

From Restorative Justice  
to Transformative Justice

**Discussion Paper**



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## Preface

The Law Commission of Canada has identified Social Relationships as one of its key research themes. As society becomes more diverse, Canadians are increasingly seeing themselves not just as individuals, but as members of groups. Yet much of our law continues to be based on the assumption that only individuals matter. This is most evident in the way it addresses interpersonal relationships that give rise to conflict.

Traditionally, judicial procedures have presumed that the goal of litigation is to discern the facts that relate to a particular situation of conflict, and then to identify the law that applies to these facts. The adjudicative process is two-sided, adversarial and backward looking. It works to produce winners and losers.

Many of our most important societal issues can be only imperfectly forced into this model. Frequently, there are multiple parties to a conflict. The issues that divide parties are often not two-sided, but are multi-sided. And the remedies sought by persons in conflict are not necessarily just the reparation of some harm or the restoration of a previous situation; often they seek the transformation of a relationship gone sour.

The limits of the criminal and the civil law in responding to conflict have been well worked over by scholars and commentators. This is especially true in relation to the criminal law. A great deal of effort has been devoted to finding alternatives to punishment and incarceration as a way of rehabilitating offenders. The idea of restorative justice is one promising approach to recasting criminal law.

In the law of civil disputes – contracts, property claims, family law, and so on – a like reassessment is underway. Here the goal has usually been to consider alternatives to courts as a way of resolving disputes. Energy has not been invested either in reconceiving the theory and the practice of justice upon which these alternatives should be based or in evaluating the way in which these challenges evidence larger social transformations.

The Law Commission of Canada sees restorative justice in the criminal law and alternative dispute resolution in the civil law as closely connected. They both attempt to trace a new understanding of how we might imagine the processes by which conflicts are named and framed, the assumptions about who is properly a party to a dispute, and what the optimal remedial outcomes might be. This Discussion Paper begins with the idea of restorative justice as it has been developed in the criminal justice system and seeks to extend it, through the notion of transformative justice, to other fields of law.



This Discussion Paper was prepared for the Law Commission of Canada by Dennis Cooley. We are most appreciative of his efforts. We also wish to acknowledge others who have contributed to our Transformative Justice project: Jennifer Llewellyn and Robert Howse, authors of a Background Paper entitled "Restorative Justice – A Conceptual Framework"; participants in the Round Table on Restorative Justice held in the fall of 1998; and those who were active in the electronic discussion group organised by the Law Commission this spring.

We hope this Discussion Paper will generate an extensive debate that will both inform further research under our Social Relationships theme and assist us in preparing a Report on Transformative Justice for submission to the Parliament of Canada. We would be most pleased to receive your comments and reflections:

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## Executive Summary

A child misses a curfew. A worker is reprimanded for a safety violation. An employee releases confidential company information to a competitor. The police arrest a woman for manslaughter. A spouse is rebuked for inappropriate conversation during dinner. A manufacturer is unable to pay for raw materials. Two neighbours refuse to speak after a disagreement about the location of a property line. A manufacturer violates an environmental regulation. A person's dog kills a neighbour's chicken. A hunter shoots a deer without a permit. A couple decides that they can no longer live together. A company goes bankrupt, leaving workers, suppliers and lenders unpaid. The Supreme Court of Canada clarifies the constitutional powers of the Parliament of Canada.

So much of our lives is bounded by situations of conflict that we are often unaware of how events and practices come to be defined as conflict. For this reason too, the implications of the strategies we use to respond to conflict often pass unnoticed. Conflict is more than a disagreement. Conflict occurs when the actions of one individual or group are defined by another as inappropriate and therefore meriting some form of response. Inappropriate behaviour is conduct that is outside the bounds of what is generally regarded as normal or acceptable in a given situation. Conflict is an elemental feature of our society because it engages us in defining and responding to right and wrong.

Some conflicts can cause deep and long-lasting physical and emotional harm. Others produce effects that are fleeting. The intensity of a conflict has both objective and subjective elements. For example, some conflicts may result in only minor property or physical damage but leave long-lasting emotional damage. The subjective element of conflicts alerts us to the fact that the effect of conflicts will depend to a large extent on the perceptions and reactions of the injured party.

Conflict is not just a negative feature of social life. Conflict can also have many positive features. Conflict teaches each one of us right from wrong and fosters moral growth and development in individuals. On a societal level, conflicts help establish what is and is not acceptable behaviour. Conflicts allows us to examine, reaffirm or revise standards of behaviour against competing interests.

Conflict thus presents a challenge and an opportunity for a society. The goal of social policy cannot be simply to eliminate conflict – an impossible task. It is, rather, to capitalise on the transformative potential of conflict, to use conflict as a springboard for moving towards a more just society.



Most people have many different ways of responding to conflict. These can be as simple as tolerating or avoiding offending behaviour or dealing with conflict themselves through self-help. These informal responses appear mundane compared to responses such as criminal and civil trials, both of which are highly formalised and imbued with ritual and symbolism. When we first think about it, we tend to see trials as the normal or even preferred process: we think that dealing with conflict should be a responsibility of government. Yet in our daily lives we rarely encounter these formal responses. Moreover, it is not certain that they are any more sophisticated or effective (or fallible) than the informal methods we use each day.

## Conflict and justice

Conflict and our response to it are directly connected to our individual and social conceptions of what justice requires. What is fair, right and appropriate in any given circumstance? Our sense of justice and injustice is aroused when we face situations of conflict. Our sense of justice is affirmed when we are able to resolve conflict to our satisfaction.

Both the civil and the criminal justice systems, as they are currently constituted, can fail to provide justice in this sense. The public seems to be losing confidence in their ability to respond to its needs and expectations. Civil courts are inaccessible to increasing numbers of people. But beyond the issue of accessibility, Canadians' experience of justice in the civil courts has come to be characterised by disenchantment and a sense of disenfranchisement. The situation is mirrored in the criminal justice system. Victims and offenders are detached from the criminal process. Police, courts and corrections professionals recognise that they are reaching the limits of the current system's capacity to respond effectively to crime. Both the general public and professionals are concerned that current policy and practices leave much to be desired. Both are searching for new methods to resolve conflicts.

## Restorative justice: Another approach to conflict

The idea of restorative justice represents an innovative way of responding to crime and conflict. Although approaches we now call restorative justice can be found in the histories of peoples across the world, the most recent movement towards restorative justice in western criminal law systems began in the early 1970s. Two Canadians, Mark Yantzi and Dave Worth, asked a judge in Kitchener, Ontario to permit them to try a different





approach in dealing with two young offenders arrested for vandalism. The approach was to allow the victims and the offenders to take a key role in deciding the most appropriate method of responding to the harm done by the conflict. Since then, the scope of restorative justice practices has grown considerably and restorative justice has moved from the margins of criminal justice policy to a point where it is now part of the mainstream.

Restorative justice begins from the premise that the most effective response to conflict is to repair the harm done by the wrongful act. Material and symbolic reparations begin the process of restoration, but restoration means more than receiving compensation. For those harmed, restoration means repairing the actual damage caused by wrongdoing *and* restoring their sense of control over their lives. For wrongdoers, restoration involves accepting responsibility for their actions by repairing any harm that they caused *and* dealing with the issues that contributed to the wrongdoing. For the community, restoration means denouncing wrongdoers' behaviour *and* assisting victims and offenders in their process of restoration. The restorative justice approach responds to the immediate conflict *and* encourages the development of respectful relationships among those who are wrongdoers, those who have suffered harm and members of the community.

Today, there are a variety of restorative justice programs in the criminal justice field. Most programs rest on the following three principles:

- Crime is a violation of a relationship among victims, offenders and the community.
- Responses to crime should encourage the active involvement of victim, offender and community.
- A consensus approach to justice is the most effective response to crime.

Wherever possible, these restorative justice programs bring wrongdoers, those who have suffered harm and community members together to work through the aftermath of a crime in a manner that reflects and responds to the needs of all parties.

## The prospect of transformative justice

Other legal domains exhibit many of the problems found in the criminal justice system: law is frequently unresponsive to the needs of people in conflict; conflicts are framed in legal language rather than in terms of how individuals experience them; remedies often do not provide adequate redress for those who have been harmed; and the process is frequently time-

**IDEAS AND INNOVATIONS** sometimes have humble, and even unplanned beginnings. A Saturday night vandalism spree by a couple of intoxicated teenagers resentful of the local police in a small town called Elmira was hardly the making of headlines or criminal justice history. And when the two young men were subsequently apprehended and pleaded guilty on 28 May 1974 to twenty-two counts of wilful damage, they had no idea that their experiences would be told and retold as the 'Elmira Case' in countless articles, speeches, and conference presentations.

D.E. Peachey, "The Kitchener Experiment" in M. Wright & B. Galaway, eds., *Mediation and Criminal Justice: Victims, Offenders and Community* (London: Sage Publications, 1989), 14 at 14.



consuming, costly and confusing. Might not we be able to apply the ideas of restorative justice to conflicts in the civil law arising in areas such as environmental law, corporate law, labour relations, consumer bankruptcy and family law to name a few? Might we even be able to use these ideas in handling civil disputes where there is no obvious wrong or wrongdoer?

This Discussion Paper is the first stage of the Law Commission of Canada's work under its Social Relationships theme. We believe there is much to be learned about how to handle complex relationships involving several competing interests from the way restorative justice is practised in Canada and throughout the world. In exploring how restorative justice can be developed within the criminal justice system, we also seek to test whether its framework and principles can be used to establish new understandings of processes for resolving civil disputes.



# I Introduction

Law and justice are two of the most important ideas our society uses to describe, shape and nurture relationships. They are also among the most controversial. The relationship between them is not always close and occasionally they stand in opposition. Sometimes law appears as among our noblest social achievements; on other occasions it offers little solace to those who must endure relationships that are painful, unfulfilling or dysfunctional.

When relationships are built upon trust, interdependence and respect it is common to use words like healthy and harmonious to describe them. Here law can be seen as offering rules, procedures and institutions that facilitate just interactions between people. When any one of trust, interdependence and respect is absent, we usually describe the relationship as being out of balance. Often, the lack of balance is manifest in a conflict.

But this is not the only way that everyday human interaction can be viewed. We can also see disagreement and conflict as an inevitable product of everyday life. People have their own interests, desires and projects. These are constantly running up against interests, desires and projects of others. Moreover, sometimes activities which do not begin in disagreement wind up in conflict because circumstances or points of view have changed. In such cases we see an entirely different side of law: law as a means to achieve justice by controlling socially inappropriate behaviour that reveals itself in conflict.

For centuries philosophers, statespersons, and jurists have debated how these two understandings can be reconciled. The debate has often centred on the criminal law, where the "law as a means of social control" perspective dominates. Law announces a series of behaviours that it deems unjust, and establishes processes for labelling, detecting and repressing them. In western law, we have long believed that giving such a role to the state is the best way to prevent blood-feuds and other escalations of conflict.

Today, this conclusion is increasingly coming into question. The state-sponsored system of criminal justice no longer appears adequate to address our needs. Many think that the "law as a means to facilitate harmonious social interaction" perspective should have a greater place in our understanding of the criminal law. Here the focus is on relationships between the parties and how these relationships are shaped by the law and other social institutions.

Restorative justice has been the concept by which this alternative understanding of the criminal law usually finds expression. But it also has



echoes in contemporary approaches to civil disputing that take their distance from adversarial adjudication. Both lead to new understandings of how conflicts are named and framed, and how conflict can be dealt with creatively.

In this Discussion Paper we begin by considering the transformative potential of the idea of conflict itself. Sufficient energy has not been invested either in reconceiving conflict or the theory and the practices of justice upon which legal responses to conflict should rest. In this light, the initial question is: how ought we to understand and approach conflict?



