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7.1. A Role For ADR In The Criminal Justice System? - 199919

7.2. Restorative Justice Theory -198919

1. Key Themes (to be explored)

It is early days for restorative justice. It may be the oldest way of conflict and dispute resolution – historically as well as culturally - but it is only a decade since such programs began to be mainstreamed, and a much shorter timeframe in which evaluation studies have been conducted.

2. Research Questions

What is the history of Community Justice in the Yukon communities?

3. Relevant Documents, Studies and Practices – Yukon

3.1. Royal Commission on Aboriginal Peoples ¹

- To date, the development of political institutions in the Yukon has followed conventional lines.
- Although some policies and programs such as heritage programming, <<community>> <<justice>> and health care delivery draw somewhat on traditional Yukon Aboriginal knowledge, the way the Yukon government operates would be familiar to any Canadian.

¹Final Report of the Royal Commission on Aboriginal Peoples, Volume 4: Perspectives and Realities, Chapter 6 The North, Section 5 Regional Dimensions of Political Development, Yukon First Nations, <http://www.indigenous.bc.ca/v4/vol4ch6s5tos5.3.asp>

4. Relevant Documents, Studies and Practices – Other Northern Territories

4.1. A Framework for Community Justice in the Western Arctic – 1999²

History and Current Environment Of The Community Justice Initiative

- In 1993, the Department of Justice assumed responsibility for Corrections from the Department of Social Services although community corrections functions were maintained by the Department of Social Services.
 - o In addition to adult and youth correctional facilities came responsibility for community corrections through the transfer of nine community corrections positions from Social Services.
 - However, these positions were deemed inadequate to provide community corrections services across the Territories.
 - As a result, a Memorandum of Understanding was signed with the Department of Social Services whereby responsibility for community corrections functions (such as pre-sentence reports, probation supervision, etc.) would be maintained by the Department of Social Services.
 - o Nine community corrections positions already transferred to Justice would be used for developing innovative approaches to justice-related problems faced at the community level.

- Seeking alternatives to courts and jails was necessary because of the significant pressures on the criminal justice system.
 - o Crime rates in the Northwest Territories were three or four times the national rates and, in the case of violent crimes, the ratio was closer to eight times the national rates.
 - o Demographic realities dictated that these pressures could only worsen in coming years.
 - o For some time the response to this pressure had been to devote more resources to the system: to policing, legal aid, courts and corrections.
 - By the time of transfer of Corrections, though, there was a growing consensus in the criminal justice community that this kind of response could not be sustained fiscally.
 - o As well, there were doubts about the effectiveness of responding to the problem of crime by just increasing budgets for the existing system.
 - o At the same time there was growing awareness nationally, aided by the publication of several highly critical inquiries that the criminal justice system in Canada was not serving Aboriginal people well.
 - o There was also dissatisfaction expressed at the community level with the perceived ineffectiveness of this system.
 - o As a result, there was a high degree of interest, both among justice players and the political leadership, in exploring potential alternatives to the current Euro-Canadian system.
 - At the time of the transfer of Corrections to the Department of Justice, a decision was made to devote resources at the community level to promote approaches whereby community members could be more directly involved in dealing with justice-related problems arising in their communities.
 - Consequently, the Community Justice Initiative was implemented in June of 1994 through the establishment of a Community Justice Division within the Department of Justice.

² Campbell Research Associates, Kelly & Associates, Smith & Associates, prepared for Government of Northwest Territories, Department of Justice, A Framework for Community Justice in the Western Arctic – June 1999

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- The nine transferred positions were reprofiled as "community justice specialists" located in each of the Territories' regions (at that time including Nunavut).
 - These community justice specialists were directed to use a community development approach to support the work of individual communities in strengthening their own capacities to deal with their particular social and criminal justice problems.
 - Consistent with that approach, the Department of Justice declined to be prescriptive in determining what communities could and could not do.
 - Instead, communities were encouraged to establish community justice committees as a primary vehicle of community interest in justice matters.
 - While there were no explicit program goals or objectives defined at that point, the general principles that informed, and continue to guide, the work around community justice at the Departmental level were that the primary responsibility for community justice lies with communities and that the Department of Justice has a role in supporting the development of community justice initiatives.
- The Community Justice Initiative of the Department of Justice is currently operating in a transitional environment.
- There are a number of changes underway in the relationships between the Government of the Northwest Territories and Aboriginal communities:
 - The creation of the Nunavut Territory on April 1, 1999, resulted in the transfer of community justice specialist positions serving regions in the Nunavut Territory along with the contribution funding for Nunavut communities.
 - Self-government discussions in many of the Territories' regions are taking place and individual communities have expressed a desire to address their own security issues through taking on an expanded role in the administration of justice in their communities.
 - There is the potential for expansion of the scope of community justice from prevention and diversion to involvement in a number of other justice-related roles.
 - With the growing interest in restorative justice approaches, questions arise of how best to support community justice interests in making various models work at the community level.
 - A stand-alone probation service for the Northwest Territories is being developed. This could have an impact on community involvement with the justice system.

5. Relevant Documents, Studies and Practices - Other Canadian

5.1. Survey of Pre-charge Restorative Justice Programs ³

Origins and Development of Restorative Justice

Three developmental phases are usually identified: i) practices in early European and Western societies, and Aboriginal and other non-Western societies; ii) the revival of interest in restorative justice in the 1970's; iii) the recent focus on the community role in restorative justice in the 1990's.

i) **Early dispute resolution** in Western societies appears to have made extensive use of negotiated settlements and reparation - paying back for damage done - often on a private or community basis to restore the balance between victims, offenders and their community. Similar approaches are still found in some traditional and non-Western societies. From 11th - 19th century in most Western countries the state gradually took over responsibility for dispute resolution on behalf of victims and the community, prosecuting offenders and punishing them for breaches of state law, retribution replacing a negotiated settlement.

ii) The **revival of interest** in restorative justice is usually identified with concerns about victims' and citizens' exclusion from justice. Christie (1977) for example argued that conflicts are *property*, and urged the development of small neighbourhood courts reducing the exclusive reliance on professional justice personnel. The Mennonite community also urged the use of non-conflictual mediation and reparation for justice disputes, and was responsible for developing the first victim-offender mediation programmes or VORP (initially in Elmira, Ontario in 1974). The model spread rapidly, in various forms, through Canada and the USA, and to European countries from the mid 1970's. The VORP involves face-to-face meetings between victim and offender, facilitated by a trained mediator, to discuss the events and their effects and reach an agreed outcome. They are usually used post-charge or as alternative measures, and often with young offenders. Community and neighbourhood justice centres also began to appear from the 1970's in a number of countries, using mediation techniques to deal with civil and criminal cases.

