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## 1. Key Themes (to be explored)

**Fear:** Even though the government is faced with several criminal justice reform options, certain options which are, arguably, defensible, and perhaps most cost-effective, are unlikely to be publicly embraced because they fail to address the public's fear of crime. What are you afraid of in restorative justice is a question worth asking. **See 5.4**

**Fundamental/Sweeping Change:** The changes being advocated by restorative/community justice is both fundamental and sweeping – the magnitude of the change should not be underestimated. Failure to recognize the degree of change leaves the restorative community justice campaign for reform vulnerable to at least two negative outcomes: collapse under the weight of resistance and inertia in the current system, or superficial changes that will, in the long term, leave the current system essentially intact but dressed in the garb of change. **See 5.12**

**Resistance to Change:** Despite the criticisms of its processes, and its not insubstantial role in exacerbating conflicts rather than managing them, the criminal justice system remains as one of the cornerstones society. The faith that we place in lawyers as suitable combatants for our battles and judges as paragons of objectivity remains largely unshaken. Law is a discipline that is highly resistant to change. The common law system is that justice is more likely to be done (indeed, to be seen to be done) when one is able to have one's day in court – it is fair, reasonable, predictable and dispassionate as opposed to being inconsistent, capricious, and emotional. There is resilience in the adversarial approaches. The certainty of a judicial pronouncement has deep appeal. The visibility of and consistency attached to an open court hearing is attractive. The adversarial system is entrenched in the current style of legal education. The adversarial system may assist those who challenge authority and power. The adversarial system is culturally determining and determined. **See 7.5**

**Broader Public Policy Trend:** Even where there is a high level support for the restorative philosophy in the criminal justice system or community, the broader public policy trend is in the opposite direction. There is also a symbolic challenge that restorative justice programs face. We live in a world where everything has to be brought back to opposition between polarized sides: it is often portrayed as though victims and offenders cannot both be winners in the same policy initiative. **See 6.8**

**Stages of Developing Change:** The modern-day application of restorative justice is now a few years old and, in some jurisdictions, is approaching its first decade anniversary. As one examines the experiences of early efforts to create system-wide movement from a retributive model to those that promote restorative principles, one discovers a wide range of success and failure. Even in areas where major changes have been made, struggles to alter long-standing system cultures are commonplace. Agencies and systems which have made a fuller transition to a restorative driven practice have at least one thing in common: they have sustained the drive for change over the developmental stages and have modified their techniques based on their changing developmental state. Stages of development can be expected. The timing of strategies and leadership styles is a key consideration to making the kind of cultural shift needed. As such, should an agency's response to these changing needs be adapted accordingly? Will failure to make these adaptations likely result in a return practice-much like a rubber band naturally returning to its original shape? Are practitioners are so overloaded that it is very difficult for them to think about questions of underlying values or philosophy of implementation? **See 6.7**

**Upscaling problems:** There is considerable variability between jurisdictions in the uptake of restorative justice programs – pattern of administrative and implementation problems – some of which may derive from need for change across the justice system/the community at large – sometimes, they relate to concerns about 'responsibility' or 'turp' – uncertainty about the value of the program? **See 7.3**

**Criticisms of Restorative – Responses:** (see chapter on 'courts') Particularly in relation to adult offending and serious offending, restorative justice is often dismissed as an unworkable soft option. Common criticisms are:

- That restorative is a "soft option."
- That sanctions agreed to within the restorative justice framework may not be proportionate to the severity of the offence and are unlikely to be consistent: offenders involved in similar offending may end up with different sanctions.

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- That restorative justice will potentially enable victims to be further victimised by the offender.
- That the offender's rights are likely to be infringed since lawyers are not always present, and the process is not managed by lawyers.
- That, in contrast to the conventional model, community based restorative justice is repressive, retributive, hierarchical and patriarchal.
- That restorative justice will not work in situations where the offender is unrepentant.
- That restorative justice is all very well for children whose families can be closely involved, but it will not work for older offenders who have left home.

## 2. Research Questions

### 2.1. Stage of Development for Change

At what stage of development is the restorative community justice in the Yukon? Or somewhere in between the stages?

#### 2.1.1. Formative Years

**Characteristics:** Is there evidence of: dependency; rapid growth; need for basics; need for nurturing environment; high energy level?

**Primary Emphasis/Activities:** Is there evidence of: training; generation of excitement; media coverage; survey of community; action planning teams; community input; community social events; communication vehicles; visioning exercises?

