring the relationship' would not benefit community safety going forward, a restorative justice programme would no longer be an option even if the needs of the victim are unchanged in either scenario. Indeed, in this participant's thought process, she has not even arrived at the interests of the victim when this decision is made.

Furthermore, while participants identify victim satisfaction as an important reason for referring a case to a restorative justice programme, there were numerous examples where victim satisfaction was secondary to the criminogenic

risk posed by the offender or secondary to other criminal justice goals such as punishment:

> [In] Canada, there are certain crimes we have deemed to be repugnant. And while it is amazing if victims of those crimes can bring themselves to forgive the perpetrators, that doesn't serve as a veto on Canadian society's … obligation to punish these crimes … Because in some cases I think [restorative justice] would work an injustice because people who should go to jail for a significant amount of time would be spared that fate … But because it's not determinative, because it's simply a consideration that is to be accorded *some* weight …, even if there is to be some discount for the insight gained between the two parties, it wouldn't move [the sentence] leaps and bounds. (Nick)

> the Crown is *not* the victim's lawyer. It has a higher calling to … protect the community and to uphold the law. And sometimes … victims are more interested in vengeance than upholding the law. And if you get … pulled into the wake of a victim who is going full-steam ahead … then the Crown can end up not doing their traditional job. (Jay)

These excerpts demonstrate limitations on what can be done for victims in the criminal justice system. Indeed, in the first scenario, being too lenient at sentencing owing to the use of restorative justice would be inappropriate. Similarly, a victim might seek an overly punitive response. In both situations, these Crowns curtail these desires by not permitting the use of a restorative justice programme.

Another participant, although not necessarily speaking about a victim's desire to use restorative justice, did reiterate that the victim's desire not to proceed through a traditional prosecution is trumped by the offender's dangerousness and the severity of the crime:

> You know, similarly, in some domestic violence cases, you have the complainant say, 'I don't want to proceed, I'm not interested, I don't want to', but I know there's been a long history of domestic violence and I might say, 'Well I hear you but, that's not my position. And that's not the position of the Crown'. Or sometimes they'll say, 'I don't want him to go to jail'. I hear what you have to say, it's a consideration. But at the end of the day, he's dangerous. It's demonstrably unfit to have a sentence that does not include jail for something like that. (Tony).

Indeed, the use of restorative justice in cases of domestic violence was almost unanimously excluded as a possibility in case processing among participants. Those who were not immediately against this possibility did admit that it would take an incredibly convincing argument for restorative justice to proceed as the risk of the offender could not be managed through restorative justice. Nevertheless, it can be gleaned here that protecting the victim from potential

harm in a restorative justice forum and protecting the public from a 'dangerous' individual supersede the desires of the victim to avoid prosecution or a jail sentence.

In all these situations, the need to protect society and reduce the risk of recidivism or the need to punish the offender come before victim satisfaction. This is not to say that victims are uninterested in safety and protection; rather, this demonstrates that Crown attorneys' evaluation of the risk of future harm to victims and society determine whether other victims' needs are to be met. If victims' needs are only tied to their safety and that of society, there is no issue. However, if victims have needs beyond this, they must hope Crown attorneys do not deem safety to be an issue in their case, or they risk not having these needs met.

4 Discussion and conclusion

The use of restorative justice in a criminal prosecution in Ontario is subject to the approval of the Crown attorney. While some have theorised that restorative justice is limited by risk logics, prosecutors are also theorised to make use of these logics. However, there is a dearth of information on how concerns for risk and its management might influence Crown attorneys in their decisions to use restorative justice programmes. As such, this study sought to respond to this gap by asking: do Crown attorneys' concerns for risk management influence their decision to refer criminal files to restorative justice programmes? If so, how and with what consequences?

This study found that, in Ontario, risk management logics influence Crown attorneys' decision to allow the use of restorative justice in the course of a prosecution. These tendencies can be seen through participants' concerns with reoffending, rehabilitation, public safety and with how they believe restorative justice can respond to these issues.

The implications for such risk analysis on restorative justice are two-fold. First, if Crowns do not perceive restorative justice programmes to decrease recidivism (and thus to be unable to protect society from harm), it is less likely they will use them. Consequently, such a requirement renders restorative justice programmes a risk management tool for increasing public safety by reducing offenders' risk of recidivism. Secondly, as a tool for risk management, victims and their needs can become secondary to the criminogenic needs of the offender.[16]

In regard to the first assertion, it can be gleaned that restorative justice subject to Crown attorney approval can become predicated on its ability to address offenders' risk of recidivism. This is concerning because, while some research has shown a modest positive impact on recidivism, other studies have found no reduction in reoffending (Wong et al., 2016). Nevertheless, at the moment it appears that programmes in Ontario receive the benefit of the doubt

16 While I describe restorative justice as a tool for risk management, this does not preclude positive and productive relationships between restorative justice programmes and Crown attorneys. Moreover, it does not assume that restorative justice is *only* a tool for risk management.

in Crown decision-making, allowing for their continued use. However, should research ever consistently show no benefit to recidivism, restorative justice programmes may lose justification for their use in the criminal justice system. This may limit their use in criminal matters if prosecutors can no longer claim that they help reduce the risk of recidivism.