High levels of satisfaction among victims and offenders with the outcome of VORP programmes have been common, but practice suggests that their use has been sporadic, referral limited, and often restricted to very minor cases or without a victim being present. Nevertheless, networks of mediation training and contact centres have been established in a number of countries, and considerable experience consolidated over the past 25 years.

iii) In 1990's a much more developed philosophy of restorative justice has emerged (eg, Zehr, 1990; Braithwaite, 1989) clearly associated with mounting dissatisfaction with the formal justice system, increasing retributive sentencing, fear of crime, overcrowded court schedules and institutions, and increasing costs. This **community phase** places much greater stress on the role of the community, on the wider circle of people involved in an offence, aims to work with more difficult cases, and advocates partnerships. **Sentencing circles and family group conferencing** are the primary examples associated with this phase. In a number of countries entire states and provinces plan to re-direct their correctional system towards a restorative justice model.

The Canadian Experience: The Evolution of Restorative Justice in Canada

Canada has played a major role in restorative justice since the 1970's having been the site of the first VORP, and has developed extensive experience in mediation and reconciliation over the past 25 years. A number of VORPs were established, often by voluntary non-profit organizations, as alternative measures for young offenders, and subsequently for adults, as well as post-charge or as alternatives to prison. A network of community organizations undertaking the promotion of information and training has also been established. As in other countries, however, early experience found referrals to VORPs have often been limited and

³ Shaw, Margaret and Frederick Jané, [Department of Sociology & Anthropology, Concordia University, Montréal, Québec, Network for Research on Crime and Justice, Survey of Pre-charge Restorative Justice Programs, http://qsilver.queensu.ca/rcinet/projects/execsum.htm](http://qsilver.queensu.ca/rcinet/projects/execsum.htm)

inappropriate, victim attendance low and with too little focus on victim needs, and there has been some evidence of 'net-widening'.

More recently legislative changes encouraging greater use of diversion for young offenders and adults, greater recognition of the need to consider alternative justice for Aboriginal peoples, the growth of victim concerns, and the movement towards community policing have all contributed towards a more receptive climate.

Spurred on by fiscal constraints, public concerns with crime levels, and dissatisfaction with the formal justice system, restorative justice has become the 'New Wave' in Canada. Renewed focus on youth justice committees and diversion for young offenders, and the legislation of adult diversion have all facilitated this movement, as has the enthusiasm generated by conferencing approaches. Voluntary, local organizations and police services are developing conferencing eg. in schools. A series of national and provincial conferences and initiatives have endorsed the overall philosophy. The federal and some provincial governments are developing strategies or exploring the scope for restorative approaches e.g. the Department of Justice, Correctional Service Canada, National Parole Board, BC, Nova Scotia, and Ontario. A number of compendiums and accounts of projects have recently been produced which show the range and variety of projects established on restorative principles, and at all stages of the justice system, as well as guides to establishing restorative-based projects.

In Ontario the OPP is actively exploring the scope for developing community justice, encouraging individual projects and well as broader service commitment and training. The provincial government has explored the scope for formal and informal diversion over the past six years, and some project goals overlap with restorative justice. Community justice committees are currently being encouraged by the provincial government as well as conferencing at the pre-charge and subsequent stages. In Toronto an Aboriginal community council has demonstrated the scope for community-based sentencing decisions in an urban setting. A 1998 survey by the OPP indicates that a number of conferences, sentencing circles, justice committees and mediation programmes have been initiated since 1993 within OPP detachments, municipal and First Nations police services, apart from other community justice projects. Many of those projects clearly based on restorative principles are in First Nations policing areas.

5.2. Restorative Justice: Directions and Principles –Developments in Canada - 2002⁴

Restorative Justice in Canada

The starting point for a discussion of restorative justice in Canada is the roots of restorative justice in the cultures of Aboriginal peoples. Although it would not be appropriate to characterize models of justice and healing in Aboriginal communities as restorative justice – clearly, they have a much broader cultural scope – the principles that underlie traditional healing approaches are entirely consistent with the concept of restorative justice (LaPrairie, 1992; Roach, 2000). Accordingly, as these rich traditions have become more well known, they have influenced the development of restorative justice in the mainstream system, particularly evident in the innovation of sentencing circles (Stuart, 1996, 2001).

The beginning of the modern application of restorative justice in Canada is typically given as 1974 in Kitchener-Waterloo, Ontario where the Mennonite Central Committee (Church) introduced victim-offender mediation in the courts (Peachey, 1989). Non-governmental organizations and faith communities have continued to be at the forefront of innovations in restorative justice since that time (Pate, 1990; Church Council on Justice and Corrections, 1996). For example, the Church Council on Justice and Corrections, a national faith-based coalition of eleven founding Churches, has made restorative justice the focus of its work since it was established in 1974.

In 1988, the Parliamentary Standing Committee on Justice and Solicitor General conducted a review of sentencing, conditional release and related aspects of corrections, and published a report titled *Taking*

⁴ Robert B. Cormier Restorative Justice: Directions and Principles –Developments in Canada 2002-02, Department of the Solicitor General Canada <http://www.sgc.gc.ca/EPub/Corr/e200202/e200202.htm>

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Responsibility, commonly known as the Daubney Report (Canada, House of Commons, 1988). This far-ranging review included a focus on the needs of victims and restorative justice. The committee recommended that the government "support the expansion and evaluation throughout Canada of victim-offender reconciliation programs at all stages of the criminal justice process which: a) provide substantial support to victims through effective victim services; and b) encourage a high degree of participation" (p. 98). The report also recommended that the purposes of sentencing be enacted in legislation, and that these include reparation of harm to the victim and the community and promoting a sense of responsibility in offenders. The purpose and principles of sentencing were introduced in the *Criminal Code of Canada* in 1996, and the stated objectives of sentencing include "to provide reparations for harm done to victims or to the community" and "to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community" [*Criminal Code*, Canada ss. 718 e) and f)].