#### 2.1.2. Early Years – Transition

**Characteristics:** Is there evidence of: a growth through discovery; time of testing rules; formulation/ testing; rebellion; seeking identity; increasing independence; confusion; experimentation; emotional fluctuation; need for clear boundaries; taking less calculated risks; emergence of independent, critical thinking?

**Primary Emphasis/Activities:** Is there evidence of: change of mission statement; new staff orientation and training sessions; new recruiting/reward mechanisms; different performance outcome measures; organizational structure change; shift in how resources are allocated; use of restorative justice guided case plans and reports

#### 2.1.3. Normative Years – Desired State:

**Characteristics:** Is there evidence of: settling down; taking on responsibilities; stability; taking calculated risks?

1. What are the existing artifacts - language, art, stratification, and status symbols?
2. What are the values - ideals, goals - typically passed on to successive generations - the artifacts are reflections of these values?
3. What are basic assumptions - rules of interaction – may be difficult to ascertain because they tend to be invisible, taken for granted, and unconsciously held?
4. What do the artifacts, values and basic assumptions say about the culture?
5. Review the restorative/community justice action plan and strategies. How well do the strategies match the current culture?
6. Review the leadership style. Is there a tendency to manage or lead? Given how closely the values and activities match up with restorative justice, -what changes need to be made? Taking into account the leadership skills and style, what is the best action choice(s) given the level of incongruent strategy and culture?
7. What are the next steps that should be taken within the selected strategic plan and action choices.

What are the challenges for progressing towards restorative community justice in the Yukon?  
Is there a process to address these challenges?

E.g. gaining information; providing introductory training; setting up planning teams; determining the readiness for change; providing additional/more targeted training; developing an action plan; developing a strategy and timelines; reviewing/revising mission/values/roles/supports/expectations/outcome measures

### 3. Relevant Documents, Studies and Practices – Yukon

#### 3.1. Building Community Justice Partnerships - 1997 <sup>1</sup>

**Barriers to Community Justice: The Myths** – a full description is outlined on pages 133-137

*All criminals are the same and require a punitive sanction, usually jail, to change their behaviours.*

*Only punitive sanctions work.*

*The public supports punitive responses.*

*Only professionals can cope.*

*There is nothing that the public can do.*

*One size fits all.*

*Community justice is only for small communities*

**Summary:** The tasks of confronting myths about crime, and of changing public opinion will not be as difficult as many assume. Aside from murder and other extreme crimes of violence, most people appreciate punishment by itself cannot change behaviour and often merely further entrenches ‘bad’ conduct by reinforcing ‘bad’ self-images. Many are becoming increasingly aware of the uncontrollable, escalating costs of excessive reliance upon the state and upon punitive responses to crime. They know they must find another way.

In the past we were able to postpone dealing with the underlying social conditions causing crime by removing offenders from their families and communities – isolating them in jails and by replacing the conflict resolution capacities of families and communities with professionals. The long-term costs of these short-term solutions are now upon us. There is much less flexibility today to employ short-term solutions, and even less scope for ignoring the underlying causes of crime.

It is time, to stop investing all our resources in filling sand bags against the flood, and to explore upstream to discover what is causing the flood waters to rise each year.

Aimed with ‘full’ and accessible information about current expenditures on justice, on what these expenditures achieve, and what options exist, the public can make choices driven less by emotions and more by the merits of what can best promote community security and well-being. The first steps in starting community justice initiatives must debunk these myths that perpetuate the growing state industry of crime-control. The first steps must ensure the community appreciates there are alternatives, alternatives that serve the best interests of communities. The energy and commitment necessary to build and sustain a community justice initiative cannot be mounted if these myths prevail. These myths keep public expenditures flowing into state agencies, reinforce disparaging attitudes among justice professionals about community empowerment, and perpetuate within communities a resignation that there is little they can do but increasingly rely upon state agencies.

**Myth - Forgiveness means forgetting or treating the offence as trivial or acting as if the offence did make a difference in the victim’s life**

- “Forgiveness is letting go of the offence of the power of the offense and the offender have over a person.
  - It means no longer letting the offense and offender dominate.

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<sup>1</sup> Stuart, Barry. 1997. Building Community Justice Partnerships: Community Peacemaking Circles. Ottawa: Aboriginal Justice Learning Network, Department of Justice.