## II Thinking about Conflict

Conflict permeates all aspects of our lives; it is present in our homes, at work and in the relations we have as members of communities. This is not to suggest that we live our daily lives under a siege mentality. Conflicts vary in intensity and duration. Some conflicts cause deep and lasting physical and emotional damage. Indeed, some conflicts pervade our lives so thoroughly that they come to define who we are. Other conflicts are simply irritants, mild aggravations that roll off our backs as we go through our daily routines. Moreover, conflicts are not entirely negative. On an individual level, they alert us to how our behaviour affects others and to different ways of looking at events and situations. On a societal level, conflict is frequently the impetus for change and social development. How we respond to the challenges and opportunities presented by conflict reflects our conception of justice.

### Elements of conflict

Conflict arises from behaviour of an individual or group that is defined by another as inappropriate and as meriting a response. The behaviour may be pathological (the sexual deviance of a paedophile, for example) but most inappropriate behaviour is of a less serious and more commonplace nature (smoking in a non-smoking area, for example). Conflict and our response to it rise and fall together. They are flip sides of the same coin of social interaction.

Conflict, as the term is used here, is a relational concept. It necessarily involves the interaction of people or groups in society. It does not include psychological conflict, the psychic tension or anxiety one may experience when faced with a problem, or the mental struggle resulting from incompatible or opposing needs, drives, or wishes. This type of conflict can have serious repercussions for individuals and those close to them. We shall, however, limit the term to conflicts that involve disagreements over right and wrong (including degrees of 'rightness' or degrees of 'wrongfulness') that occur between individuals or groups.

Conflict is not the opposite of order; conflict and order do not exist in a zero sum relation. In many instances the rules and methods we use to bring about order in our society actually engender conflict, either intentionally or unintentionally. More fundamentally, conflict among people is inevitable because it involves labelling behaviour as right or wrong. Clashes over

**CONFLICT OCCURS** whenever anyone provokes or expresses a grievance. It occurs whenever someone engages in conduct that someone else defines as deviant or whenever someone subjects someone else to social control.

D. Black, *The Social Structure of Right and Wrong*, rev. ed. (San Diego, CA; Academic Press, 1998) at xiii.



conceptions of right and wrong behaviour characterise the human condition. Such conceptions often vary along the major axes of our societies: culture, geography, gender, generation, ethnicity, race and religion. Some notions of right and wrong are more or less constant across these axes (homicide, for example) while others exhibit a much greater variability (the use of alcohol, for example). Some engage most members of society while others directly relate to particular groups within society. Whatever the criminal law might say, peoples' conceptions of right and wrong can change across social settings and over time.

Discussions of right and wrong are present in all facets of our private and public life. Within the family, they are frequent, particularly with respect to interactions between parents and children. In our work lives we are continually called upon to create, interpret, or observe the rules and procedures that structure our relationships with co-workers and the general public. As members of a community we engage in discussions both on issues of local and particular concern (zoning and by-law enforcement, for example) and on issues of a national and wide-ranging scope (constitutional law, euthanasia, trade policy and immigration, for example). These discussions are focussed on how to understand the meaning of right and wrong, on how to respond to actions we see as wrongful and on how to prevent actions giving rise to conflicts in the future. It is through these types of discussions that notions of right and wrong are crystallised into social rules and practices. These discussions are never complete. Standards of behaviour, whether formal or informal, are constantly challenged, reconsidered and scrutinised.

Agreeing on general principles to define right and wrong behaviour is an important first step in establishing the scope of a conflict. But conflict also occurs over the interpretation and application of definitions of right and wrong. An environmental organisation and a mining company may recognise the need to minimise environmental degradation but disagree over the interpretation of emission standards established by a regulatory body. Two siblings may agree with the general principle that a toy should be shared but they may have conflicting views on how this general principle ought to be put into practice. Two countries may enter into negotiations to draft a joint management agreement to protect fish stocks, but they cannot agree on how the catch is to be distributed amongst each nation's fishers. Many reasons account for disagreements over the interpretation of an agreed upon principle: the inherent uncertainty of language, the difficulty of quantifying or measuring practices against abstract principles, the desire



to gain an unfair competitive advantage, spite and the protection of economic or political interests are just a few.

Even if conceptions of right and wrong and their meaning in practice were more or less agreed upon by all members of society, conflicts would still arise. Individuals, for a variety of reasons, sometimes engage in behaviour that they know will be met with disapproval by others. Often, a community comes to a better understanding of its values because there are those who expressly contest these values.

The intensity of a conflict can be measured objectively and subjectively. Objectively, we can assess the physical and emotional harm to persons and the damage to property. Wars, violent insurrections and other forms of armed conflict result in substantially more damage than spray-painting graffiti or illegal parking. The intensity of a conflict also has subjective elements. Suppose a couple's apartment is broken into and some belongings are stolen. The two individuals may respond quite differently; one may experience greater levels of fear and anxiety and may change his or her behaviour or may invest in a security alarm or window bars to prevent future break-ins. The other may simply replace the lost articles and carry on with life in a normal fashion.

The objective and subjective effects of conflict do not always go hand in hand. Conflicts that result in high levels of property and physical damage are likely to have substantial subjective effects, but this is not always the case. How people experience wrongdoing is affected by their age, gender, their relationship to the other parties in the conflict, their reaction to previous conflicts and several other variables. In many circumstances, the objective damage caused by an incident can be remedied rather easily, but its subjective repercussions may last for weeks, months or even years.

Conflict causes pain and loss. It damages people and property, sometimes irreparably. Conflict has the potential to destroy relationships between people. But there can also be positive effects of conflict. Conflict defines boundaries, both in a physical sense and a social sense. It establishes limits as to what is and is not acceptable behaviour. Children learn what is socially acceptable behaviour through conflicts with their peers, their parents, their teachers and others they encounter in their lives. Conflict clarifies and reinforces standards in society.

On an individual level conflict provides an opportunity for growth and moral development. We learn from our mistakes. We learn to develop an appreciative understanding of the interests and concerns of others. At the community level, conflict provides an opportunity to discuss the values and standards that underpin rules and regulations, to examine their



assumptions and to test their validity against opposing claims. In this way, conflict is instrumental in changing formal rules to better accommodate the competing interests of individuals and groups.

## Different ways of defining conflict situations

The way we understand and judge behaviour is never fixed. It reflects our striving for a better understanding of right and wrong as well as the ebb and flow of power relations in our society. For example, environmental groups have sought for many years to re-define certain accepted practices – clear-cut logging, commercial whaling, the seal hunt and natural gas flaring – as inappropriate. In short, they have tried to define a conflict. It is not enough to simply generate conflict. We also have to specify the type of conflict that exists. Whether we see a particular conflict as a health issue, a tort, an error in judgement, a breach of contract, a personal short-coming, evidence of psychosis, a violation of international law, an economic matter, or in some other fashion in part reflects how successful competing groups have been in advancing their interests. These different characterisations are not, of course, exclusive: violently striking another person may be at the same time a crime, evidence of psychosis and a personal shortcoming. Nor are they fixed: violently striking another person may be defined first as a personal shortcoming, then a crime, and then evidence of psychosis. Each party to a conflict may see the conflict differently, which only adds to the complexity of resolving it.

Conflict is a relational concept; it occurs when one party defines the actions of another as inappropriate and therefore meriting some type of response. The party that was wronged is not always in the best position to recognise the act as deviant. In the case of incest, for example, a child may be told by an authority figure that sexual relations between an adult and a child are appropriate. The child may accept the abuse as normal behaviour. Only after third party intervention does the child come to understand this behaviour as wrong.

There is nothing inherent about a conflict situation that would privilege one characterisation over another. Which characterisation prevails is largely shaped by the relative power of different groups in society at different times. Business and labour, gender, race and ethnicity are common ways by which we group diverse interests in society. The power of these groups to have their interests recognised varies over time. Nonetheless, because of their structural position in society and because of the resources they have available some groups have a decided advantage in defining





conflicts – business more than labour, the wealthy more than poor, men more than women and non-Aboriginals more than Aboriginals, for example.

The relationship between power and conflict is exposed when characterisations of conflict change as a result of political struggle among competing groups. Health advocates fought tobacco companies to change the public's view of cigarette smoking from a lifestyle issue to a health issue. Conversely, many cancer specialists are now lobbying to have cannabis recognised as a legitimate medical treatment rather than strictly as a substance subject to criminal sanctions.

The definition of a conflict can also be a means by which relationships of unequal power are maintained. Until the last quarter of this century domestic assault was treated as a private issue. Law enforcement agencies were reluctant to intervene in disputes that the law defined as private issues between men and women. The definition and application of the law reflected power imbalances based on gender; defining spousal abuse as a private act, a matter best left within the family, was one of many ways in which law functioned to accord men legal rights *over* women. It was only through the efforts of women's organisations and other groups that spousal abuse was recognised and dealt with as a criminal act. The quality of the act did not change. But its definition did. As the power of different groups grew, the bias in traditional definitions of public and private came to be exposed. In a very real sense, how we define conflict is a product of struggle between competing groups in a society.

This competition for power is also reflected in the language we use to describe a conflict and the types of knowledge and experience that are deemed relevant in discussions about it. The medical profession, social services, labour, the criminal and civil law, victims' organisations, environmentalists, health groups, economists and business interests have their own language and set of concepts. These they use to qualify particular experiences, to promote certain kinds of knowledge and to discount alternative accounts. The legal system, for example, takes conflicts that occur in our everyday lives and translates them into the language of rights and wrongs. Parties to a conflict are constituted as legal subjects with rights rather than as individuals with problems that need to be solved. Those aspects of the conflict that are legally relevant are recast within the language of the law while legally irrelevant events are left aside, regardless of their importance to the participants.

The way we think about a conflict establishes a set of criteria against which a successful outcome is measured. Defining a conflict one way brings certain issues to the foreground and pushes others to the background.

**IF WE ACCEPT THAT LAW**, like science, makes a claim to truth and that this is indivisible from the exercise of power, we can see that law exercises power not simply in its material effects (judgements) but also in its ability to disqualify other knowledges and experiences. Non-legal knowledge is therefore suspect and/or secondary. Everyday experiences are of little interest in terms of their meaning for individuals. Rather these experiences must be translated into another form in order to become 'legal' issues and before they can be processed through the legal system.

C. Smart, *Feminism and the Power of Law* (London and New York: Routledge, 1989) at 11.



The use of illicit drugs is currently viewed as a criminal problem. Once defined as a criminal problem, law enforcement agencies are called upon to police the use and distribution of illicit drugs. The primary goal is to reduce the incidence of illicit drug use through arrests and convictions. Prevention and treatment for the effects of drug use are secondary goals. If drug use were re-defined as a health problem (as cigarette smoking currently is defined), the primary goal would shift to prevention and cessation. Treatment would become a high priority. Economic issues around taxing the sale of formerly illicit drugs would move to the foreground and the enforcement role of police would recede.

Once an issue is characterised in one particular way, there is an institutional impetus to maintain that characterisation. This is particularly true of the criminal law. For example, once a given dispute has been defined by the police as a criminal offence, the original parties to it are almost powerless to change the definition. The conflict is now under the control of the state; the participants in the dispute may be consulted or they may be asked to provide evidence in court, but the decision on how to proceed with the case is ultimately the state's. There is no necessary connection between the interests of the state and the interests of the participants in conflict: the victim may want a quick resolution to the case, whereas the Crown may wish to hold the case over to collect more evidence; the victim may want to be compensated for the damage caused by the crime whereas the Crown may be primarily interested in a conviction; the victim may simply want to put the incident out of her mind or deal with it privately, whereas the Crown may want the victim to provide evidence of the crime in court; the victim may want the Crown to proceed with all the charges laid by the police, while the Crown may conclude that it only has enough evidence to proceed with some of these.

## Responses to conflict

Conflict arises when actions are judged to be inappropriate. Responses to conflict are how we put into practice standards of appropriate conduct, or principles of right and wrong. Our responses to conflict can take many forms. They may reflect a highly individualised sense of justice, as in a personal retaliation for a perceived wrong. Or they may be much broader in scope and reflect more abstract considerations of justice such as procedural fairness, equity and proportionality.