In the 1990s, restorative justice gained significant momentum in Canada. The National Associations Active in Criminal Justice, an umbrella organization that brings together twenty non-governmental national organizations involved in criminal justice, published a discussion paper that highlighted restorative justice within a "social responsibility approach" to justice (National Associations Active in Criminal Justice, 1990). Consistent with the recommendations of the Daubney Report, there was an expansion of restorative justice programmes across Canada. The approach could be generally characterized as one of exploring ways of applying restorative justice processes to improve the existing criminal justice system. These restorative processes have been understood to be complementary to the mainstream criminal justice system (Department of Justice, Canada, 2000).

Restorative justice programmes have been categorized under three core models: victim-offender mediation, family group conferencing and circles (Department of Justice, Canada, 2000). Victim offender mediation, where the victim and the accused person are brought together with a trained mediator to discuss the crime and develop a resolution agreement, is commonly used as a post-charge alternative measure (Pate, 1990) but is also used post-sentence in serious cases (Roberts, 1995). The family group conferencing model, which originated in New Zealand based on Maori traditions and was later developed in Australia, engages the family in resolving conflicts involving youth. In 1995, the Royal Canadian Mounted Police adapted this model in a programme called Community Justice Forums that are designed to divert cases of less serious crime where the offender admits responsibility (Chatterjee, 1999). The model has since been applied by other police forces in Canada including the Edmonton Police Services and the Ontario Provincial Police (Shaw and Jané, 1998). Circles are based on North American Aboriginal traditional practices and ceremonies where people sit in a circle and speak in turn to discuss and resolve an issue affecting the community. This model has been used in various forms including sentencing circles (Stuart, 1996), healing circles in the context of community corrections (Solicitor General Canada, 1997a), and community-assisted hearings by the National Parole Board for decisions regarding the conditional release of an offender from prison into the community (Vandoremalen, 1998).

The Federal/Provincial/Territorial Ministers Responsible for Justice endorsed a report titled *Corrections Population Growth* (Solicitor General Canada, 1996) which aimed to address the growth in the prison population in Canada at that time. One of the recommendations of the report was to increase the use of restorative justice and mediation approaches, and share information on the results of demonstration projects based on restorative principles. Jurisdictions reported on activities in response to this and the other recommendations in subsequent progress reports (Solicitor General Canada, 1997b, 1998, 2000). Most Canadian jurisdictions reported having introduced restorative justice policies and programmes.

A national conference on restorative justice, sponsored by the Canadian Criminal Justice Association and the International Centre for Criminal Law Reform and Criminal Justice Policy, was held in March 1997 in Vancouver, British Columbia (Scott, 1997). This conference brought together representatives of government departments and non-governmental organizations, criminal justice practitioners and researchers to explore the implementation of restorative justice initiatives and plan the further expansion of the field. The Vancouver conference was a watershed for restorative justice in Canada. It raised awareness of restorative justice and served as a catalyst for subsequent action in many locations across the country. For example, a major programme of restorative justice with youth in the Province of Nova Scotia was launched in the following year (Department of Justice, Nova Scotia, 1998).

A working group composed of senior officials from Federal, Provincial and Territorial governments was established following the Vancouver conference with a mandate to collaborate in the elaboration of policies for

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restorative justice, promote and disseminate research, and share information on developments in the various Canadian jurisdictions. In May 2000, the working group prepared a consultation paper titled *Restorative Justice in Canada* (Department of Justice, Canada, 2000). This paper provides an overview of the nature and philosophy of restorative justice and its applications, a brief synopsis of key developments in legislation, policy and programmes in Canada, and a list of consultation questions under five main headings. The consultation questions address the roles of government and community in restorative justice, the effects on victims, appropriate offences for restorative processes, accountability issues, and training and standards of practice.

Restorative justice has been a topic of discussion in Canada in many fora in recent years. The Church Council on Justice and Corrections published a compendium of restorative justice programs in 1996 (Church Council on Justice and Corrections, 1996). This document was instrumental in informing a broad audience about restorative justice initiatives in Canada and elsewhere. The Law Commission of Canada has published a discussion paper titled *From Restorative Justice to Transformative Justice* (Law Commission of Canada, 1999) in order to stimulate a broad debate about how conflicts in society are framed, assumptions concerning the parties to a conflict, and how remedial outcomes are achieved. A video titled *Communities and the Challenge of Conflict: Perspectives on Restorative Justice* (Law Commission of Canada, 2000) has also been produced and disseminated by the Law Commission of Canada. The video describes restorative justice initiatives in Canada and captures the views of various practitioners and informed commentators on key issues surrounding restorative justice. A recent issue of the *Canadian Journal of Criminology* (July 2000) was devoted to restorative justice.

The Royal Canadian Mounted Police held a symposium, *Achieving Justice with the Community in Canada: Restorative Justice – the Role of Police*, in March 2000 (Chatterjee, 2000). The symposium brought together a wide range of practitioners from across Canada and invited speakers from abroad to discuss issues in restorative justice with a particular focus on the contribution of the police. Conflict Network Resolution Canada, a non-governmental organization that focuses on the resolution of conflict in all spheres of life, is undertaking a consultation on restorative justice among a wide range of governmental and non-governmental stakeholders, using the draft basic principles produced by the U.N. Experts' Meeting on Restorative Justice held in Ottawa, October 29 to November 1, 2001, as the focal point for the consultation.

The Correctional Service of Canada initiated a restorative justice week that has been held annually in November since 1996. During the week a number of activities are held in various communities across the country to showcase and celebrate work in the field of restorative justice. A wide range of partners from governments, the non-governmental sector and faith communities participate in restorative justice week. Each year, a theme is chosen in order to highlight a perspective on restorative justice and is supported by the publication of resource kits. For example, in 2001, the theme was "Giving Voice to Hope."