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- Without this experience of forgiveness, without this closure, the wound festers, the violation takes over consciousness, our lives.
- It, and the offender, are in control.
- Real forgiveness, then, is an act of empowerment and healing.
- It allows one to move from victim to survivor.”<sup>2</sup>

**Myth - Community justice focuses primarily on offender’s interests**

- In developing processes, communities sought a balanced focus between the needs of the offender and the victim.
  - The very essence of the philosophy is balance reflected by according equal respect and importance to the needs of everyone affected by the crime.
- In some early cases, this balance was achieved. In many it was not.
- In the first cases, communities primarily focused on offender’s interests.
  - There are many explanations why processes at first failed to pay equal attention to the interests of both victims and offenders.
    - One cause of their failure, now overcome in some communities was opening statement of the Crown pressing for a jail sentence.
      - If a Crown, in opening remarks, presses for jail, the community presses for anything but jail.
      - The resulting clash of positions, as in any adversarial process, distorts or hides truth and can restrict an open frank focus on the merits of the case.
      - Until communities learn to believe that the solitary interest is not fill jails, and to believe the justice system can explore the merits of each case without preconceived notions of what must be done, the thrust of community input will remain principally on opposing jail sentences.
    - By inserting information about the victim before general discussion commences a more balanced contribution is elicited from all participants.
      - If the victim’s story is not shared until later, the focus on the offender may be accentuated to the detriment of both victim and offender.
      - An early imbalanced focus on offender’s issues may prompt victim supporters to react by challenging offenders or their supporters – or worse, the early imbalance may, through intimidation or frustration, cause the victim to be silent.

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<sup>2</sup> Zehr, Howard, *Changing Lenses*, Herald Press, Scottsdale, PA, 1990, p.47

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



## 5. Relevant Documents, Studies and Practices – Other Canadian

### 5.1. Survey of Pre-charge Restorative Justice Programs -<sup>3</sup>

The limitations include problems relating to individual rights, overemphasis on offenders and neglect of victims, overall goals, community and organizational commitment, and funding. Many are common to all forms of restorative justice.

Earlier practice and experience is a guide to the avoidance of many future problems, but eight major issues need to be considered in the development of restorative and community justice: net-widening; defining community; power imbalances; philosophy, goals and terminology; legislative impediments; justice issues; costs, benefits and funding, and evaluation.

*Net-widening:* a problem inherent in all, and a major criticism of many diversionary programmes or alternative sanctions. Minor offenders are drawn into the formal justice system and receive sanctions designed for more serious cases, or alternative sanctions are added-on to existing ones.

*Defining the community:* the term community is a vague one and has been used indiscriminately. Not all communities are clearly definable, or capable of sustaining or engaging in restorative justice projects, nor are those engaging in partnerships necessarily representative of all groups in a community. Engaging the community in restorative justice should not be seen as a 'quick fix' for crime prevention, some community problems cannot be dealt with without broader policy and longer-term input.

*Power imbalances:* those in positions of power in a community may not necessarily endorse restorative principles. Gender, cultural and minority concerns need to be included in developing restorative practice - eg. in individual circles or conferences - as well as broader planning or on-going partnerships. By virtue of their roles, justice professionals and others in positions of authority need to guard against abusing their power, particularly over young people.

*Philosophy, goals and terminology:* these are linked together and need to be clearly articulated to avoid the 'incorporation' of programmes and movement away from restorative principles, and to retain a balance between the interests of victims, offenders and community members. Incompatibility between the goals of partners, often imbedded in past training or working practices, requires particular attention.

*Structural and legislative barriers:* these may restrict the essential flexibility and vision of restorative approaches, or prevent their application to the more serious cases which stand to gain most from such approaches.

*Justice issues:* lack of due process, of clear definitions, vague procedures, and disparities in outcomes e.g. in circle sentencing, conferencing and informal diversion, have all be criticised, although admitting involvement in an offence is an essential safeguard. Injustices may also result if the most isolated and marginal offenders are excluded from restorative approaches.

*Evaluation:* the lack of evaluation of restorative justice projects has been a major complaint. Evaluation provides assessment of how far programme goals are being met, substantiation of claims for effectiveness, and accountability to communities and funders. Evaluation needs to be integral to the development of projects and involve those closely associated with them. It should examine the process and implementation of projects as well as outcomes, including case selection, participant involvement and satisfaction, agreements reached, community involvement, completion of agreements etc. Projects need to be well planned, monitoring set in place, and implementation assessed, since poor implementation may sink viable ideas. Assessment of impact may consider immediate and medium term outcomes, or longer term outcomes including re-offending, and

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

comparative costs and benefits with the formal justice system. Data should be qualitative and quantitative. All evaluative processes require adequate staffing and funding.

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## 5.2. The Criminal Justice System: Significant Challenges – 2002 <sup>4</sup>

### Changing the boundaries of the system

**Restorative justice.** Like crime prevention activities, restorative justice initiatives have increased in response to dissatisfaction with traditional approaches to criminal justice. The move to restorative justice has been embedded in legislation and endorsed by the courts, the highest levels of government, and international organizations such as the United Nations.