One way to think about different responses to conflict is according to the degree of formality they exhibit. There are many formal arenas for handling



conflict: the civil and criminal law systems, administrative tribunals, regulatory agencies, tax courts, human rights tribunals, labour relations boards, and professional association disciplinary panels, to name only a few. The degree of formality varies from setting to setting but each of these formal responses to conflict has its own particular sphere of jurisdiction, each has a cadre of professionals with expert knowledge regarding the rules of process that govern its particular tribunal and each has a defined set of sanctions or remedies that can be applied in an effort to resolve the conflict.

A central feature of formal responses to conflict is that the authority of the decision-maker ultimately rests on coercion backed up by state force. The link between the decision of a criminal court judge and the legitimate use of force is direct and immediate. In other settings, this link is more attenuated. Opposing sides to a civil trial may negotiate statements of fact or they may enter into a settlement prior to the court's decision. Nevertheless, these negotiations and settlements take place against the backdrop of the authority of the court to impose a decision and to issue an order enforcing the judgement.

When we think about how to resolve conflicts, we tend to think first of formal types of responses: for example, the criminal and civil courts. Considerable resources and energy are invested in the courts to make them more efficient and improve the quality of justice they render. By focussing on these formal processes, however, we tend to neglect other responses to conflict that play an equally prominent, or perhaps more prominent, role in our lives. Often we handle disputes ourselves. Sometimes the court system may be unavailable or inaccessible to individuals. Abused children, battered partners, the poor and others often lack the power or resources to seek out agencies such as the police or social service workers to assist them in resolving a conflict. Frequently they are threatened with further violence if they do. The Law Commission of Canada's examination of child abuse in institutions tells us that people who lack power are often denied access to the legal system. They are placed in a position of having to tolerate abuse or deal with the situation themselves.

Sometimes, even if the courts are available people choose to deal with conflict informally. Neighbours settle disputes with a fence. A small business owner reaches an understanding with a supplier. Consumers who purchased defective products may accept the loss rather than face the uncertainty, cost and time of bringing a lawsuit. Prisoners, outlaw motorcycle gangs and drug dealers resolve conflicts themselves rather than draw the attention of police and other officials.

**STUDENTS IDENTIFIED THE ADULTS** who had abused them. Students identified other children who had been victims of abuse. Students disclosed that they had, in turn, abused other children. Their stories were not acted upon by the police or the authorities responsible for their care. ... Jericho Hill dormitory staff denied any knowledge of abuse and were believed, even though they could clearly be viewed as in a position of conflict, needing to protect their own self-interests. It appears that some staff were aware of abuse situations. Those who disbelieved attempted to discredit and remove the advocates who persisted in presenting the children's disclosures as credible.

Ombudsman of British Columbia. *Abuse of Deaf Students at Jericho Hill, Public Report No. 32*, November 1993.



Aggression, avoidance and toleration are methods of informal conflict resolution. Some of what we define as crime is aggressive self-help, or using violence as a means of resolving a conflict. Avoidance includes walking away from a conflict that is in progress or not exposing oneself to situations in which conflict is likely to occur. Resignation, running away, hiding, shunning and migration are specific examples of avoidance. Toleration is another response to conflict. We may simply tolerate the inappropriate behaviour of those we love, those we fear and those who are more powerful.

Therapy, counselling, popular justice forums, community organisations, meetings, discussion groups and working parties are less formal responses to conflict that do, nonetheless, involve other people. These forums are generally, but not always, at a distance from the government. They tend to be more local, less bureaucratic and less likely to rely on coercion as a means of ensuring that participants comply with decisions reached. Mediation, negotiation, settlement and reconciliation are well-known methods of arriving at consensually-based resolutions to conflicts.

The relationship between disputing parties has a large bearing on how conflict is handled. Conflicts can occur between individuals, between an individual and a collectivity and between collectivities. The inability to repay money borrowed from a family member will be dealt with differently than a default on a bank loan. A small business takes a different approach to labour-management issues than a multi-national corporation. Those with more power may favour the unilateral imposition of a resolution to a conflict as opposed to a negotiated or consensually-based resolution. Parties who are interdependent (on-going business and professional relationships, for example) or whose mobility is restricted (residential schools, prison and army barracks, for example) may favour certain responses to conflict that are not available to, or not favoured by parties who are independent or transient.

The subject matter of the conflict also affects the availability of options for resolving it. For example, suppose two enterprises negotiate a million dollar contract for the sale of computer chips. The chips are of sub-standard quality. In the normal course of business, this situation may be defined as a breach of contract, and may lead to a lawsuit. Suppose, however, that instead of computer chips the product in question was illegal drugs. In this case a breach of contract action is unavailable since the courts will not enforce an illegal contract. Moreover, the parties themselves would likely prefer an informal method of conflict resolution that does not involve the state.



## Thinking about conflict restoratively

Thinking creatively about conflict is the first step to finding responses that resonate with how Canadians perceive justice. This is true whether the substance of the conflict is a bank robbery, environmental pollution, a consumer dispute or an argument on a school playground.

Restorative justice is a general approach to the challenge and opportunity of conflict. It offers a framework for thinking about and responding to conflict and crime, rather than a unified theory or philosophy of justice. The restorative justice approach has been used to develop a number of programs that are currently operating in Canada and elsewhere: victim-offender mediation, sentencing circles, family group counselling and sentencing panels, among others.

The starting point of most restorative justice programs is the idea that conflicts that are called crimes should not be viewed just (or even primarily) as transgressions against the state; conflict represents the rupture of a relationship between two or more people. For this reason, the criminal justice system ought to focus on and address the harm that was caused by the wrongful act. Victims, offenders and the community should, as much as possible, participate in dealing with that harm. Offenders are encouraged to take responsibility for their actions. Victims are provided an opportunity for the damage caused by the act to be healed. Community members are actively involved in the process of resolving the conflict. While the specific role of the police, Crown attorneys and the judiciary varies from program to program, the key idea is that they should facilitate the settlement of the conflict to the satisfaction of the parties involved.

**WHAT IS CALLED FOR** is no less than a *fundamental shift in direction* to change the way we see the whole picture of what justice is about.

Church Council on Justice and Corrections, *Satisfying Justice: A Compendium Of Initiatives, Programs And Legislative Measures* (Ottawa: Church Council on Justice and Corrections, 1996), online: Correctional Service of Canada [http://www.csc-scc.gc.ca/justice/e\\_justoc.htm](http://www.csc-scc.gc.ca/justice/e_justoc.htm)





### III Thinking About Justice

The recent interest in restorative justice developed as a response to dissatisfaction with certain aspects of the criminal justice process. Justice means achieving a situation in which the conduct or action of individuals is considered to be fair, right and appropriate for the given circumstances. Justice reflects our sense of right and wrong. Our sense of justice is called into question when our understanding of what is right is offended and is restored when wrongs are addressed. Justice, then, is bound up with responses to conflict.

When we talk about responses to conflict as justice we move beyond simply describing how one response works or why one particular response is more likely to occur in a particular setting. We are concerned with how things ought to be. Of course, volumes have been written about how the courts ought to render justice in situations of conflict. What is often overlooked, however, is that we are confronted with similar questions as we go through our daily routines. Should I reprimand my child for missing a curfew even though her explanation for why she was late sounded reasonable? What type of reprimand does she deserve? What purpose will a reprimand achieve?

#### Concerns with the criminal justice system

Over the past several decades many Canadians have criticised the law for its ineffectiveness in controlling (let alone reducing) the amount of crime in society. The courts, in particular, are said to be 'soft on crime', most recently in reference to young offenders. Being 'soft on crime' is the public's way of saying that sentencing is too lenient. Yet crime rates have been actually declining in recent years and Canada's rate of incarceration is among the highest of western nations.

Public opinion surveys have shown that some Canadians *underestimate* the severity of sentences that are actually handed down in youth and adult courts. This may be related to the type of information about sentencing that they receive from the media. The media tend to focus on violent crime. This leads Canadians to over-estimate the level of violent crime in their own neighbourhood. Furthermore, stories about sentencing generally lack sufficient details about the context of a crime.

This portrayal of crime affects how people regard criminal sentencing. Research has shown that when Canadians are asked to comment on the

**THE CRIME RATE ... FELL** for the seventh consecutive year in 1998. The 4.1% drop resulted in the lowest rate in almost 20 years. ... Since peaking in 1991, the national crime rate has declined 21.7%. The rate for violent crimes was down 1.5% in 1998, the sixth consecutive annual decline. ... The property crime rate fell 6.7% in 1998, continuing the general decline since 1991. The youth crime rate ... has been dropping since 1991, including a 4.0% decrease in 1998.

Statistics Canada, "Crime Statistics, 1998", The Daily (Wednesday July 22, 1998), online: Statistics Canada <http://www.statcan.ca:80/Daily/English/990721/d990721b.htm>

**THE PUBLIC HAS VERY LITTLE CONFIDENCE** in the justice system's ability to deal with crime. Major flaws in the system are mainly seen as being related to the lack of severity in sentencing, the fact that inmates are released prior to completing their sentences, the parole board's inability to determine and assess risk properly, and the conditions in Canada's prisons which are viewed as being luxurious.

Angus Reid Group, *Alternatives to Incarceration, Final Report submitted to Solicitor General* (Ottawa: Angus Reid Group, April 1996) at 3.



**VICTIMS ARE CONFUSED**, fearful, and angry. They want to know why this happened, and why it happened to them. They feel insecure and do not know who to trust or rely on for support, understanding, and help. Not only do they suffer physically, emotionally, and financially from their victimisation, but they then face, often for the first time in their lives, the confusing complexity of the criminal justice system and all of its at times conflicting elements.

Canada, *Report of the Standing Committee on Justice and Human Rights: Victims' Rights – A Voice, Not a Veto, Report 14* (Ottawa: 1998) at chap. 1, online: Standing Committee on Justice and Human Rights <http://www.parl.gc.ca/InfoComDoc/3...URL/Studies/Reports/jurirp14-e.htm>

**AS AGENTS OF THE STATE WORK** on the accused's case, they redefine it and transform it in terms of the criminal law and also use the criminal law to regulate the process of resolution....They take over the accused's trouble or conflict and make it state property ... leaving the accused to await an outcome via a process that to him is complex, difficult to comprehend, and mystical and which makes him powerless.

R. V. Ericson & P. M. Baranek, *The Ordering Of Justice: A Study Of Accused Persons As Dependents In The Criminal Process* (Toronto: University of Toronto Press, 1982) at 216.

appropriateness of a sentence after reading newspaper accounts of a crime, they tend to think that the sentence was too lenient. However, when they are asked to comment on a sentence after reading court documents most believe that the sentence was too harsh.

Concerns have also been expressed about the ability of the correctional system to deter or rehabilitate offenders. Some people believe that life in prison is too comfortable and is not sufficiently punitive. This view is not shared by many who are familiar with the system. They see the high rate of repeat offenders as a direct consequence of the violent, over-crowded and inhospitable living conditions inside most prisons. Rather than rehabilitating offenders, prisons make some offenders more prone to commit crimes when they are released.

Canadians are also disillusioned with the conditional release system. But again, research shows that a high percentage of the population is supportive of conditional release and alternatives to incarceration for low risk, non-violent offenders. Other studies show that these alternatives are effective methods of dealing with offenders.

Dissatisfaction with the criminal law is particularly acute among those most affected by the process: victims and offenders. Victims are largely left out of the court process, except in their role as witnesses. It is assumed that the interests of the state and the interests of the victim are the same. Most victims want a public affirmation that what occurred to them was wrong, a need to which the criminal justice system is capable of responding. However, many victims also want answers to questions that the criminal courts are not structured to provide: Why did this happen to me? Will I be compensated for my damaged property? Victims' rights organisations have also expressed concerns about procedural issues. They feel that they have been excluded from the process and have lobbied for greater control over and input into decisions that are made regarding how cases are processed through the system. Finally, victims lack important information about what happens to offenders as they progress through the correctional system.

Many positive steps have been taken to assist victims. For example, victim impact statements may now be introduced in court. Victim/witness support programs have also been established in many jurisdictions. The goal of these programs is to assist victims and witnesses in understanding the trial process and to help avoid re-victimisation. Nonetheless, neither alters the structural position of victims within the system. Victims remain on the outside looking in, rather than being engaged as direct and active decision-makers.