There has also been a substantial growth in interest in restorative justice in universities, colleges and institutes across Canada. A compendium of restorative justice and conflict resolution education programmes offered by universities, colleges and other post-secondary or community-based institutions has been published (Correctional Service Canada, 2001). While not purporting to be an exhaustive list of such programmes, it contains thirty-nine entries.

In the absence of an agreed-upon definition of restorative justice it is difficult to produce a definitive inventory of restorative justice programmes in Canada. In addition, since some of these programmes are initiated informally at the community level they are not easily identified when doing a compilation. Notwithstanding these challenges, an inventory of events and initiatives related to restorative justice was produced (Correctional Service of Canada, 1998), and a *Canadian Directory of Restorative Justice Programs* is posted at the Web site of Conflict Resolution Network Canada (www.cnetwork.ca).

5.3. Restorative Justice - A program for Nova Scotia - 2001⁵

Development and Implementation of the Nova Scotia Restorative Justice Program

⁵ Restorative Justice - A program for Nova Scotia, Update 2001, <http://www.gov.ns.ca/just/rj/rj-update.htm>

- A multi-disciplinary committee was formed in 1997 to consider the development of a framework for Nova Scotia. The consultation process identified that the Government should not be the service deliverer, but should develop the legal framework, set standards and monitor progress. Government and communities would enter into a partnership to develop restorative justice capacities in Nova Scotia.
- It was fortunate that Nova Scotia already had youth justice agencies which were delivering Alternative Measures Programs. These agencies had dedicated staff, community boards, and a volunteer-driven model based on community development concepts.
- Four communities were selected to participate in the first phase of Program implementation targeting youth aged 12 - 17: Cape Breton Regional Municipality, Halifax Regional Municipality, Cumberland County and the Annapolis Valley.
- Multi-disciplinary working groups were formed in these communities, and these groups provided significant input into the development of the protocols for service delivery. Service delivery began November 1, 1999 for pre- and post-charge referrals, and March 1, 2000 for post-sentence and post-conviction referrals.
- Phase II starts September 1, 2001, and will expand the Program Province wide. A similar step by step implementation will be followed, with the police entry point commencing September 1, 2001, followed by the crown entry point in October, 2001 and by court and corrections entry points in January 2002.

The Start of Action in Nova Scotia⁶

Over the past decade the shortcomings of the justice system have led many to consider turning to the idea of restorative justice.* Initiatives with restorative justice principles have been emerging in communities throughout Canada, including Nova Scotia.

The Nova Scotia Department of Justice is committed to improving the delivery of justice. Its leadership in the development of this Restorative Justice Initiative is part of its continuing commitment to meaningful improvements. In the summer of 1997 a multi-disciplinary Steering Committee¹⁰ was struck by the Department to develop a system-wide Restorative Justice Initiative for Nova Scotia.

In September 1997 the Steering Committee hosted a one-day symposium on the future of restorative justice in this Province. It was attended by key individuals from all components of the criminal justice system, including the Minister of Justice, key Justice officials, Chief Justices/Judges of each level of court (or his/her representative), the Executive Director of Legal Aid, the Director of Public Prosecutions, chiefs of various key police services, Victims' Services staff, and community representatives. This group enthusiastically endorsed the idea of moving forward with restorative justice ideas.

5.4. Restorative Justice In Canada - 2001⁷

- Some would argue that restorative justice is not new, but is really a return to what was historically the dominant model of criminal justice.
 - This approach arises from a growing acknowledgement that the more traditional adversarial justice system is not always the most appropriate or effective way to deal with crime and its effects on the victim, the offender and the community.

⁶ <http://www.gov.ns.ca/just/rj/rj-develop.htm>

⁷ Justice Canada, Restorative Justice in Canada, 2001-11-19, <http://canada.justice.gc.ca/en/news/conf/rst/rj.html>

A growing movement

- Many Canadian communities have developed restorative justice initiatives and some have comprehensive strategies, training material and evaluation plans. A 1998 survey by the Correctional Service of Canada found almost 200 initiatives across the country, including conferences, publications and a wide range of community justice programs.
- Some programs are delivered through and funded by community agencies, while others are administered by government departments.
- The Department of Justice Canada funds a number of restorative justice programs through such initiatives as the Aboriginal Justice Strategy, the Policy Centre for Victim Issues, the Youth Justice Renewal Initiative and the National Crime Prevention Centre.
- Other federal departments and agencies are also active in advancing restorative justice initiatives, including Solicitor General Canada, the Correctional Service of Canada, the National Parole Board and the RCMP.

International Initiatives

- The United Nations Commission on Crime Prevention and Criminal Justice is developing a draft declaration of basic principles on the use of restorative justice programs in criminal matters.
 - Canada has taken a leading role in sponsoring this resolution and hosted a major meeting of international experts in October 2001 to draft a set of basic principles for further consideration by the UN Commission.
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5.5. Aboriginal Justice Strategy (AJS) Trends - 2000⁸

5.5.1. Project Growth:

- The most growth, by year, took place in fiscal year 1998-99 where the projects increased from 42 to 62.
 - The most growth by province or territory from 1996-97 to 1998-99 was both Northwest Territories and Nunavut where no projects were funded in 1996-97 but by 1998-99 there were 6 in each.
 - In terms of location, while on-reserve projects and urban projects increased in numbers through the years, the most dramatic was in the northern location.
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5.6. Restorative Justice in Canada - 2000⁹

- Restorative justice, an approach to crime that focuses on healing relationships and repairing the damage crime causes to individuals and communities, is not a new idea.
- The concept has been accepted for some time by governments, community organizations, Aboriginal organizations, interest groups, and even by courts that are looking for more constructive ways to deal with crime.
- **Mainstream System:** Recent years have seen a growing interest in the concept of restorative justice.
 - The conventional attitude to crime in Canada has been to see it in terms of abstract offences against the law or the state – an offender is found guilty and punished, usually with fines or incarceration.
 - Over the past two decades, the Canadian public has become increasingly interested in alternative ways of resolving conflict and preventing crime.