Restorative justice focuses on repairing the harm that offenders have done to their victims and the community. Victims and other members of the community are included in the justice process as active participants. Advocates of this approach believe that it helps to make the justice system more humane, reinforce accountability of offenders, and rebuild communities that may have been weakened by crime and other social ills.

Restorative justice approaches are being used at various points in the criminal justice process. Federal criminal justice agencies have established restorative justice programs:

- The RCMP uses community justice forums, usually as an alternative to charging an offender.
- The Federal Prosecution Service has played a key role in introducing restorative justice concepts in the North, such as sentencing circles.
- Correctional Service Canada has a number of restorative justice programs including victim-offender mediation in serious crimes, prison-based restorative justice, and circles of support and accountability.
- The Aboriginal Justice Strategy encourages community-based programs to use restorative justice concepts, such as sentencing circles.

While many believe that restorative justice can yield significant benefits, reservations expressed by others include the following:

- The adoption of restorative justice approaches is creating a parallel, community-based stream of justice in Canada.
- There is a risk that restorative justice measures funded or overseen by criminal justice agencies could actually draw more offenders into the criminal justice system, because they deal with relatively minor incidents that used to be handled outside the system.
- Offenders and victims may feel pressured to participate in a program.
- There are few standards and benchmarks for restorative justice programs.
- The effectiveness of restorative justice approaches is uncertain because offenders and victims choose to become involved in the process.

The Department of Justice told us that when it has provided funding to a restorative justice program, it has always ensured that the conditions attached to participation remove any pressure on victims that would tend to

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<sup>4</sup> Office of the Auditor General of Canada, The Criminal Justice System: Significant Challenges, Chapter 4, April 2002, <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/0204ce.html>

victimize them again. However, the Department noted that it is not a participant in the program and has no way of knowing exactly what transpires during discussions between program officials and victims.

There is not enough information available on the extent and effectiveness of restorative justice measures. For example, there is a need for research to determine whether restorative justice approaches reduce recidivism more effectively than traditional approaches.

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### **5.3. Restorative Justice: Directions and Principles –Developments in Canada - 2002<sup>5</sup>**

#### Emerging Concerns

While the search for empirical support continues, the debate on restorative justice is unfolding on various fronts. Although restorative justice holds promise to deliver a more healing and satisfying justice, there have been concerns expressed about restorative justice, particularly from victims and victims' advocates (Canada, House of Commons, 1998). There are concerns that restorative justice programmes will be used inappropriately, and will fail to denounce and deter serious crime.

Another concern is that restorative justice programmes are dominated by non-governmental organizations with a primary mandate to assist offenders in their rehabilitation and reintegration, and that the perspective of victims has not been adequately taken into account in the design and implementation of these programmes. In particular, there are concerns about the *ad hoc* approach to restorative justice programmes and the absence of guidelines, especially in relation to victim participation, power imbalances, serious crimes and the training of facilitators. Victims are concerned that there is a lack of services to victims currently within the mainstream system and that basic services to victims will be sacrificed in order to fund restorative justice programmes. Victim advocates have expressed an interest in participating in the process of setting the criteria and parameters for restorative justice programmes (Simmonds, 2000).

Quite apart from the concerns of victims, there are also concerns that in the zeal to encourage offenders to participate in restorative justice programs their rights may be compromised (Brown, 1994).

Other concerns have emerged from academics, particularly those focusing on sentencing. Roberts (2002) has argued that restorative justice may undermine the other principles of sentencing. He noted that the criminal law is an instrument of last resort, and using the criminal law to "do good" runs the risk of widening the reach of the criminal law beyond its intended use. Restorative justice, with its focus on repairing harm in an individualized manner, may also undermine the proportionality principle, i.e., that the severity of punishments should reflect the seriousness of the crime, as well as the principle of equity in treatment. Roberts cautioned that the public will reject sentences with restorative aims that are not sufficiently punitive in cases of serious crimes.

#### Future Directions

With the adoption of U.N. basic principles, the issues facing restorative justice will not evaporate. Finding a place for healing in a system that is fundamentally punitive will continue to challenge policy makers and practitioners. There will continue to be concerns regarding the application of restorative justice. Nevertheless, internationally accepted principles will assist by providing guidance that, if followed, will help to prevent the misinformed and inappropriate activities that may be undertaken under the rubric of restorative justice but do not conform to its philosophy and values.