The current criminal process also does not always do justice for offenders. It encourages many to be passive and to plead guilty in order to receive the





most lenient sentence possible. Their crime is objectified and abstracted from the social context in which it took place. Offenders' actions are cast in terms of violations of the Criminal Code rather than as violations of others. The offender's lawyer uses the law to distance the offender as far as possible from the conflict. Offenders are rarely provided the opportunity to develop an appreciation of the impact their actions have on the lives of victims, and seldom are they asked to repair any damage they have caused. Because it offers few incentives for offenders to accept responsibility for their actions, the trial process does little to instil in them respect for the law or respect for others.

The dissatisfaction of some Canadians with the criminal justice system often surfaces as outrage or shock in response to a particularly heinous crime or what is considered to be an inappropriate response by the courts or police. Crime fuels moral outrage and enflames passions. Parliament frequently responds by offering more stringent measures that it thinks will better protect law-abiding citizens – incarcerating more, and younger, offenders for longer periods of time in harsher prison environments and with fewer chances for early release. There are also forces pulling criminal justice policy in the opposite direction. Officials in the corrections system are seeking alternatives to incarceration by diverting offenders from prisons and increasing the number of prisoners eligible for community supervision. Moreover, these debates are taking place within the context of a government-wide realignment of social welfare policies and a climate of fiscal restraint.

## Private and public punishment

The above criticisms cut to the core of the criminal justice system: they reflect a fundamental scepticism about its capacity to deliver justice. Many people do not believe that there is now a connection between the requirements of justice and the ways we respond to crime. To assess whether this is a valid belief it is necessary to examine different approaches to this relationship.

Revenge is individualised justice or justice as self-help. It is a personal matter, an individual response to a harm. An injured party seeks revenge against a wrongdoer in response to a harm for which the wrongdoer was responsible. In the eye of the injured party, the wrongdoer has gained an unfair advantage resulting in an imbalance in their relationship. Punishment is a means of restoring this relationship to one of equality. The imposition of a harm equivalent to the original harm imposed on the

...**THE PERCEIVED NORMALITY** of high crime rates, together with the widely acknowledged limitations of criminal justice agencies, have begun to erode one of the foundational myths of modern societies: namely, the myth that the sovereign state is capable of providing security, law and order, and crime control within its territorial boundaries.

D. Garland, "The Limits Of The Sovereign State: Strategies Of Crime Control In Contemporary Society" (1996) 36 *British Journal of Criminology* 445 at 448.



injured party confirms that the injured party did not deserve the original harm. Revenge satisfies an individual need for vindication by ‘evening the score’ with the wrongdoer.

Because it is personal, there is no necessary reason to believe that what the injured party perceived as a harm was a legitimate harm or a harm that should be revenged. Revenge is also often highly emotional and random. A harm to one individual may result in a serious retaliation while a similar harm to another person may result in no retaliation. Revenge, therefore, is disconnected from proportionality. There is no way of ensuring that the punishment is proportionate to the harm done, nor is it possible to ensure that equal amounts of punishment are applied to similar wrongs.

Retribution is revenge formalised by the state. The idea of retributive justice is backward-looking; justice requires that wrongdoers receive their moral deserts. They should be punished because of their moral wrongdoing. The law reflects the basic standards of behaviour in a community; therefore, a wrong done to an individual is, by extension, a wrong done to the community. The state is justified in exacting retribution when there has been a violation of the law. In the hands of the state, revenge is cleansed of its arbitrary and capricious qualities. In a pure retributive system, punishment should be proportional to the harm caused by the act, and should not vary according to the characteristics of the wrongdoer or the individual who suffered harm. State-controlled retribution responds to the need to punish to restore a sense of balance between victims and offenders but it does so in a manner that is less emotional, more rational and more socially constructive than revenge. Impartiality is assured because justice is removed from the hands of individuals and placed in the courts which make decisions according to standardised criteria.

Notions of corrective or reparative justice operate in the field of civil disputes much like retributive justice operates in the criminal law. They focus on offering wrongdoers the opportunity to put right the wrong by making good the damage that was caused. Reparations indicate a willingness on the part of the wrongdoer to accept responsibility for the harm that was caused. Reparations are also an acknowledgement of the victim’s suffering. The return of the property re-establishes a relationship of equality. Thus, a violation of corrective justice involves one party’s material gain at the expense of another. Similar to ‘an eye for an eye’, the wrongdoer must return no more or less than what the victim lost. Justice is a matter of the transfer of resources from one party to another.

There are also forward-looking theories of justice. These theories seek to maximise the common good. Responses to conflict are not justified in terms



of desert or individual moral culpability. Rather the only just response to conflict is one that maximises social utility. Punishment may achieve this goal by deterring others from committing crimes. Punishment may also incapacitate an individual offender and therefore prevent further crime. Punishment may also rehabilitate the offender, in which case social utility is achieved through a reduction in crime.

The theory of distributive justice responds to the assumption that benefits and punishments in society ought to be distributed amongst individuals in accordance with some principle of proportionality. Distributive justice closely corresponds to our sense of fairness. The values that determine a just distribution are also variable and many volumes have been written about which should be preferred. 'Equal pay for work of equal value' responds to equity. 'One person, one vote' responds to equality. 'To each according to his or her need' responds to our concern for social justice in the distribution of goods and services. But what if need became the value that determined pay, or merit became the value for determining the number of votes or equality the value for determining the distribution of goods and services?

Justice can also be understood solely in procedural terms: regardless of the substantive outcome of their case, people want to be treated fairly by judges. They want judges to be impartial, to listen to them, to give appropriate consideration to their story and to make decisions in accordance with existing standards. A focus on procedural justice affirms that people are concerned about fairness, honesty and respect for rights in decision making. Being treated with respect and dignity reaffirms the place of individuals in society and shows that their views and concerns are valid regardless of factors such as social standing, age, gender or ethnicity.

## Justice as a lived experience

These different conceptions of justice resonate with quite different moral concerns and interests. Each provides a unique perspective on how to respond to conflict. Each perspective is also partial. There is no way of ensuring that revenge does not lead to excessive retaliation. Retribution does not establish why we should punish offenders in order to restore the moral balance. Reparative and corrective justice are difficult to apply in conflicts not involving property. Distributive justice does not itself offer criteria for choosing between different principles of distribution. Procedural justice is silent on substantive issues.



Is it possible to think about justice as flowing from lived experience? If so, how?

Justice as a lived experience involves a search for the truth in the eyes of those most immediately involved in a conflict. This means no more than that they ought to be provided the opportunity to give their version of what happened, to explain their intentions and provide reasons for their behaviour in a language and manner to which they are accustomed. However much abstract ‘truth’ may rest on an objective set of facts and principles, the search for justice as a lived experience is a process of contestation, negotiation and agreement between parties to a conflict. By searching for truth in this sense, parties are better able to comprehend each others’ position. In turn, this encourages a better understanding of their own behaviour and reactions.

Justice also requires that wrongdoers and those who have suffered harm are provided with the opportunity to vent their anger in constructive ways. After all, revenge is the acting out of anger, however inappropriate that may be. It is important that victims are provided with a controlled, safe opportunity to say to wrongdoers “this is what happened to me”, or “this is the consequence of your actions”. Anger can be used as a means of showing wrongdoers that their behaviour has consequences and to encourage them to accept responsibility for their actions.

Justice as a lived experience may require a public confirmation that a wrong has occurred. Public confirmation affirms in the eyes of other members of society that rules about right and wrong matter and that there are consequences for violating them. Public confirmation also singles out the wrongdoer for special attention. Because of his or her behaviour, the wrongdoer is temporarily symbolically separated from society so that the behaviour may be scrutinised. The goal is not to stigmatise the wrongdoer, but to hold wrongdoers accountable for their actions.

Justice also has to be measured in terms of its outcomes and effects. It must be pursued in a manner that, at a minimum, does not cause any further damage. Any pain or suffering that results from the actions of wrongdoers must be minimised. Once this is accomplished, efforts should be directed at resolving the conflict in a manner that does not cause further pain to any of the persons harmed, the wrongdoer or the community.

Justice as a lived experience also has a procedural dimension. Justice demands that the procedures used to make the decisions are impartial and fair. Individuals must be treated with respect. The acknowledgement of wrongdoing must not be swayed by the individual circumstances of victims or offenders. But the outcome of the process must be tempered by



compassion. Justice must be capable of adapting to account for the context and the specific characteristics of the wrongdoer or those who were harmed.

Does the justice as a lived experience approach demand punishment – the wilful infliction of severe deprivations on a wrongdoer? Two preliminary points must be made. First, the use of the term punishment refers only to the actual sentence handed down. Second, not all such sentences actually amount to a punishment. One example can illustrate both points. A person is accused of stealing an article from a store and is charged with theft. The person suffers the shame of being arrested, the embarrassment of having to tell friends and family, the cost of hiring a lawyer and the stigma of having to go through the court process. Again, suppose the person was found not guilty. In this case, there is no punishment even though the person suffered a number of indignities along the way. Instead of being found not guilty, suppose the same person received an absolute or conditional discharge. Here also, the individual suffered a number of indignities, but does the absolute or conditional discharge amount to punishment? The suffering was the result of the process and not the sentence handed down by the court. Finally, suppose the same person received a fine of \$500. If that person had an annual income of over \$1,000,000 per year, would this constitute a punishment – the imposition of severe deprivations on a wrongdoer?

The criminal justice system is coercive. The process itself causes harm; but this is not the same as punishment. If a goal of justice as a lived experience is to do no further harm to the victim, the wrongdoer or the community, the wilful infliction of severe deprivations should not be a primary reflex.





## IV The Promise of Restorative Justice

Restorative justice occupies the space between theories of justice and specific practices. Restorative justice is less a philosophical system than a set of ideas about how justice as a lived experience should be pursued. These ideas are experiential in nature. They are grounded in concrete actions. Restorative justice is a response to conflict that brings victims, wrongdoers and the community together to collectively repair harm that has been done in a manner that satisfies their conception of justice.

### Restorative justice programs

There are a number of different types of restorative justice programs currently operating across North America, Europe, Australia and New Zealand. Victim-offender reconciliation programs are perhaps the best known and most widespread type of restorative justice initiative. These programs bring victims and wrongdoers together with a trained facilitator to discuss the conflict, identify strategies to repair the harm done by the conflict and agree on schedules for restitution, follow-up and monitoring. Victim-offender reconciliation programs allow victims to express their anger in a controlled environment and to ask questions of offenders. They also place wrongdoers in a position to learn the consequences of their behaviour, to accept full responsibility for their actions and to make appropriate reparations.

Victim-offender reconciliation programs are not appropriate when either the victim or the wrongdoer is unwilling or unable to participate, or when the offender has not been identified. In these circumstances, victim-offender panels offer an alternative. These programs bring victims of a certain type of crime together with people who have committed the same type of crime. While there may be no direct relationship between victims and wrongdoers, victims and offenders gain insight into their respective behaviour and reactions, and wrongdoers are shown the consequences of crime.

Family group conferences are similar to victim-offender reconciliation programs with the exception that they include a larger number of participants. Along with the victim and wrongdoer, family group conferences often include the victim's and wrongdoer's family members, professionals such as teachers and social workers, police officers and lawyers. During a conference, victims and wrongdoers tell their version of the event.

**[RESTORATIVE JUSTICE IS]** a way of dealing with victims and offenders by focussing on the settlement of conflicts arising from crime and resolving the underlying problems which cause it. It is also, more widely, a way of dealing with crime generally in a rational problem solving way. Central to restorative justice is recognition of the community, rather than criminal justice agencies, as the prime site of crime control....

New Zealand, Ministry of Justice, *Restorative Justice: A Discussion Paper* (Ministry of Justice of New Zealand, 1996) at 1, online: <http://www.justice.govt.nz/pubs/reports/1996/restorative/index.html>



Other participants are then given the opportunity to speak and the participants discuss what reparations are required. Family group conferences rely heavily on the ability of community members to evoke a sense of shame among wrongdoers. The purpose of the exercise is to show the community's disapproval for the act (but not the actor) and to provide an avenue for the offender to be welcomed back into the community.