⁸ Department of Justice Canada, The Aboriginal Justice Strategy: Trends in Program Organization and Activity 1996-1997, 1997-1998 and 1998/1999, Prepared for the Aboriginal Justice Directorate, Department of Justice Canada by Naomi Giff, March 10, 2000 -

⁹ Federal-Provincial-Territorial Working Group on Restorative Justice, Restorative Justice in Canada: A Consultation Paper (May 2000) available from the Department of Justice Canada, <http://canada.justice.gc.ca/en/ps/voc/rijpap.html>.

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- Many believe that our court-based, adversarial system needs to be supplemented by other approaches that allow for the active involvement of victims, offenders, and communities.
- Restorative justice tries to meet these needs by addressing the harm that a crime has caused to the victim, the community, and even the offender.
- The goal is to repair the damage caused by crime as much as possible, to restore harmony and stability, and to prevent further crime from occurring.
- **Jurisdictions:** Since each jurisdiction in Canada is responsible for developing its own restorative justice programs, programs vary from jurisdiction to jurisdiction.
 - Many Canadian jurisdictions are developing restorative justice programs and initiatives –some already have comprehensive strategies, training material, and evaluation plans.
 - A 1998 survey found almost 200 initiatives under way across the country, including conferences, seminars, publications, and a wide range of programs¹⁰.
- **Gladue:** An important step came in 1996 when the sentencing principles in the Criminal Code were amended.
 - The 1996 principles encourage the use of community-based sentencing and draw on key restorative elements such as the need to promote a sense of responsibility in offenders and for them to acknowledge and make reparation for the harm they have done to their victims and to the community.
 - One important passage, paragraph 718.2(e), states that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."
 - This statement, recently endorsed by the Supreme Court of Canada in the *Gladue* decision, acknowledges that many Aboriginal justice projects use a restorative approach that builds on values of healing and restoring harmony in the community.

5.7. The Incorporation of Dispute Resolution into the Criminal Justice System: Playing Devil's Advocate - 1998¹¹

Restorative Justice: Understanding the Quality of Change

While it may be something of a surprise to some, building a *restorative justice* paradigm at the end of the twentieth century has involved a deliberate *reaching back* to social, moral and philosophical belief systems of other ages and other cultures.¹² The objective, then, has been to bring those belief systems forward, implant them in western culture and reengineer justice. On one level, the process can be considered analogous to the transplant of organs in a body. A very basic concern, following from this analogy, is that the same potential that exists for rejection of an implanted organ by the host body exists also for western society which could reject this new justice paradigm that is rooted in belief systems and models of community which, arguably, no longer exist in western cultures.

¹⁰ Corrections Services Canada, September 1998, Inventory of Canadian Events and Initiatives Related to Restorative Justice, Ottawa: Corrections Services Canada *cited in* Federal-Provincial-Territorial Working Group on Restorative Justice Restorative Justice in Canada: A Consultation Paper (May 2000) available from the Department of Justice Canada, <http://canada.justice.gc.ca/en/ps/voc/ripap.html>.

¹¹ Montgomery, Andrew N. Restorative, Justice Canadian Forum on Civil Justice, The Incorporation of Dispute Resolution into the Criminal Justice System: *Playing Devil's Advocate*, 1998 <http://www.law.ualberta.ca/centres/civilj/full-text/montgomery.htm>

¹² Whether one considers the religious roots of *restorative justice*, as outlined by Bontrager, Bill, JD, 1997. *Restorative Justice: A concept whose time has come*. International Institute of Christian Studies, located on the internet at <http://www.>; or Price, Marty, 1998. *The Mediation of Drunk Driving Deaths and other Severely Violent Crimes*. Victim-Offender Reconciliation Program Information and Resource Centre, located on the Internet.

6. Relevant Documents, Practices and Studies – USA

6.1. Restorative Justice, Earned Redemption/A Communitarian Response To Crime-? ¹³

Historical Overview

- The principles and approaches now being referred to as restorative justice are grounded in ancient codes of conduct and practices have been at the core of many religious and ethical traditions.¹⁴
 - In fact, pre-state societies appear to have made use of two primary responses to crime.
 - The first, based primarily on vengeance, was associated with repayment of harm *with harm*.¹⁵
 - In addition, there were, as Weitekamp argues, in virtually all acephalous societies a variety of settlement and dispute resolution practices that typically included some effort to repair the harm, that might today be called restorative.¹⁶
 - Generally, these practices focused on some form of repayment or restitution to the victim or his/her family, and indeed, such reparative practices were formalized and detailed in a variety of ancient justice documents including:
 - The Babylonian Code of Hammurabi (c. 1700 BC) prescribed restitution in property offense cases;
 - The Sumerian Code of UrNammu (c. 2060BC) required restitution even in the case of violent offenses.
 - The Roman Law of the Twelve Tables (449 BC) required convicted thieves to pay double the value of stolen goods, and more if the thief had concealed the stolen goods in his or her home.
 - The earliest surviving collection of Germanic tribal laws (the *Lex Salica* promulgated by King Clovis soon after his conversion to Christianity in AD 496) includes restitutionary sanctions for offenses ranging from homicides to assaults to theft.
 - Ethelbert the Anglo-Saxon ruler of Kent, England, issued the Law of Ethelbert (c. AD600) containing detailed restitution schedules. For example, the laws differentiated the value of the four front teeth from those next to them, and those teeth from all the rest.
 - The Hebrews, perhaps more than any other ancient people, understood the importance of peace Shalom - in the community. *Shalom* meant much more than "absence of conflict," as many Westerners understand peace today. Shalom meant completeness, fulfillment, wholeness - the existence of right relationship among individuals, the community and God. Shalom described the ideal state in which a community should function.¹⁷
 - Acephalous societies generally preferred reparative and often ritualistic responses to crime that sought to restore community peace and harmony to crime as an alternative to blood feuds which generally had devastating consequences for community life.¹⁸

¹³ Gordon Bazemore, The Communitarian Network, Restorative Justice, Earned Redemption And A Communitarian Response To Crime * <http://www.gwu.edu/~ccps/Bazemore.html>