The first task will be to promulgate the basic principles, and seek an understanding and broad-based commitment to them. As with any set of principles, their application in specific circumstances is the crucial

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<sup>5</sup> 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>

piece. No doubt, there will be debates regarding their interpretation. Ideally, the principles will serve as a focal point for discussion and examination of issues that will contribute to the growth of restorative justice.

The second task, and perhaps the key to the future of restorative justice, is further research and evaluation of programmes. Restorative justice has a very compelling philosophical basis. It is rooted in fundamental values of respect for human dignity, honesty, openness, responsibility, caring and healing of relationships. Yet, questions regarding whether it works, and how it works, abound. We have barely scratched the surface in the research to date on restorative justice and have just begun to conceptualize the research questions in this field (Nuffield, 1997; Presser and Van Voorhis, 2002). Clearly, restorative justice needs a stronger theoretical and empirical basis if it is to be sustained. Part V of the proposed basic principles addresses the continuing development of restorative justice programmes and concludes with the sentence: "The results of research and evaluation should guide further policy and programme development." To those who subscribe to evidence-based policy this is a call to action. The future of restorative justice depends on it.

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#### **5.4. Law, Justice, And The Community -2001<sup>6</sup>**

##### **Fear of Crime**

The Canadian government is confronted with increasing public pressure demanding tougher measures for violent offenders, especially for violent recidivists, sexual offenders, and mentally-disordered offenders. However, society's perceptions of the frequency of violent crime and of the public's vulnerability to crime are somewhat distorted. Most people:

- erroneously perceive violent crimes to occur more frequently than they actually do;
- erroneously believe the probability of becoming a victim of violent crime is higher than circumstances warrant; and
- erroneously assume the mentally ill are responsible for a disproportionate number of violent and sexual offences, regardless of the type of mental illness.

Further, the primary focus of the public's fear of crime may be misdirected. Its primary focus is on sexual and violent offences committed by strangers, when in fact, sexual and violent offences most frequently occur where the parties involved are acquainted.

The media's obsession with sensationally reporting, sometimes inaccurately, any incident involving rare and horrifying acts of violence by recidivists, sexual offenders, and psychiatric patients, is correlated with, and, arguably, under certain conditions partly responsible for, the public's distorted perceptions.

Even if the perception is irrational, anxiety resulting from fear of violent crime and perceived probability of victimization has negative psychological effects. Some authors have argued governments should develop and implement legislation which is specifically designed to reduce fear of crime.

Some commentators have even argued the fear of becoming a victim is a social problem as serious as crime itself.

##### **The Vicious Circle**

One of the major policy issues, other than whether "get tough" legislation is effective at reducing recidivism, is whether "get tough" legislation can reduce public fear of crime. In my opinion, it is unlikely that a specific piece of legislation can decrease the public's fear of crime. The enactment of punishment-oriented legislation may well strengthen society's irrational fear of crime by providing corroborative evidence that such enactments are in fact needed because crime is "truly" out of control. Moreover, such legislation may well generate further similar legislation, creating a vicious circle. Once a serious incident occurs after the enactment of a punishment-oriented provision, a scenario which is unfortunately doomed to happen, the public may lose faith in the

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<sup>6</sup> Dr. Ivan Zinger, Principal Researcher, Research & Statistics Division, Department of Justice Canada Report on the 28th Canadian Congress On Criminal Justice, June 20 - 23, 2001/20 Halifax, Nova Scotia Law, Justice, And The Community, hosted by the Canadian Criminal Justice Association <http://home.istar.ca/~ccja/angl/>

government's ability to address crime. The government in turn may be pressured to enact further punishment oriented provisions to address the public's loss of confidence.

Fear of crime and the perception of becoming a victim of crime has important public policy implications. Even though the government is faced with several criminal justice reform options, certain options which are, arguably, defensible, and perhaps most cost-effective, are unlikely to be publicly embraced because they fail to address the public's fear of crime.

### **A multifaceted, Evidence-Based and Convincing Response to Crime**

#### *Multifaceted*

- Making our communities safe, strong and healthy requires that crime be addressed on several fronts –a uni-dimensional response to crime (i.e., amending, or new, criminal laws as a first and single response) is not likely to effectively address crime.
- Carefully selecting the most effective instrument(s) of choice is essential. A combination of instruments may yield better results.
- There is a need to provide policy-makers (under pressure to enact tougher measures) with alternative instruments that would appease the public demands for immediate action.

Commission of inquiries and public days of mourning/recognition are examples of alternative instruments.

#### *Evidence-Based*

- Criminal justice policies must be effective and enhance public safety.
- Criminal justice policy must be evidence-based to be consistent with the public's best interest.
- Sufficient data must exist to justify policy reforms.