Restorative justice is an approach to resolving conflict that places much attention on the physical, economic, emotional, psychological and spiritual elements of conflict. As such, it can be well-suited to achieving justice within a diverse population. Sentencing circles, for example, operate in many Aboriginal communities in Canada. Sentencing circles allow victims, offenders, community elders, other community members and court officials to discuss together the consequences of a conflict and to explore ways of resolving the aftermath. Restitution for damages and reintegrating the wrongdoer into the community are high priorities. Community members play an active role in assisting the victim and the wrongdoer with the healing process. Youth justice committees operate similarly to sentencing circles, although they are also used for non-Aboriginal offenders as well as Aboriginal offenders.

## The restorative justice framework

A common theme of restorative justice programs is the effort to repair the harm caused by crime to the victim, the offender and the community. Currently, the criminal law focuses on the actions and mental state of the offender. Its aim is to determine guilt and to assess punishment. The actual harm that the offender caused is considered only as evidence of the seriousness of the offence or when determining the sentence. Restorative justice shifts attention towards redressing the harm that was done by the act and making reparations.

Reparations include returning or replacing property, repairing physical or economic damages such as fixing a broken window, paying for property damage, or providing compensation for out-of-pocket expenses incurred by the victim. Reparation may also take a more symbolic form such as providing community service or the offender participating in counselling or therapy to resolve issues that may have contributed to the wrongdoing. Reparations can be directed towards the immediate victims of the incident, secondary victims such as family and friends of the victim, or the larger community of the victim or wrongdoer.





Reparations are a vehicle through which restoration is achieved, rather than ends in themselves. The goal of restorative justice is not simply to compensate victims for lost property or damages that resulted from the wrongdoing. The damage caused by crime cuts far deeper than one's material possessions. Anger, resentment and a sense of loss of control over one's life are emotions that are often expressed by victims. Restoration is the process of 'righting wrongs' or healing wounds. Additionally, reparations only operate in one direction: the offender repairs the damage caused by the act. Restoration involves both the victim and the wrongdoer. Thus, while reparations are a strong (and perhaps necessary) first step towards restoration, in themselves, they are not enough.

Restoration has different meanings for victims, offenders and the community. For victims, restoration has a healing component. It may involve restoring victims' sense of control over their lives by providing them the opportunity to express their anger, to get answers to questions they may have about the incident and to re-establish order and predictability in their lives. For offenders, restoration involves accepting responsibility for their actions by repairing the harm they have caused. It also means addressing the issues that contribute to their propensity to engage in harmful behaviour. This may require dealing with anger management or chemical dependency. For the community, restoration involves denouncing wrongful behaviour and reaffirming community standards. Restoration also includes ways of reintegrating offenders back into the community.

The concept of restoration draws attention to the relationships between victims, wrongdoers and community members. A conflict may damage an otherwise healthy relationship between two or more people; a conflict may further damage an already unhealthy relationship; or a conflict may end a relationship between people. In some cases, restoration may mean re-establishing a pre-existing relationship between a victim and a wrongdoer that was damaged by the conflict. It does not, however, imply that all such relationships should be returned to their previous state. The relationship between a victim and a wrongdoer may have been steeped in inequality or held together by coercion or violence. In such a case, the parties may not wish to restore the original relationship but rather build new relationships based on principles of mutual respect. In the case of 'stranger crimes' or crimes in which the victim and the offender had no prior contact, the crime actually creates the relationship between the two parties. Here, the goal of restoration refers to the process of building a new relationship founded on respect and equality *if this is in the interests of both the victim and the offender.*

**RESTORATIVE JUSTICE RECOGNISES** the emotional effect of crime on victims, offenders and the community. This can adversely impact on people's functioning, their rehabilitation and their enjoyment of life. Restorative justice seeks healing of the emotional effects of crime as an important part of putting right the wrong. Hearing the emotional, physical and financial effects of crime is also an important component in holding the offender accountable. Without understanding the effects of their behaviour it is unlikely that an offender could genuinely take responsibility for the offence and its consequences.

New Zealand, Ministry of Justice, *Restorative Justice: A Discussion Paper* (Ministry of Justice of New Zealand, 1996) at 1, online: <http://www.justice.govt.nz/pubs/reports/1996/index.html>



Restoration, therefore, has a double meaning. For victims and offenders it means healing the emotional and material harms caused by crime. At the level of relationships, restoration refers to the potential to build a new relationship based on respect and dignity.

## Principles of restorative justice

The notion of restorative justice provides a framework for responding to crime that addresses the needs of victims and provides an opportunity for offenders to accept responsibility for their actions. Within that framework a number of different restorative justice programs may be imagined. Several have already been put into place. Almost all are based on three principles.

### Principle 1: Crime is a violation of a relationship among victims, offenders and the community

The current criminal justice system in Canada defines crime as a violation against the state; the state takes control of prosecuting accused people. The focus of attention is on establishing that the conduct of the wrongdoer does or does not satisfy the legal definition of an offence. Many rules of criminal procedure have been developed to assist judges, lawyers, police and other court workers in this task. Once legal guilt has been established, attention shifts to determining an appropriate punishment for the offender.

Restorative justice redefines crime, interpreting it not so much as offending against the state, as an injury or wrong done to another person or persons. Crime is conflict between individuals that results in injuries to victims, communities and to wrongdoers themselves. In a restorative justice framework, the purpose of the criminal justice system is to respond to the harms caused by the conflict. This requires a complete understanding of the relationship between the victim and the wrongdoer, the nature of the conflict, the full range of harms that the victim received, what can be done to repair the harm and an understanding of what prompted the offender's behaviour and what can be done to prevent this behaviour from occurring in the future. Restorative justice is concerned with establishing that one is responsible for the violation of the relationship between the victim and the offender. Responsibility means accepting the consequences of one's behaviour and showing a willingness to be accountable for one's actions.

Legal guilt does not always directly relate to responsibility. One may be found guilty of a crime but still refuse to accept responsibility ("it wasn't my fault", "he deserved what he got"); one may accept responsibility for an act but be found not guilty ("I caused harm regardless of the fact that I was not

**RESTORATIVE JUSTICE EMPHASISES** the ways in which crime hurts relationships between people who live in a community. Crime is seen as something done against a victim and the community – not simply a violation against the state.

Center for Restorative Justice & Mediation, *Restorative Justice for Victims, Communities and Offenders* (St. Paul, MN: Center for Restorative Justice & Mediation, University of Minnesota, 1996) at 1.



guilty”); or one may both accept responsibility and be found legally guilty for an act (“I committed the act and I must repair the damage”). Moreover, the punishments following a determination of guilt (incarceration, fines, probation, etc.) do not necessarily relate to the sanctions that might flow from accepting responsibility for the consequences of one’s behaviour (reparations, compensation, community service, etc.).

Many procedural and substantive elements of the criminal justice process that are deeply entrenched are needed, given the consequences of a finding of guilt. But they can hinder the achieving of justice. Sometimes wrongdoers can hide behind these legal protections rather than accept responsibility for the consequences of their behaviour. What is lost by focussing exclusively on establishing legal guilt is any examination of the relationship between the victim and the offender, the harm that the victim suffered and the types of remedies that would redress the harm caused by the act in a manner that is satisfying to the victim and the community. Sometimes these necessary rules of criminal procedure actually make restorative justice harder to achieve.

## Principle 2: Restoration involves the victim, the offender and community members

The logical response to seeing crime as a violation of human relationships is to invite those people who have been most affected to participate in deciding what to do about the wrongdoing. In the current system, the state assumes control over the process and the victim, offender and community members play passive roles. Victims have limited control over the proceedings or the outcome of the case and participate only by giving evidence; there is little incentive for wrongdoers to assume responsibility for their actions; and the role of community members is limited to serving on juries. By defining crime as a violation of relationships, all these have the opportunity to assume a greater role in the process of resolving conflict. The role of the state and legal professionals is cast as one of supporting a system that seeks offender accountability, as full participation as possible by both victims and offenders and making good, or amending, the wrong.

Restorative justice programs such as victim-offender reconciliation, family group conferencing and sentencing circles are built around an encounter between the victim and the offender. The encounter is designed as a safe space for people to meet in the presence of a trained facilitator to discuss ways to resolve the conflict. The facilitator guides the interaction. The parties provide their versions of the incident and are encouraged to ask questions of one another, provide clarification and context and develop



a common understanding of the event. They are also encouraged to talk about what steps can be taken to repair the harm done by the crime. This results in an agreement that specifies the type of reparations that have been negotiated.

The encounter places offender accountability in the forefront. Wrongdoers have to personally explain their behaviour to the victim and community members. Accountability is based on the belief that a wrongdoer owes a debt to the victim and the community for committing the offence. Wrongdoers are encouraged to develop an understanding of how their behaviour affected the lives of victims and to acknowledge the wrong through verbal or written apologies and by addressing any behavioural issues that contributed to their actions. They also demonstrate accountability by repairing the harm they have done through compensating victims or engaging in community service work.

Restorative justice requires the active participation of community members. They are encouraged to engage in constructive efforts that show their disapproval of the actions of offenders. Community members are also encouraged to support offenders' efforts to take responsibility for their actions and to support victims as they come to terms with the harm caused by the action. By playing an active role in the conflict resolution process, they are able to re-establish bounds of appropriate behaviour within the community.

### Principle 3: A consensus approach to justice

The current criminal trial process developed centuries ago as an adversarial process. Opposing sides present their arguments before a judge. The judge weighs the arguments against legal principles, comes to a decision and announces that decision to the two parties. For the prosecution, the practical goal (whatever the theory) is to gain a conviction. For the defence, the goal is to avoid conviction. Offender accountability and victim needs are not key values.

In many situations a strict guilty/not guilty dichotomy is not an appropriate way to frame a conflict. Conflicts are frequently cumulative, the product of interactions of two or more individuals over time. The conflict that brought the participants into contact with the criminal law may be a symptom of an on-going problem in the relationship. Guilt may be ambiguous or it may be mutual. A finding of guilt may not even be relevant to the participants who may be more concerned with dealing with the aftermath of the conflict.

**...LET US HAVE AS FEW EXPERTS AS WE DARE TO.** And if we have any, let us for God's sake not have any that specialise in crime and conflict resolution. Let us have generalised experts with a solid base outside the crime control system.

N. Christie, "Conflicts as Property" (1977) 17  
British Journal of Criminology 1 at 12.



A restorative justice approach aims at developing a consensus on how best to resolve the conflict. It sees the role of the criminal justice system as facilitating the active participation of victims, offenders and communities in finding resolutions to the conflict. This has to be negotiated and agreed upon by all parties. Lawyers, judges, police and other criminal justice personnel may be included in the process, although their role is more limited than in an adversarial process. Mediation, negotiation, settlement, compensation and reparation are the key concepts. The focus is on finding situations that are better able to satisfy victims' needs, better able to reintegrate offenders into the community and more adequately reflect communities' demands for justice. In order to encourage consensus on how best to handle a conflict, procedures have to be highly flexible and creative. In this a way, outcomes can be tailored to the particular needs of individual victims and wrongdoers. Restorative justice programs must be able to respond to the needs of victims in a timely and sensitive manner.

## Restorative justice as a response to conflict

The idea of restorative justice is a way of dealing with crime that redefines the role of victims, wrongdoers and community members. As a central component, restorative justice programs require the voluntary participation of victims and offenders. Both must be fully informed of their options prior to agreeing to participate in a restorative justice program. This is particularly the case for wrongdoers, who may be required to make an admission of guilt. The restorative justice process is relatively informal. Victims, offenders and community members are encouraged to find creative ways to resolve the conflict. Officials assume a non-directive role while ensuring that rights and interests of all parties are protected.