¹⁴ Van Ness, "New Wine and Old Wineskins," 251-76; Zehr, Changing Lenses cited in Gordon Bazemore, The Communitarian Network, Restorative Justice, Earned Redemption And A Communitarian Response To Crime * <http://www.gwu.edu/~ccps/Bazemore.html>

¹⁵ G.M. Weitekamp, "The History of Restorative Justice," in Restoring Juvenile Justice: Changing the Context of Youth Crime Response, eds. G. Bazemore and L. Walgrave (Monsey, NY: Criminal Justice Press, forthcoming [1998]) cited in Gordon Bazemore, The Communitarian Network, Restorative Justice, Earned Redemption And A Communitarian Response To Crime * <http://www.gwu.edu/~ccps/Bazemore.html>

¹⁶ R.J. Michalowski, Order, Law, and Crime (New York: Random House, 1995); Van Ness, et. al., "Restorative Justice Practice." cited in Gordon Bazemore, The Communitarian Network, Restorative Justice, Earned Redemption And A Communitarian Response To Crime * <http://www.gwu.edu/~ccps/Bazemore.html>

¹⁷ Van Ness, et.al., "Restorative Justice Practice." cited in Gordon Bazemore, The Communitarian Network, Restorative Justice, Earned Redemption And A Communitarian Response To Crime * <http://www.gwu.edu/~ccps/Bazemore.html>

¹⁸ Weitekamp, "The History of Restorative Justice." cited in Gordon Bazemore, The Communitarian Network, Restorative Justice, Earned Redemption And A Communitarian Response To Crime *

- The emphasis on vengeance later became more formalized, more predominant, and also moderated somewhat in the late middle ages as feudal lords and kings consolidated the response to crime and social control through the power of the state.
- Van Ness, et. al. argue that the Norman invasion of Britain marked the beginning of paradigm shift, a turning away from the understanding of crime as a victim-offender conflict within the context of community toward the concept of crime as an offense against the state.¹⁹
- William the Conqueror (1066) and his descendants saw the legal process as one effective tool for centralizing their own political authority.
 - Eventually, anything that violated the "king's peace" was interpreted as an offense against the king and offenders were thus subject to royal authority.
 - Under this new approach, the king, and gradually "the state," became the paramount victim, while the actual victim was denied any meaningful place in the justice process.
 - As this occurred, the emphasis on reparation to crime victims was gradually replaced with the emphasis on punishment of the wrongdoer by the state, what is now referred to as "retributive justice."²⁰
- Although reparation in the form of restitution and community service had been used occasionally by U.S. courts in this century,²¹ these sanctions did not become widely popular as sentencing options until the 1970s.
 - Restitution and community service, and to a lesser extent victim-offender mediation, have been used since the 1970s with some regularity in U.S. criminal and juvenile courts and are often administered by probation and community diversion programs.²²

6.2. Restorative Justice – State of the Field 1999 ²³

Chronology Of Restorative Practice Developments 1970-1995

1970

- U.S.: The Institute for Mediation and Conflict Resolution (IMCR) Dispute Center used 53 community volunteer mediators and received 1,657 referrals during their first 10 months. By 1983 32-33,000 cases were referred and screened yearly (Wright 1996, McGillis 1997).

1971

- U.S.: In an experimental evaluation of restitution as a sanction, the Minnesota Restitution Center developed a residential program as a diversion for adult male property offenders sentenced to prison. The program's central focus was the active collaboration of the offender and his victims in the development of a restitution agreement. Center staff mediated restitution negotiations in direct victim/offender meetings (Fogel, Hudson & Galaway 1972; Hudson & Galaway 1974).
- U.S.: Night Prosecutor Program in Columbus, Ohio, diverted 3,992 cases from CJS Sept 72-3, then accepted bad checks cases and referrals went to 7,800 annually (Wright 1996:67).

1974

- *CAN: VORP The Kitchener experiment Kitchener, Ontario (Peachey 1989)*

1976

¹⁹ Van Ness, et.al., "Restorative Justice Practice." cited in Gordon Bazemore, The Communitarian Network, Restorative Justice, Earned Redemption And A Communitarian Response To Crime *

²⁰ Monarchs who succeeded William, competed with the church's influence over secular matters and effectively replaced local systems of dispute resolution. In 1116, William's son, Henry I, issued the Leges Henrici securing royal jurisdiction over certain offenses against the king's peace, including arson, robbery, murder, false coinage, and crimes of violence. cited in Gordon Bazemore, The Communitarian Network, Restorative Justice, Earned Redemption And A Communitarian Response To Crime *

²¹ S. Schafer, Compensation and Restitution to Victims of Crime (Montclair, NJ: Smith Patterson, 1970). cited in Gordon Bazemore, The Communitarian Network, Restorative Justice, Earned Redemption And A Communitarian Response To Crime *

²² J. Hudson, et.al., "Research of Family Group Conferencing in Child Welfare in New Zealand," in Family Group Conferences: Perspectives on Policy and Practice (Monsey, NY: Criminal Justice Press, 1996); A. Schneider, "Restitution and Recidivism Rates of Juvenile Offenders: Results from Four Experimental Studies," Criminology 24 (1986): 533-52; Umbreit, Victim Meets Offender. cited in Gordon Bazemore, The Communitarian Network, Restorative Justice, Earned Redemption And A Communitarian Response To Crime *

²³ McCold, Paul. "Restorative justice practice: The state of the field 1999." Paper presented to the Building Strong Partnerships For Restorative Practices Conference, Burlington VT, Aug. 5-7. 1999. http://www.restorativepractices.org/Pages/vt_mccold.html