#### *Convincing*

- Public perception plays an important role in public policy. Active steps must be taken to publicly demonstrate that policy is developed in the public's best interest and to reinforce public confidence in the criminal justice system.
- Targeted convincing criminal law responses are at times required to address serious criminal activity.

These legislative responses must be justified by evidence.

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## **5.5. Restorative Justice: Its Promise/Challenges/Place in a Democratic Society - 2001<sup>7</sup>**

- There is also a symbolic challenge that restorative justice programs face.
  - We live in a world where everything has to be brought back to opposition between polarized sides: it is often portrayed as though victims and offenders cannot both be winners in the same policy initiative.
  - It is therefore important to understand well the nature of the fear directed at restorative justice.
  - At the Law Commission of Canada, we have recognized that such fears are legitimate and need to be expressed and taken into account.
  - Our next restorative justice project is the organization of an exercise in consultation and discussion between supporters and critics of restorative justice.
  - Hopefully, we will seek to identify the issues that critics fear.
- There is a need to build in best practices that respect these fears and do not dismiss them without hearing them fully.
  - We can guard against the risks; we can monitor to ensure that they are not realized.

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<sup>7</sup> Des Rosiers, Nathalie, President, Law Commission of Canada, Restorative Justice: Its Promise, Its Challenges, and Its Place in a Democratic Society, November 19, 2001, <http://www.lcc.gc.ca/>

## Community Justice- Challenges for Change

- We can create links between critics of traditional models of justice and equality seeking groups who aim at putting more equality in the justice system.
- What are you afraid of in restorative justice? is a question worth asking.
  - It allows everyone to understand the other in his or her vulnerability.
  - This project will be in progress from the fall into the spring and should allow us to gain further insights in developing the adequate criteria for evaluating restorative justice and developing best practices in restorative justice programs.

### System Failures

- There are two main challenges to restorative justice - the first is one that is shared among all justice systems.
  - It is a very practical one - any system will have failures.
- It is important to recognize the risk of failures of restorative justice.
  - One must accept that they are inherent to the experience of doing justice.
  - There will be failures as a result of human involvement - community members coercing the victims into participating, processes manipulated by clever offenders, communities not honouring the task and operating for ulterior interest or motives, acting in biased way or unable to carry this function honourably.
- These very practical risks must be reflected upon and must be guarded against.
  - We must engage seriously in understanding more fully the nature of these risks - do we know the subtle forms coercion can take?
  - How can we understand better and create the right incentives in the system so that victims have a real choice?

### 5.6. Alternative Justice, Testing the Waters - 2001 <sup>8</sup>

- When I raise this issue (restorative justice) however with other players in the court system they seem mystified or perhaps uncertain about what I am saying as if I am speaking a different language or at least with an accent that they cannot understand.
- There seems to be a reluctance or maybe a fear to try these alternatives, like circle sentencing.

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### 5.7. Deconstructing Restoration: The Promise of Restorative Justice-2000<sup>9</sup>

Restorative justice is a concept whose time has come. It is frequently bandied about in diverse contexts, from criminological circles, sentencing forums and young offender regimes to the brainstorm meetings of many a criminal justice agency. Government agencies eager to be seen to be doing something about a variously defined 'crime problem' have endorsed restorative justice, such as in New Zealand where since 1989 it has been

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<sup>8</sup> Judge Steven Point, *Provincial Court of British Columbia*, is program alumnus of the [Program of Legal Studies for Native People](#) and was director of the First Nations Program at the [University of British Columbia](#). He was appointed to the B.C. Provincial Court in 1999 and prior to that time he served as Tribal Chairman of the Sto:lo Nation and Chief of the Skowkale First Nation. *Alternative Justice, Testing the Waters*, reprint of the lecture delivered at the College of Law, University of Saskatchewan, on January 29, 2001. cited in Justice as Healing Vol. 6, No. 1 (Spring 2001)

<sup>9</sup> George Pavlich, *Deconstructing Restoration: The Promise of Restorative Justice*, Department of Sociology, University of Alberta to be presented at the International Conference on Restorative Justice Tübingen University, Tübingen Germany, 1-4<sup>th</sup> October, 2000

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officially endorsed as a privileged technique for governing young offenders.<sup>10</sup> Religious leaders, many involved in pioneering the concept, herald its spiritual promise as a humane and defensible way to heal the social harms witnessed in the course of their ecumenical duties (Considine, 1995; Van Ness, *et al.*, 1989). Some judges and lawyers, implicated in the shortcomings of state-legal institutions, see value in supplementing justice beyond that provided by Themis, her sword, her congested and alienating courtrooms (e.g., British Columbia, 1998; Brown and McElrea, 1993). As well, community workers and communitarians see restorative justice's potential value for democratic empowerment and ownership of local conflict (Merry and Milner, 1993).