Borrowing the term from Nick, restorative justice thus becomes a 'tool' for these prosecutors to manage and reduce the risk of recidivism through rehabilitation. Participants described how they assess the risk of recidivism that an individual poses to society and how that risk could be managed using restorative justice owing to its potential for rehabilitating offenders. Crowns felt that restorative justice could offer a chance to responsibilise and transform offenders into better, more law-abiding citizens, reducing their risk of recidivism, as one goal of risk management (Gray, 2005).

These findings are consistent with previous theorisations of risk and restorative justice whereby restorative justice becomes a way to respond to offenders' risk of recidivism (O'Malley, 2006, 2008, 2017; Werth, 2017). However, these studies often lacked empirical evidence for their conclusions, while those that did have data were conducted outside of Canada.

This study finds evidence that these logics can influence the use of restorative justice by Crown attorneys in Ontario. However, in addition to providing this empirical evidence, these findings also integrate Crown attorneys into the relationship between risk and restorative justice, a piece that was previously lacking in the literature. The findings demonstrate that risk management does not simply permeate from the criminal justice system; instead, they highlight risk management being put into practice by prosecutors in their role as gatekeepers to some types of restorative justice programmes. Indeed, in regions such as Ontario, they reinforce risk management by predicating their decision-making regarding the use of restorative justice on their personal evaluation of an offender's risk.

The second assertion regarding the transformation of restorative justice into a risk management tool by Crown attorneys is noteworthy because of the dangers associated with this justice alternative. As discussed previously, public safety and reduced recidivism are not traditional goals of restorative justice (Maruna, 2016; Zehr, 2002).[17] However, if prosecutors' use of restorative justice is contingent on its ability to respond to offenders' criminogenic risk, the needs of victims are necessarily secondary in an approach where all parties have a right to 'equal dignity, concern and respect' (Llewellyn & Howse, 1999: 1); after all, even though victims are considered, Crowns' decisions to use the programme were not determined by a victim's desire for the programme. This strengthens the warning that 'focusing upon desistance might produce an overly offender-centric consideration of restorative justice' (Claes & Shapland, 2016: 303).

This is not to say that victims were unimportant to these Crowns but rather that victims' needs are addressed only once the criminogenic needs of the

17 Note that some restorative justice programmes, such as the Nova Scotia Restorative Justice Program, do have reduced recidivism as a stated goal (Archibald & Llewellyn, 2006: 306).

The International Journal of Restorative Justice 2021 vol. 4(2) pp. 283-304
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offender are managed. Indeed, participants offered several examples where the desires of victims to proceed in a certain manner or to use restorative justice in a criminal case would be overruled by concerns for public safety and managing the risk of recidivism. For example, Abby described how concerns for the victim's needs would be addressed only once she judged public safety not to be at risk. Furthermore, her overarching thought was how restoring the relationship between victim and offender could benefit community safety, rather than addressing the victim's specific needs.

In these ways, evidence of Pavlich's *imitor paradox* (2005) in the context of Ontario's institutionalised restorative justice is strengthened. Indeed, like the findings of Quirouette (2018), risk management logics from the criminal justice system are forced upon programmes and organisations that may not otherwise have this as their primary goal. Nevertheless, restorative justice programmes' dependency on the system obliges them to cooperate to ensure they continue operating.

More generally, this work bolsters claims about the challenges of institutionalising restorative justice in the Canadian criminal justice system. As previously suggested by several authors, I have demonstrated how criminal justice concerns can compromise the practice of restorative justice (McCold, 1998; Wood & Suzuki, 2016; Woolford & Ratner, 2008). However, I have provided a specific example of how one particular value (risk management) can compromise another at the heart of restorative justice theory (the primacy of the victim and their needs). Moreover, this work has provided empirical evidence in a jurisdiction lacking such data.

Nevertheless, these findings are limited in some respects. First, owing to the difficulty of recruiting Crown attorneys, a limited number of interviews were conducted with participants. However, ethnomethodology understands individuals as comprehending and communicating logics shared by the group rather than just their own personal view. This concern is further assuaged when considering the concordance of this study with prior works on the use of institutionalised forms of restorative justice and its relation to risk management. Given the similarities in my findings, the number of interviews conducted was not considered greatly problematic.

It must also be added that all participants practised in Ontario, Canada. Given that the administration of justice is a provincial responsibility, it is possible that the findings do not apply in other regions. However, even if not directly transferable, these findings can indicate what might transpire in other areas when Crown attorneys are integral for the use of restorative justice programmes. Future research in different areas of Canada would be useful in validating the generalisability of these findings.

Despite these limitations, these findings provide an understanding of the referral process for institutionalised restorative justice programmes in Ontario, Canada, where the Crown attorney acts as gatekeeper. Moreover, while offering some insight into the workings of Crown attorneys, this study also provides a concrete example of the reality that restorative justice faces when institutionalised in the criminal justice system.

It is hoped that this study will have both practical and theoretical impacts. In practice, it is hoped that it demonstrates to restorative justice practitioners that for some Crown attorneys the most important objective for any decision they make is to reduce recidivism and protect the public. If they can be convinced of a programme's potential on these grounds, the likelihood of case referrals may increase. This in turn might allow for increased usage in Canada. However, it is up to theorists to decide whether promoting public safety and reduced recidivism to the detriment of the victim is a worthwhile trade-off. If this question is answered affirmatively, it is next a question of asking whether the consequence of this trade-off can be overcome. In this way, I hope this study provides more evidence to further the debate on the institutionalisation of restorative justice and the ways its negative effects can eventually be overcome.

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