Research Framework for a Review of Community Justice in Yukon

Community Justice – History

- CAN: *Community Diversion Centre of Victoria, British Columbia, Canada (Aubuchon 1978)*
 - NOR: Nils Christie "conflicts as property"
- 1977**
- U.S.: Randy Barnett Harvard Law proposes a paradigm based on "pure" restitution without punitive intent. "Our goal is not the suppression of crime; it is doing justice to victims" (Barnett 1977:296). Barnett recognizes that this would involve major shifts of perspective in favor of the victim. For one thing, the offense would be seen as primarily against the individual victim, not the State. The distinction between tort and crime would collapse (Wright 1996:60).
- 1978**
- U.S.: Elkhart, Indiana begins VORP (Gehm & Umbreit, 1985).
 - US: Department of Justice developed three experimental neighborhood justice centers (all still operating): Justice Center of Atlanta - 40,000 cases, 70% settlement rate; community, civil and criminal matters; Dispute Resolution Services in Los Angeles - civil, community & peer mediation - now \$1.3 million budget; Dispute Resolution Program, in Kansas City Missouri. - 15,000 disputes, community, civil, and criminal.
- 1979**
- U.S.: inauguration of the Makiki Neighborhood Justice Center Hawaii (Barnes & Adler 1983)
 - UK: Reparation Scheme UK Devon, Exeter juvenile court cases (Marshall 1992:16)
 - CAN: *Victim-offender mediation Winnipeg established (Perry, Lajeunesse & Woods 1987)*
- 1980**
- U.S.: Funding from LEAA, American Bar Association, American Arbitration Association, Institute for Mediation and Conflict Resolution, US DOJ's Community Relations Service and NIJ provided national leadership in developing community mediation centers.
 - AUS: Established three experimental community justice centers in New South Wales (Anderson 1982).
- 1981**
- NOR: Justice mediation - Child Welfare Conflict Councils Norway 90% referrals from police (Falck 1992)
 - NZ: National Advisory Committee on the Prevention of Child Abuse by Minister of social welfare.
 - U.S.: New York State-funded network of community-based dispute resolution centers
- 1982**
- U.S.: 200 mediation services in US all of which take at least a proportion of criminal cases, where there is a relationship between victim and the offender (Ray 1982 1983).
 - U.S.: Fresno VORP begins.
 - UK: first community mediation service UK Newham Conflict and Change Project (Wright 1996:83)
 - U.S.: the Navajo Nation established Navajo Peacemaker Courts (Yazzie & Zion 1996)
- 1983**
- NZ: child protection teams - not uncommon for families to be a part of the decision-making meeting or "case conference" (Hassall 1996:21)
 - FIN: youth justice mediation–social welfare approach using resident population as mediators in Vantaa Finland.(Iivari, 1992:137)
- 1984**
- GER: first generation of CM models begun as effort to implement restitution more effectively in criminal justice practice. (Kerner, Marks & Schreckling 1992)
- 1985**
- U.S.: 400 programs provide mediation to a diverse caseloads of disputes.
 - SCOT: minor crimes (all) Scotland SACRO reparation and mediation feasibility study Edinburgh using trained volunteer mediators (Warner, 1992)
 - U.S.: national survey located 32 victim-offender mediation (VOM) programs (Umbreit 1985)
 - NZ: Criminal Justice Act - reparation as preferred sentence for property offenders (Galaway 1992)
 - FRN: Paralegal community mediation Valence France (Bonafe-Schmitt, 1992: 182)
 - U.S.: Zehr published "Retributive Justice, Restorative Justice." Mennonite Central Committee. Office of Criminal Justice.
- 1986**

Research Framework for a Review of Community Justice in Yukon

Community Justice – History

- NZ: Children and Young Persons Bill introduced - proposing child protection multi-disciplinary teams of professionals and requiring involvement of parents and family groups in developing solutions in care and protection cases (not proposed for youth justice). (Hassall 1996:25)
- FRN: Community mediation experiment Lyon, France (Bonafe-Schmitt, 1992: 183)
- NZ: Dept of Social Welfare pilots 2 child protection teams regularly inviting families and their supporters to meetings and to involve them in the decision-making (Hassall 1996:22).
- *CAN: Healing Circles initiated by Hollow Water First Nation (Ojibwa) in Manitoba*
- NZ: PUAP-TE-ATA-TU Ministerial committee report. (Hardin 1996)

1987

- UK: VOM with adults offenders in Northants Kettering (Marshall 1992:16)

1988

- NZ: Victim-offender mediation by New Zealand probation officers (Galaway 1995)
- NZ: Whakapakiri Whanau! Family Decision Making, report of Dept of Social Welfare on FGC pilots in child protection (Hardin 1996)
- U.S.: Family Unity Meetings. Children's Services Department Oregon (Marsh & Crow 1998:40, citing Graber, et al., 1996)

1989

- NZ: Children, Young Persons, and Their Families Act New Zealand requiring family group conferences by care and protection coordinators and youth justice both under Dept. of Social Welfare - purpose to advance the well-being of families, minimize out of home placements, engage extended family (Hardin 1996).

1990

- U.S.: more than 400 dispute resolution services in U.S. responded to ABA questionnaire.

1991

- AUS: Wagga Police model piloted (Moore 1995a)

1992

- UK: Child Welfare FGCs piloted Family Rights Group London (Marsh & Crow 1998)

1993

- U.S.: Fresno VORP develops scripted Community Justice Conferences
- NZ: mandatory training modules for social worker FGC facilitators (Hardin 1996)

1994

- U.S.: National survey located 123 VOM programs in U.S. (Umbreit 1994)
- U.S. & Canada: Real Justice begins standardized training of conference facilitators.

1995

- South Africa: Truth and Reconciliation Commission established.
- U.S.: States with the largest numbers of community mediation programs are New York, Michigan, North Carolina, Massachusetts, California, Florida, Ohio, Texas and New Jersey (McGillis 1997).
- U.S.: Experimental evaluation of police conferencing begins in Bethlehem PA (McCold & Wachtel 1998).
- AUS: Reintegrative Shaming Experiment (RISE) begins in Canberra.

1999

- Welfare FGCs and justice conferencing pilot projects underway in Australia, New Zealand, United States, Great Britain, South Africa, Singapore and Israel (Braithwaite 1999). A greater number of projects now include evaluation instruments.