From modern political horizons, conservative thinkers find solace in restorative justice's promise to re-emphasize the plight of victims, the role of family, the potential cost savings, the possible administrative efficiencies, etc. Many are also attracted by communitarian utopias that herald a return to mythically conceived communities, harmoniously gracing the days of yore (DeJulio, jr., 1998; Etzioni, 1998; Dignan and Cavadino, 1996). Liberal advocates point to a framework of justice that fully endorses the emotional deprivations and scars left on victims by 'criminal' behaviours (Cragg, 1992). Other liberals are attracted by restorative justice's promise to address the plight of offenders and the community through procedures that actually do something about the problem of crime, without relying – in the first instance – on retributive and coercive punishments (see Galaway and Hudson, 1996). Reformers too are enticed by images of social and community transformation, and see restorative justice as possibly leading to 'transformative' justice (R. Morris, 2000; Cooley, 1999; Bush and Folger, 1994).

If these brief statements indicate the broad-based appeal of restorative justice, they also imply the ambiguity of its various formulations. Belying the concept is a raft of disparate programmes, institutions and procedures that claim the mantle.<sup>11</sup> My experience of having a car stolen by a 15-year-old youth in New Zealand confirmed the official blessing there conferred to restorative justice in the youth justice terrain. After being apprehended, the youth precipitated much activity, and I found myself speaking on the telephone to a youth justice co-ordinator seeking a date for an FGC. I asked what the value of this meeting might be, and he diplomatically mentioned working within the 'principles of restorative justice.' Further interrogation indicated that this co-ordinator envisaged restorative justice as a complement to the state's justice system, but as much more effective in cases such as this one. There was a note of politely resigned patience as I pursued my questioning; I was told to expect a voluntary process that allowed me to have my say as a victim (which, he emphasized, would not have happened before). As well, he assured me, there were benefits to being part of a community process aimed at restoring and healing relationships. In his circles, I gathered, evoking the authority of restorative justice was sufficient to silence further questions into the underlying rationales of the FGCs. My own ambivalence about the promises of such justice surfaced around its assumption that I wanted to repair a harm (beyond having my vehicle returned), had a 'relationship' with the offender that needed to be restored, and that I was a member of a common set of relations – an amorphous 'community' which required my active participation for the benefit of all concerned.

Regardless, silhouetted against its broadly-based political, cultural, religious and common sense appeal, restorative justice's popularity has soared (see Cooley, 1999; Walgrave, 1998). But what precisely are we to understand by the concept, and more specifically how might one assess its promise? Responding to such a question is no easy task, given the exponential growth of discourses directed to the matter (see McCold, 1997).

Consequently, I shall attempt but a modest overview of some important themes as a basis for reconceiving two of restorative justice's key promises; namely, to (i) provide for justice against the state's 'repressive' or 'rehabilitative' responses to crime, and (ii) focus on developing fixed communities to house a limited restorative – rather than state, legal – justice.

Highlighting the paradoxes and dangers associated with fixed images of justice and community points me towards a deconstructed alternative. The latter views justice as a forever elusive promise surrounded by

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<sup>10</sup> See Akester, 2000: 25-36, and New Zealand Ministry of Justice, 1995.

<sup>11</sup> As noted, there are state sanctioned family group conferences (FGCs) in New Zealand (Bazemore, 1998; Morris and Young, 1989), and equivalents in Wagga Wagga (Australia – Braithwaite, 1998), the NGO efforts in Canberra, the healing or sentencing circles of Canada, the many different 'community' or 'neighbourhood' victim-offender reconciliation efforts, and mediation programmes in the USA (Kurki, 1999; Bazemore, *et al.*, 1997), Britain (Akester, 2000) and Europe (Akester, 2000; Walgrave, 1998). See generally, Galaway and Hudson (1996).

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changing calculations (e.g., law, restorative justice, socialist justice) claiming its name. It also leads me to argue that quests for a fixed, consensual, stable, etc., community are deeply problematic. I prefer to understand the quest for community as an attempt to calculate collective solidarity, and one whose promises of change and alternation are better met through the concept of 'hospitality'. My endeavour bears traces of Derridean deconstruction in the sense that its overriding approach is one of opening up concepts rather than closing them off as necessary, immutable, or inevitable decrees (See Derrida, 1997, 1976). But deconstruction is not destruction; it is one way of coming to grips with the radical contingency, and paradox, of any present discourse that makes possible the sorts of resistance and social change implied by restorative justice rhetoric.