The timing of the restorative justice process and content of agreements will have more to do with the needs of victims, wrongdoers and the community, rather than the characteristics of the offence or the procedural requirements of the criminal justice system. Addressing the social, psychological, emotional and spiritual needs of victims and offenders as well as providing restitution to victims are top priorities. Justice is produced and reproduced in the actions of individual victims, wrongdoers and community members. It is the result of hard work, negotiations, disagreements and consensus building. In restorative justice the role of the criminal law process is not to exact retribution for the conflict but to engage victims, wrongdoers and community members in a constructive encounter that responds to their own understanding of what justice requires.





## V The Challenges Of Restorative Justice

The above review of restorative justice focussed on the overall framework and principles that guide current programs. Because the restorative justice approach is a different way of thinking about crime and how to respond to it, a number of challenges it poses for the legal system have yet to be worked through. This section examines some of these.

### What does restoration mean?

The concept of restoration itself causes some confusion about what the outcome of the process might be. A first point is that restoration is not the same as reparation. Reparations and restitution may be important to victims and offenders, but they do not constitute restoration itself. Second, 'restoration' should not be taken to mean returning the victim and the offender to their condition prior to the conflict. There are many situations in which the relationship between the victim and the offender was dysfunctional. For example, in cases of spousal abuse, child abuse and in other crimes involving abuses of power, the restoration of the relationship *as it was constituted at the time of the conflict* would not be an appropriate response to the conflict.

Restoration refers to engendering a sense of control over one's life and constructing relationships based on respect and equality. Restoration is brought about through healing wounds, developing a sense of well-being, fostering emotional and spiritual growth and moral development. Developing a sense of trust is also an important element of restoration. For both victims and wrongdoers, restoration is the personal reclamation of what was damaged during a conflict. This may or may not involve restoring the relationship that existed prior to the incident.

Restorative justice takes on the appearance of therapy for both the victim and the offender. Justice is seen to depend on achieving psychological/emotional well-being. As a therapeutic intervention restorative justice can operate at any point in the criminal justice process. Currently, restorative justice programs operate at the pre-charge stage, at the pre-conviction stage, at post-conviction but prior to sentencing, after sentencing, and while offenders are in prison or under community supervision. Sometimes they seem more directed to responding to conflict and sometimes they appear more as a therapeutic intervention, depending on the stage of the process.



For example, victim-offender mediation at the pre-charge stage may have a different dynamic than victim-offender mediation while the offender is incarcerated or on parole.

**DISCUSSION POINT:**

**Restorative justice programs offered at different stages of the criminal justice process will have different goals. What are the implications for how the programs are structured, who participates, and how they are co-ordinated with the existing criminal justice system?**

Some writing about restorative justice implies that crime represents a fall from grace. Offending is often recast as a moral failure, a personal violation that is tangible evidence of a lack of respect for community standards. If crime reflects a failure of personal responsibility then the goal of restorative justice is to reaffirm personal responsibility in the offender by acts of repentance through community service and restitution to the victim. Personal empowerment becomes a key feature of justice. There is a recognition that community members have a role to play in creating a social milieu that is favourable to crime, but only in so far as the community failed to integrate the offender. Changing society so that people are less alienated is less emphasised than individual restoration.

**DISCUSSION POINT:**

**What is the relationship between individual restoration and the social forces that produce conditions favourable to crime?**

Healing, contrition, forgiveness, growth and development are quite different concepts than those like proportionality, certainty and severity that we associate with the courts. As noted earlier, how we talk about a conflict structures our response to it, provides legitimacy to some forms of knowledge and discounts others and establishes criteria for how success is measured. For some people, the therapeutic twist of restorative justice represents an unwelcome expansion of state power. Others see restorative justice as curtailing state power. They see restorative justice as removing conflict from the clutch of the state and returning it to victims, offenders and the community.

**FAR FROM USER EMPOWERMENT** limiting the intervention of professionals into the lives of citizens, in current empowerment discourses we see the space being created for new sorts of professional expertise to emerge and for new or transformed 'client groups' to be identified as the objects of this new type of professional attention.

K. Baistow, "Liberation and regulation? Some Paradoxes Of Empowerment" (1995) 42 *Critical Social Policy*, 34 at 41.





**DISCUSSION POINT:**

**Restorative justice offers a different way of organising our response to crime and conflict. What are the implications of introducing new types of knowledge and a new group of professionals into the criminal justice system?**

One consequence of restorative justice programs is said to be the curtailment of state power. This assumes, however, that power transferred to the community is necessarily more benign than state power. It also assumes that once communities achieve this power there will be a corresponding decrease in the power of the state.

**DISCUSSION POINT:**

**Restorative justice programs create new arenas of power in communities. What are the implications of this? Do they represent another layer of power that is superimposed on the existing criminal justice apparatus?**

## **Restorative justice as a separate or integrated response to conflict?**

The relationship between restorative justice programs and the current criminal justice process must be closely examined. Forms of popular justice that are set up as alternatives to the official process tend to be co-opted over time, just as forms of dispute resolution that are established by the state tend to become incorporated into the official system.

At the moment, restorative justice assumes a critical stance in relation to the criminal justice system. It is frequently cast as an alternative to the existing process *and* is dependent upon it. The relationship between these two responses to conflict will always be in tension. For example, restorative justice challenges the definition of crime: crime is a violation of relationships among people and not a violation of the state. Most restorative justice programs, however, do not carry forward this distinction. Most programs are organised around criminal behaviour rather than around conflict that may or may not be criminal.



#### ...MAINTAINING THE PRESENT SYSTEM

would give heart to many people who fear violence. If [an alternate model] failed to work in a certain case, we could always fall back on the repressive system. The present system should always be kept in reserve, as a second string on the bow of crime control.

H. Bianchi, *Justice as Sanctuary: Toward a New System of Crime Control* (Bloomington, IN: Indiana University Press, 1994), at 96.

#### DISCUSSION POINTS:

**Is it necessary for restorative justice to be tied closely to the criminal justice system?**

**If restorative justice is concerned with community building, or slowing the pace of community decline, then how should communities respond to non-criminal incivilities (broken windows, for example) that engender a sense of disorder, and heighten fear and anxiety?**

There are other points of intersection between restorative justice and the existing criminal justice process. First, while the criminal justice system is not effective in dealing with the physical and emotional consequences of conflict it does have a better track record at determining legal guilt. Since many restorative justice programs require an offender to accept responsibility, what happens if responsibility/guilt is contested by the accused? How well equipped is restorative justice to sort out issues of guilt? Second, there would appear to be a requirement for some type of mechanism to enforce agreements between victims and offenders. What organisation or agency will assume this enforcement role? Does the organisation of policing services need to be re-structured to bring them in line with the principles of restorative justice? Third, to what extent does restorative justice fall back on the retributive process when victims and/or offenders are unwilling to participate?

#### DISCUSSION POINT:

**Is restorative justice a system of justice? Can it operate independently from the current criminal justice process?**

Today, restorative justice programs operate under the shadow of the criminal justice system. If they continue to multiply and gain a larger place within the criminal justice system, how the two systems interact and influence one another over time will be a key issue. Will restorative justice programs become integrated into the existing criminal justice system and in the process lose their innovative potential? Alternatively, will the concepts and practices of restorative justice filter into the regular criminal justice system? Or will the two systems co-exist in a mutually accommodating relationship where each influences the other?



## Coercion

The current criminal justice process is constituted as a coercive system. To the extent that restorative justice relies on the police to bring cases forward (as opposed to individual wrongdoers entering a restorative justice program without their actions first being identified by a police officer), an element of coercion remains. Even when both victims and offenders consent to a restorative justice program coercion operates on a more subtle level. As long as the threat of incarceration hangs over offenders their agreement to participate in a restorative justice program is not totally free. Some wrongdoers may be coerced into a restorative justice program even though they are not guilty of an offence.

On the other hand, genuine voluntariness may be a standard that is too high to achieve. Perhaps simply offering a choice to offenders and accepting their decision to participate is sufficient, while ensuring that the facilitator is trained to deal with the unlikely event that an offender would choose to feign remorse or if an offender was unwilling to accept responsibility for harms that were caused. It could also be argued that some level of coercion may be required for some offenders. Thus, while a genuine acceptance of responsibility manifested in, for example, an apology, cannot be given under coercion, it may be the case that some offenders (in particular offenders who have been through the criminal justice system previously) may require some inducement to try out a different method of resolving conflicts.

Victims may also feel coerced into participating in restorative justice programs. This is particularly the case if they feel powerless to defend their interests. For example, a victim may feel reticent to decline to participate in a program when faced with an accused, community members, the police, other professionals and a facilitator who are all willing to participate. This is a major concern in smaller communities where victims, offenders and community members are likely to have prior relationships. Finally, coercion also comes into play when negotiating restoration agreements, especially when the failure to negotiate an agreement may result in the offender receiving formal charges or being returned to the formal courts for sentencing.

### **DISCUSSION POINT:**

**We believe that the concerns about coercion are valid. Are there ways to minimise coercion? Are there any positive effects of coercion in a restorative justice program?**



## Restorative justice and justice

The therapeutic twist that is evident in much writing on restorative justice has already been noted. Whether restorative justice as a response to conflict should be disentangled from restorative justice as a therapeutic intervention is a question that strikes at the core of restorative justice: how does restorative justice conceive justice? Restorative justice is a practical response to conflict to be worked out in the actions of individuals. This, however, does not mean that justice is simply a matter of problem solving between victims and offenders. Suppose, for example, that after a particularly violent assault, a victim and an offender negotiate a 'resolution agreement' that is regarded by the facilitator and community participants as 'lenient'. Is the consent of the parties to the conflict all that is required for a resolution agreement? The involvement of the community suggests that there is a community interest at stake, that the interests of justice go beyond resolving problems to the satisfaction of only the individuals involved. While restorative justice may be better able to reflect the community interest than the retributive system there may be situations in which the interest of the community is at odds with the interests of either the victim or offender.

**IS THE LOGIC OF REPRESENTATION** an acceptance of the normative values of the given group or association? Should mediation be culturally relativistic in its approach to outcomes? In other words, is an agreed settlement acceptable purely because the parties have exercised their own agency and judgement in the process? Or should the process and outcome accord to some standard notion of acceptability?

A. Crawford, *The Local Governance of Crime: Appeals to Community and Partnerships* (Oxford: Clarendon Press, 1997) at 188.

### DISCUSSION POINT:

**We believe that restorative justice must be more than a forum for individuals to resolve their disputes. There is a community interest at stake in how many conflicts are resolved. What is the relative weight of the interests of the community, the interests of victims and the interests of offenders?**

Restorative justice is often portrayed as being something less than justice because it proposes restoration over punishment and restitution over incarceration. It is, in brief, cast as being 'soft' on crime. For some offenders, having to meet with victims and confront the consequences of their behaviour may be less of a punishment than having to spend any number of years confined in a prison where degradation and humiliation are part of the daily routine. For others, the opposite may be true. The relative harshness of each way of dealing with crime is largely an empirical question, subject to the individual psychology of victims and offenders. At best, debate about the merits of restorative justice on the basis that it is 'soft' or 'hard' on crime steers us off track from what should be the criteria for evaluating sound policy. At worst, it leads policy makers into an escalating



competition of trying to stay one level of harm above or below other options.

What must be confronted is the necessity for punishment. The wilful infliction of severe deprivations is quite distinct from the imposition of a penalty that may be experienced as painful. For example, offenders may experience pain by having to confront victims and realise the consequences of their acts. This pain is a consequence of doing the work necessary to bring about reconciliation or resolve the conflict; the pain was not imposed as suffering. The issue is how incarceration can be accommodated within a restorative justice framework.

#### **DISCUSSION POINTS:**

**To what extent is punishment a legitimate response to conflict within a restorative justice framework?**

**Can incarceration be justified as a restorative sanction without falling back on retribution, or, are certain aspects of retribution consistent with restorative justice?**

## **Restorative justice and private justice**

The relationship between restorative justice and private justice needs to be clarified. By private justice, we are referring to disputes that are resolved without the intervention of state officials. Private justice may be individualised and informal (personal revenge, for example) or it may be corporate and formal (private policing and security, for example).