7. Relevant Documents, Practices and Studies – International

7.1. A Role For ADR In The Criminal Justice System? - 1999²⁴

- Dating all the way back to 12th Century England, following the Norman Invasion of Britain, a major paradigm shift occurred that turned away from the well established understanding of crime as a victim-offender conflict within the context of community. William Conqueror's son, Henry I, issued a decree securing royal jurisdiction over certain offences (robbery, arson, murder, theft, and other violent crimes) against the King's Peace. Prior to this decree crime had been viewed as conflict between individuals. The traditional emphasis was upon repairing the damage by making amends to the victim.
 - Under the Anglo-Saxon Kings Justice was shared between all "free men" (skilled tradesmen and property owners - those who were not serfs (peasants)), and the King, the Bishops and the Sheriff's (Shire Reeves had little of a Judicial role until about 1000 A.D, prior to that for about 100 years they were Policemen and Tax Collectors) . King Henry I (1068 – 1135) set up the system of local Justices of the Peace (Magistrates) and Justices in Eyre (Circuit Judges). Justices were not recorded by name until the reign of King Henry II. Prior to the time of King Henry I the Sheriff and the Bishop presided over local Justice. The *Leges Henrici Primi* (Laws of King Henry I) was a compilation of the earlier Mercian, Danelaw and West Saxon Laws, combined with some Canon Law and other European Laws. It was more a restatement of the existing Law. However in the *Leges Henrici Primi* (hence its name), is the first "Law" created by King Henry I – his Coronation Oath – where he announced his policies, including recognition of previous Law..²⁵
 - It is therefore not a foreign idea to return responsibility for law and order back to the community.²⁶
 - We've been doing this for hundred's of years!²⁷
-

7.2. Restorative Justice Theory -1989²⁸

- Ancient cultures - whose legal systems form the foundation of Western law - viewed crime as an intensely personal event. Although crime breached the common welfare, the offense was not considered primarily a crime against the state as it is today. The community had an interest in addressing the wrong and punishing the offender. But ancient cultures held offenders and their families responsible to settle accounts with victims and their families.
- This concept of justice is evident in ancient legal codes:
 - The Babylonian Code of Hammurabi (c. 1700 BC) prescribed restitution in property offense cases.

²⁴ Laurence M. Newell, Adviser to the Chief Justice of Papua New Guinea, A Role For ADR In The Criminal Justice System?, A paper prepared for the PNG National Legal Convention 25-27 th July 1999 Papua New Guinea

²⁵ Mark S. Umbreit in a paper entitled Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment <http://wcr.sonoma.edu/v1n1/umbreit.html>

²⁶ Francis Koimanrea MP, East New Britain (Papua New Guinea) Governor commenting on the introduction of community policing at the opening of the Baliora police barracks and the regional police headquarters in Rabaul on Friday 14 th May 1999

²⁷ Judge Michael Brown of New Zealand (a Maori), speaking of Family Group Conferencing, quoted in the Introduction to A New Approach to Juvenile Justice: An Evaluation of Family conferencing in Waga Wagga – A Report to the Criminology Research Council by David Moore with Lubica Forsythe and with the assistance of Terry O'Connell (Centre for Rural Social Research, Charles Sturt University-Riverina, Wagga Wagga NSW). Australian Institute of Criminology Papers on Restorative Justice: <http://www.aic.gov.au/rjustice/jjustice/index.html>

²⁸ Restorative Justice, Theory, by Daniel W. Van Ness, David R. Carlson, Jr., Thomas Crawford, and Karen Strong Excerpted from Restorative Justice, Theory, by Daniel W. Van Ness, David R. Carlson, Jr., Thomas Crawford, and Karen Strong © 1989 with permission of Justice Fellowship, PO Box 17500, Washington, D.C. 20041-0500. <http://www.context.org/ICLIB/IC38/vanGeldr.htm#Van%20Ness>

Community Justice – History

- The Sumerian Code of Ur-Nammu (c. 2060 BC) required restitution even in the case of violent offenses.
- The Roman Law of the Twelve Tables (449 BC) required convicted thieves to pay double the value of stolen goods, and more if the thief had concealed the stolen goods in his or her home.
- The earliest surviving collection of Germanic tribal laws (the *Lex Salyca*, promulgated by King Clovis soon after his conversion to Christianity in AD 496) includes restitutionary sanctions for offenses ranging from homicides to assaults to theft.
- Ethelbert, the Anglo-Saxon ruler of Kent, England, issued the Laws of Ethelbert (c. AD 600), containing detailed restitution schedules. For example, the laws differentiated the value of the four front teeth from those next to them, and those teeth from all the rest.
- The Hebrews, perhaps more than any other ancient people, understood the importance of peace - shalom - in the community. *Shalom* meant much more than "absence of conflict" as many Westerners understand peace today. *Shalom* meant completeness, fulfillment, wholeness - the existence of right relationships among individuals, the community, and God. *Shalom* described the ideal state in which a community should function.
- Crime was understood to break *shalom*, destroying right relationships within a community and creating harmful ones. Hebrew justice, then, aimed to restore relationships to wholeness.
- Restitution was an essential part of that restoration, but it was not an end in itself. The justice process required a commitment not only to address the wrongs, but also to reconcile the parties and re-establish community peace.
- That was, of course, not the only commitment. The victim, and the law itself, was also to be vindicated or requited. The purpose of the justice process was, through vindication and reparation, to restore *shalom* in a community that had been sundered by crime.

A PARADIGM SHIFT

- The Norman invasion of Britain marked the beginning of a paradigm shift, a turning away from the understanding of crime as a victim-offender conflict within the context of community toward the concept of crime as an offense against the state.
- William the Conqueror and his descendants found the legal process an effective tool for centralizing their own political authority. They competed with the church's influence over secular matters and effectively replaced local systems of dispute resolution.
- In 1116, William's son Henry I issued the *Leges Henrici*, securing royal jurisdiction over "certain offenses against the *king's peace*, arson, robbery, murder, false coinage, and crimes of violence." Anything that violated this peace was interpreted as an offense against the king, and offenders were thus subject to royal authority.
- Under this new approach, the king became the paramount victim. The actual victim was denied any meaningful place in the justice process.
- A new model of crime was emerging, with the government and the offender as the sole principal parties. Rather than centering on making the victim whole, the system now focused on upholding the authority of the state.