When conflicts are handled privately an entire body of knowledge and information does not become part of the public record. In some cases, this may be appropriate. For example, a stern warning from a security agent and a telephone call to a parent may be sufficient to deter a young person from shoplifting. In other cases, private justice may not be an appropriate way to deal with wrongdoing. For example, an accountant embezzles money from a charitable foundation. Rather than go public with a complaint to the police or the regulatory body governing accountants, the organisation decides to handle the matter privately by dismissing the accountant. The accountant is then hired by another organisation and continues the illicit behaviour. Because the initial embezzlement was handled privately, the second organisation did not have the benefit of a public record of the accountant's actions. The Law Commission's investigation into child abuse



### IF MEDIATION ARRIVED IN BRITAIN TOO LATE

for the enthusiasts, it came just a little too early for Victim Support. Victims of crime were not yet properly provided for and their needs were only beginning to be recognized and understood. ...the idea of mediated agreements between victims and offenders was born prematurely from an unusual union between policy-makers and penal reformers concerned primarily with an ailing criminal justice system which was in urgent need of a new direction. The concern for victims which was emerging in the early 1980s was seized upon as a potential means of diverting cases from the over-stretched courts and offenders from the crowded, unmanageable prisons.

H. Reeves, "The Victim Support Perspective" in M. Wright & B. Galaway, eds., *Mediation and Criminal Justice: Victims, Offenders and Community* (London: Sage Publications, 1989), 44 at 44.

[RESTORATIVE JUSTICE] has largely been an initiative of the faith community within corrections and organizations that work with and support offenders. There has been little involvement of any person or group that is solely concerned with the victim. Victims' groups, therefore, are apprehensive that the process is offender based and with too much of a focus on the offender's needs, making the victims' needs secondary.

Canadian Resource Centre for Victims of Crime, *Balancing The Scales: The State Of Victims' Rights In Canada*. (Ottawa: Canadian Resource Centre for Victims of Crime) at 48 online: Canadian Police Association [http://www.cpa-acp.ca/vrc/briefs/balancing\\_the\\_scales.htm](http://www.cpa-acp.ca/vrc/briefs/balancing_the_scales.htm)

in institutions also found that in many instances rather than call in the police to investigate suspected child abusers, organisations handled the allegations privately by transferring or dismissing the suspect. In many of these cases, the suspected abuser went on to commit further abuse in the new setting.

These examples of private justice illustrate the differences between the forum where justice occurs and its form. Even though they do not involve public processes, they do not reflect the principles of restorative justice. A private resolution to a conflict that does not lead to acknowledgement of wrongdoing and accountability does not respect the principles of restorative justice. Often this acknowledgement and accountability is sufficient to ensure that the wrongful behaviour will not be repeated. But not always. In some cases, it is important to establish a public record of offending. Even though they do not capture all of the details of a particular incident, court records provide a valuable source of public information about what occurred. We believe that restorative justice must be able to accommodate this public accountability function, even in cases where the conflict itself is handled privately.

### DISCUSSION POINTS:

**In what types of situations is it necessary to meet the accountability goals of restorative justice by generating a public record?**

**In these cases, what is the best way of ensuring that important information about conflicts is retained on the public record?**

## Victims' needs

A key claim of restorative justice programs is a sensitivity to the needs of victims. By allowing victims to become engaged in the process they will regain a sense of control over their lives and will be in a better position to manage the emotional and psychological consequences of conflict. Recently there has been a demand by victims to be better informed about the processing of their case, to be allowed to participate in the retributive system, to receive information about the sentence the offender receives and to be kept informed of offenders' progress through the probation or correctional system.

Within the restorative justice framework, however, victims assume a much greater responsibility over the outcome of their conflict, and,



consequently, over the fate of offenders. It must not be forgotten that state control over criminal prosecutions reduces the likelihood that victims will initiate personal acts of revenge, and, it protects victims from further harm caused by offenders. This is particularly true when victims are less powerful than offenders. Victims may want restitution; they may want information about their case, they may want to ask the offender questions or vent their anger. But these are separate issues from victims being involved in helping to determine the sentence that the offender will receive. Given that the victim already bears a disproportionate burden as a result of the offence, there is a real possibility that placing greater responsibility for sentencing may lead to re-victimisation, the very condition it sought to ameliorate. To fully realise the potential of restorative justice victims must be involved in the design and monitoring of programs.

#### **DISCUSSION POINTS:**

**To what extent do victims want to become involved in the criminal justice system?**

**How does restorative justice coincide with victims' needs for information, restitution and involvement in the criminal justice process?**

**Is it appropriate to give victims the responsibility for deciding how the criminal justice system should respond to someone who breaks the law? Do they want this responsibility?**

### **What does 'community' mean?**

'Community' is a key concept in restorative justice programs. The community is the place in which justice is realised. Community members are also key participants in restorative justice programs. 'Community', however, has many meanings and often these meanings are contradictory.

Community is often assumed to be wholly virtuous, something that should be worked towards, nurtured, or established. Community building is part of our civic responsibility. Community is often associated with order, stability and group solidarity. But there are other sides to communities. They can be exclusionary, defined by what they are not. Elaborate security features of gated residential communities, for example, routinely exclude certain groups to ensure homogeneity. Communities are often portrayed as egalitarian. This obscures how some members of a community – by virtue

**'COMMUNITY'** ... has become the policy buzzword of the 1990s, the antidote to the *fin de siècle* crisis of modernity.

A. Crawford, *The Local Governance of Crime: Appeals to Community and Partnerships* (Oxford: Clarendon Press, 1997) at 148.



of their age, sex, or religious or political affiliation – will have greater power than others, which they may or may not use for the ‘common good’. The whole idea of a single common good is also suspect. Communities may be composed of groups with different conceptions of what constitutes inappropriate behaviour and what appropriate responses might be.

Community can be simply a geographic unit, a sub-division or a village, for example. Member and non-member are easily identified and outsiders are easily excluded. Community can also be conceived of as a set of attitudes. Phrases such as ‘sense of community’, ‘community spirit’, ‘community building’ and ‘community pride’ reflect this symbolic conception and exert social pressures on members to conform. Finally, community may be conceived more fluidly as networks of associations that bind people together based on mutual interests or obligations. Individuals may be members of several communities such as family, work associations, or friendship networks that may be local or widespread. They can choose to enter into communities based on mutual interests and they can opt out of communities, such as families, by breaking ties with others in the community. These different ways of thinking about communities have implications for how a restorative justice program is structured.

#### **DISCUSSION POINTS:**

**Should restorative justice programs be developed to correspond with geographic communities, similar to the approach taken by Neighbourhood Watch and community policing programs with volunteer mediators and community members drawn from a local neighbourhood? Or should restorative justice programs have appeal to a more normative interest?**

**How is ‘community interest’ determined? What role do those who challenge the ‘community interest’ have to play in restorative justice programs?**

**Should community involvement in restorative justice programs be constituted to reflect the individual and overlapping networks into which offenders and victims enter?**

Restorative justice also confronts us with the question of whether community is a means or an end. Some proponents perceive the community as a resource from which to draw individuals to participate in family group conferences, sentencing circles, or youth justice committees. There is a sense





that the community has a set of attitudes and values that can be identified and that these attitudes and values are broadly shared. Wrongdoers have strayed from community norms. Truth-telling, shaming, encounters and community service work to bring that offender back into the fold by reinforcing common values. Here, community is a means through which justice is achieved.

Others see the notion of community differently. Crime is a result of the failure of the community to generate the requisite degree of shared values that would engender local solidarity. If a breakdown in the level of community commitment results in an increase in crime, then building solidarity within a community should lead to a reduction in crime. By discussing conflicts in an open and safe environment, community members are able to evaluate normative standards of behaviour, reaffirm those that are consistent with the views of members and transform those that require modification. Here, community is the end and restorative justice is a strategy to strengthen the social ties among community members.

#### **DISCUSSION POINT:**

**What are the assumptions about the role of communities that inform how different restorative justice programs are currently structured?**

## **Criminal justice as a way of changing society?**

Restorative justice programs can work as a community building exercise in which people are able to clarify norms, affirm behavioural standards and transmit these to other members of the community. Victims are able to play an active role in dealing with wrongdoing. Offenders are called upon to take responsibility for their actions, including dealing with the issues that lead to their criminality.

One may question whether “dealing with crime” is the best starting point to promote social transformation. The traditional criminal justice system is reactive: it responds to a negative event or conflict situation. It deals in hurt, betrayal, deception, violence, misunderstanding, negligence and pain and confronts people when they are most vulnerable. If we aim to have people better off after going through the criminal justice system than before they entered it, there can be little doubt that, as it is currently constituted, the criminal justice system is not one that promotes change in society or that is a transformative experience for victims and offenders.

**COMMUNITIES SIMPLY CANNOT** be transformed into sane and civil places by installing cops on every corner or, for that matter, welfare workers in every home. Criminalization does not solve problems created by racism, de-industrialization or immiseration. It does provide satisfying outlets for much legitimate rage, but at the cost of leaving dominant groups unthreatened and dominant relations, of capital and patriarchy, unchallenged.

L. Snider, “Towards Safer Societies: Punishment, Masculinities And Violence Against Women” (1998) 38 *British Journal of Criminology* 1 at 15.



Restorative justice programs have this potential. But they require a heavy dose of community involvement. Not only is the goal of the criminal justice system broadened to include the task of social transformation, but the onus for this transformation is placed on the community. Typically, communities that are most affected by crime are the least organised and capable of responding effectively to crime. Conflict does present an opportunity for growth and development, but this growth and development is often associated with pain and suffering. Without an investment of resources, it may be too large a burden to place on these communities to ask them to not only respond to conflict, but to do so in a manner that leads to social transformation.

#### **DISCUSSION POINTS:**

**Does restorative justice set for itself an impossible task if it seeks something beyond ensuring that no further damage is done to either victims or offenders?**

**We believe that communities will require considerable resources in order to effectively implement restorative justice programs. What are the most effective methods of ensuring that communities are provided with these resources?**

### **Whose interests does restorative justice serve?**

If we are to adopt a restorative justice approach, it is important to ask whose interests this approach would serve. Take first, its possible client group. Experience with forms of popular justice suggests that informal methods are not equally used by rich and poor. Moreover, in mediation processes, mediators tend to be from a higher social class than participants. Finally, experience with mediation in the criminal context suggests that race may affect whether restorative justice programs are made available to victims and wrongdoers. There is empirical evidence that victims and offenders are satisfied with their experience with restorative justice programs. What requires further examination, however, is why certain victims and offenders choose not to participate in restorative justice programs and if certain victims and offenders who do wish to participate are denied the opportunity.



#### DISCUSSION POINTS:

We believe there is a danger that restorative justice programs may evolve into a second class system of justice. Are there ways to prevent this from occurring?

What may account for why some victims and offenders choose not to participate in restorative justice programs?

Restorative justice programs have recently received support from both the provincial and the federal governments because of their capacity to respond to concerns raised by victims' groups about the injustices they are currently facing. But governments also have other reasons for promoting restorative justice. Some view the approach as a means of reducing traffic through the court system. This is especially true for less serious crimes that are considered a nuisance to prosecute. Some also see restorative justice as a diversion program that works to reduce the number of offenders in prison and the costs associated with incarceration. For restorative justice proponents, reducing court traffic and decreasing the number of offenders who are incarcerated are consequences of restorative justice; for government these consequences become goals.

#### DISCUSSION POINT:

What are the implications of these competing sets of goals? How can we ensure that a restorative justice program is not evaluated exclusively by reference to goals and values that have little or nothing to do with the underlying principles of restorative justice?

Another issue is how restorative justice fits in with broader shifts in Canadian public policy. Federal and provincial governments are experimenting with new methods of delivering services. As governments attempt to be more responsive to local needs, within a context of fiscal restraint, they often simply withdraw. In stating that they do not have the answers for many social problems they have traditionally addressed, they justify off-loading responsibility onto local communities.

**NO LONGER IS CITIZENSHIP CONSTRUED** in terms of solidarity, contentment, welfare and a sense of security established through the bonds of organizational and social life. Citizenship is to be active and individualistic rather than passive and dependent. The political subject is henceforth to be an individual whose citizenship is manifested through the free exercise of personal choice amongst a variety of options. Programmes of government are to be evaluated in terms of the extent to which they enhance that choice. And the language of individual freedom, personal choice and self-fulfilment has come to underpin programmes of government articulated from across the political spectrum, from politicians and professionals, pressure groups and civil libertarians alike.

P. Miller, N. Rose, "Governing Economic Life" (1990) 19 *Economy and Society* 75 at 98.

**[THE FEDERAL PROGRAM REVIEW]** contained a *general philosophy of governance based on self-reliance and subsidiarity* – a philosophy built on personal responsibility and on the provision of help on the basis of individual needs by the private sector, community groups or the level of government closest to the citizen and capable of providing help effectively.

G. Paquet, "Alternative Service Delivery: Transforming the practices of governance" in R. Ford & D. Zussman eds., *Alternative Service Delivery: Sharing Governance in Canada* (Toronto: KPMG, 1997) 32 at 36.



**DISCUSSION POINTS:**

**To what extent does restorative justice, as an alternative form of delivering justice services, coincide with broader shifts in Canadian public administration?**

**We believe there is a possibility that restorative justice may be promoted and used simply as a means of cutting expenditures and reducing the size of government. To what extent should we be concerned about replacing state and professional governance by market or community forms of governance when governments are not prepared to fund restorative justice adequately?**

Many of the issues identified in this section can only be worked through as different types of restorative justice programs are tried out and evaluated. To return to one of our initial premises: justice must be flexible and dynamic. The process of developing restorative justice will be one of trial and error. While these issues may never be fully resolved, restorative justice programs have the potential to meet Canadians' expectations of how criminal justice ought to operate. Whether restorative justice, as a response to conflict can extend beyond the criminal justice system, is a question now to be addressed.



## VI The Prospect of Transformative Justice

Restorative justice can have a significant impact on how we resolve conflicts in the criminal justice system. By confronting the harm done to individuals, and what it will take to repair this harm, restorative justice places the participants to a conflict at the centre of the process and provides the opportunity for them to be active in resolving it. But restorative justice can also help the law build a framework for handling other kinds of conflict as well. In this sense, the principles and practices of restorative justice can be transformative.

How can we move from restorative justice to transformative justice? What do we mean by transformative justice? Transformative justice is a way of handling conflict that recognises and responds to the variety of harms caused by conflict and capitalises on the opportunities offered by conflict by bringing individuals together in a process that encourages healing and growth.

Transformative justice, as a general strategy for responding to conflicts, takes the principles and practices of restorative justice beyond the criminal justice system. In Section I, we noted that what comes to be defined as crime is the result of a complex interplay of moral ideas and shifting balances of power within society. The manner in which a conflict is defined shapes the type of response that is pursued. This may also be true in areas such as environmental law, corporate law, labour-management relations, consumer bankruptcy and debt and family law.

The framework and principles of what is called alternative dispute resolution suggest that many of the concerns expressed by victims and offenders about the criminal justice process have parallels in the civil justice system. Non-criminal dispute resolution in the courts is costly and time consuming. Injured parties have little control over the process and often find it incomprehensible. Issues are framed in legal language rather than in terms of how they are experienced by the parties involved. Judicial remedies are not always consistent with how the parties to the conflict would have resolved the issue if they had been given the opportunity.

It would be wrong, however, to equate the ideas of alternative dispute resolution as a way of dealing with conflicts in the civil law with restorative justice in criminal law. There is a continuum of alternative dispute resolution mechanisms ranging from informal negotiation to traditional adjudication by private courts. Alternative dispute resolution processes can



be highly formal or quite informal. They can be voluntary or mandatory. Agreements may be negotiated or they may be imposed. Many proponents of alternative dispute resolution do believe that alternatives to court processes must respect principles analogous to those of restorative justice. But not all. To date the idea of alternative dispute resolution has not focussed on ways to ensure that the concerns and interests of parties to a conflict are addressed in a more satisfying manner than they would were the regular civil process to be deployed.

The significance of transformative justice in non-criminal areas of law will lie in its ability to inform and enrich our understanding of the diverse forms of alternative dispute resolution that have been developed over the past two decades. Different forms of alternative dispute resolution can be examined and evaluated against the three principles of restorative justice outlined in Section III. Do alternative dispute resolution programs frame disputes in terms of violations of relationships rather than in terms of the substantive conflict in question? Do the most common forms of alternative dispute resolution – negotiation, mediation and arbitration – vest parties to a dispute with sufficient power to frame issues and determine outcomes according to their particular interests? Is there a role for the community in the resolution of civil disputes? While environmental disputes have an obvious community interest, this is less clear in cases of bankruptcy, and is possibly quite attenuated in disputes arising in a family context.

Restorative justice approaches turn on the existence of a wrong. Restorative justice begins with the premise that a wrong has occurred. Restorative justice works well within the criminal justice system because the criminal law provides a ready-made list of wrongs and an easily identifiable wrongdoer. In the vast majority of cases there is no ambiguity regarding what is the wrong, who is the wrongdoer and who is the victim. For restorative justice, because the culpability of the wrongdoer is taken for granted, determining what happened is important only in order to address the wrong.

When one moves beyond the criminal law, a new set of questions relating to the relationship between wrongdoing and the application of restorative justice emerges. Of course, in many civil disputes there is an obvious wrong: a person intentionally or inadvertently damages property; a person intentionally or inadvertently breaks a contract; a person intentionally or inadvertently profits from the work or ideas of another. But in other cases, the wrongfulness of a person's behaviour cannot be taken for granted: when children argue about their respective entitlements under a parent's will the dispute is not normally about wrongdoing; when parents disagree about custody and access to children in a divorce case the dispute is normally not



about wrongdoing; when creditors make conflicting claims to the property of a bankrupt company, they usually do not accuse one another of wrongdoing. Can the principles of restorative justice be made to apply to these situations where there is no wrongdoing?

Again, can they be extended to accommodate cases where an individual desires to use the law to prevent a potential harm from occurring rather than remedying a harm that has already occurred? For example, an environmental organisation may seek an injunction to halt the construction of a chemical warehouse adjacent to a residential neighbourhood. And still again, are the principles of restorative justice applicable in situations where a choice must be made between competing harms: to stop something and cause one kind of harm as a result, or to continue doing something and cause another kind of harm as a result? For example, a manufacturer in a small town cannot meet environmental standards. The choice is between continuing to violate the standards and pollute the local environment or close down the operation and cause an economic downturn in the community.

There are also civil disputes that do not involve a discrete wrong; some family, labour and landlord-tenant disputes often comprise cumulative wrongs committed by all parties to the conflict. For example, an eviction notice given to a tenant for not paying rent may follow a landlord's failure to fix broken plumbing, which follows a tenant's refusal to dispose properly of garbage, which follows the landlord's failure to rid the apartment properly of pests. What role can principles of restorative justice play in these cases?

Finally, can the principles of restorative justice apply when there is no dispute regarding the harm done, but the dispute centres rather on who is responsible for the harm? A homeowner, for example, sues a general contractor for the improper construction of a house foundation. The contractor acknowledges the harm (leaky foundation) but claims that its source was improperly mixed concrete and that, therefore, responsibility should lie with the concrete company.

The last few examples raise a number of issues about the possibilities (and appropriateness) of transferring the principles of restorative justice to non-criminal law settings. On the other hand, they are all cases where the traditional processes of civil disputing have encountered difficulty. If not all the principles and practices of restorative justice are applicable, can they be modified to meet the particularities of non-criminal disputes without undermining the overall framework of restorative justice as a response to conflict in the criminal law field? Here, perhaps, is where the transformative potential of restorative justice can be used to develop a



#### THE AIM OF TRANSFORMATIVE FACILITATION

is to help parties become better human beings by stimulating moral growth and transforming human character, which results in parties finding genuine solutions to their real problems.

Chris Maser. *Resolving Environmental Conflict: Towards Sustainable Community Development* (Delray Beach, FL: Saint Lucie Press, 1996) at 4.

broader conception of transformative justice capable of handling both criminal and civil disputes.

Even when it does not involve a discrete wrong, conflict remains a relational concept. A conflict about where to locate a landfill site may involve relationships between members of different industries, labour organisations, environmental organisations, Aboriginal peoples, different levels of government, citizens' organisations and other individuals or groups. Bankruptcy involves relationships between a debtor and one or more creditors, and between various types of creditors – each of whom may have an entirely different kind of relationship with the debtor: a bank, a car dealer, an employee, a spouse, the government, someone who has been injured by the debtor, and so on. Labour relations conflicts always involve complex relationships between labour and management, between shareholders of a company and managers, between employees and their union, between government and the corporation, between a community and its factories, and so on. In each situation, competing interests are at stake and values may clash as parties attempt to shape the definition of and response to the conflict.

Taking a cue from restorative justice, a transformative approach to dispute resolution would begin with a commitment to transforming the relationships between parties to the conflict. The power of restorative justice is the ability to use conflict to encourage growth and development. The same potential exists in conflict in other domains. A transformative approach to conflict resolution would encourage accommodative relationships between groups with competing interests. The conflict situation would be transformed from one in which groups are in competition with one another to one in which groups recognise their mutual interests in arriving at workable solutions.

What does restorative justice have to say about the underlying approaches that should be taken to resolve non-criminal disputes?

Most importantly, it provides a benchmark for evaluating different alternative dispute resolution processes. A transformative justice approach would bring together all those individuals and groups affected by a conflict, including those with the power to make the decision. As much as possible, the participants must be provided the freedom to control the process, to establish the boundaries of the conflict, to establish rules about how the process should unfold, and what, if any, role does the mediator play. Interests should be discussed and negotiated and positions should be clarified. Like an encounter between a victim and an offender in the criminal process, meetings between parties in a civil conflict help develop an





appreciation of one's own and others' position as they work towards a resolution.

Unlike a restorative justice encounter in the criminal context, there may not always be a requirement to restore relationships by repairing the harm that was caused as a result of the wrong-doing. For example, a conflict over a workplace health and safety standards may be about encouraging a company to abide by air quality standards rather than about repairing any harm that was caused by faulty air circulation. In these cases, apologies, reparations and restitution may not always be appropriate remedies. Rather the goal is to arrive at an agreement that is acceptable to all parties.

In some situations, however, the conflict may appear to be a technical issue but underlying this may be an unresolved wrong. For example, a workers' compensation appeal may ostensibly be concerned with establishing the status of a claimant. Underlying this concern, however, is a worker's perception that the company refuses to acknowledge how unsafe working conditions contributed to the injury. An apology, reparations and restitution may be the most appropriate remedy in this situation.

Transformative justice must be driven by the needs of participants. Decisions on how to resolve the conflict ought to be based on a consensus. By consensus, we mean an agreement on how to move forward that is acceptable to all parties. A consensus cannot be imposed. Nor is a consensus just a middle ground position. The goal will be to find common ground on which a mutually acceptable resolution can be established. This is the power of transformative justice: the possibility of using the substance of a conflict as a means of exploring options and establishing responses that are not only acceptable to all parties but develop and strengthen relationships among those involved.

People encounter conflict – both criminal and non-criminal – because of the inter-connectedness of their lives. In some sense then, there is an inevitability to conflict. How we respond to conflict is a choice that we make. The Law Commission of Canada believes that restorative justice and transformative justice present new possibilities for responding to conflict in a positive and constructive manner by using conflict to encourage the development of strong and respectful relationships.

**IN A CONSENSUS PROCESS**, participants work together to design a process that maximizes their ability to resolve their differences. Although they may not agree with all aspects of the agreement, consensus is reached if all participants are willing to live with the total package.

Gerald Cormick, Norman Dale, Paul Emond, S. Glenn Sigurdson and Barry D. Stewart. *Building Consensus for a Sustainable Future: Putting Principles into Practice* (Ottawa: National Round Table on the Environment and the Economy, 1996) at 4.





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