### **Intimations of Restorative Justice**

The success of restorative justice is, no doubt, related to its ambiguity and equivocation. Indeed, as at least one author discovered, it is very difficult to achieve anything like a clear consensus on what the concept actually means (McCold, 1998). There is good reason for this: to be more precise would open the concept to specific challenge, and risk losing the broad-based appeal that its ambiguity affords. Nevertheless, there are several privileged signs in the discourse through which protagonists espouse restorative justice. To begin with, as with most enunciations of what something is – claims to presence, if you will – advocates explicitly refer to what it is not. Presence is enunciated by absence, and in the case of restorative justice, many key texts pay attention to specifying what such justice stands against. Hence, Zehr's (1990) influential text describes restorative justice as a radical shift of perspectives, a change of 'lenses' from those used by conventional state justice practices. This reflects a recurring *leitmotiv* that pits restorative justice against the poverty of existing criminal justice frameworks (Bazemore and Walgrave, 1999; Bazemore, 1998; Zehr, 1995; 1990).

This line of thinking has a rich genealogy, emerging from earlier efforts to enunciate the promise of community justice (Shonholtz, 1988/89; Abel, 1982), popular justice (Merry and Milner, 1993), victim-offender reconciliation programmes (e.g., Umbreit 1994), community mediation (Pavlich, 1996a), and quest for, as Auerbach (1983) put it, 'justice without law'.<sup>12</sup> From these lines of descent, restorative justice was championed as a radical alternative to two crime control perspectives; namely classicism and positivism (see Bazemore, 1998; Bazemore and Umbreit, 1995; Zehr, 1990). Restorative justice claims *not* to involve approaches to crime that focus on legally defined guilt. It eschews criminology's classical images of crime as a violation of law's implicit social contract, and so repudiates the so-called 'just-deserts' model that lies behind much of the neo-conservative calls to get tough on crime (see Pavlich and Ratner, 1996). Equally, restorative justice does not embrace the rehabilitative, correctional, emphasis of liberal "welfare" justice (Braithwaite, 1999: 8). Criminological positivism undergirds this approach, viewing criminal individuals, by virtue of their biological, genetic or psychological makeup, as being predisposed to offending (see Pfohl, 1994). This welfare image of justice calls for treatment that has included such horrors as social defence and correction through sterilisation, genocide, and the like, but its main impact has been to encourage classification-based, rehabilitative, treatment-orientated, correctional efforts in prisons (see Cullen and Gilbert, 1982). Like classical formulations, the individual is targeted as the source of the problem and in need of remedy, as requiring the attention of criminal justice agencies. The victim and community tend to be tangential to the main thrust of both philosophies.

By contrast, restorative justice is positioned as an alternative that embraces a vision of justice far older than professionalized legal justice (Bazemore, 1998; Braithwaite, 1999, 1998; Zehr, 1995; etc.). Restorative justice directs attention to the harms introduced by an offending (criminal) act. Its justice is directed not simply to the offender, or to the law, but emphasizes the victim, the offender and the community, promising a different, healing-centred and empowering justice arena (Zehr, 1990). Justice is evoked here not say as Thrasymachus' will of the strong, or Plato's image of a key virtue that has to do with fairness, or the retributive 'just deserts' retributive images, etc. Rather, 'justice' is mobilized through a definitional framework that permits talk of restoring crime and/or conflict's ravages:

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<sup>12</sup> The promise to develop alternative forms of dispute resolution (ADR) institutions was also related to the work of legal anthropologists and sociologists of law, who – in effect – questioned Western legal claims to have uniquely advanced, progressive legal systems (see Starr, 1989; Roberts 1979). This preliminary deconstruction of western jurisprudential hegemony opened the way for prominent debates on popular, and socialist, justice that rose to prominence in the 1970s and 1980s (see Pavlich, 1996b; Marshal, 1995). The complexities of these debates defies simple enunciation here, but suffice it say that they established the key bases for attempts to recalculate justice beyond law's institutions on the strength of promises to resolve what contemporaneous criminal justice practices could not.



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...Justice is then, bound up with responses to conflict (Cooley, 1999: 14)

Conflict is present when, “the actions of one individual or group are defined by another as inappropriate and therefore meriting some response” (Cooley, 1999: 3). Some conflict situations entail significant harm for parties, whilst others do not; but all provide an opportunity for social actors to reflect on acceptable behaviour, to accept these or to revise them in light of competing interests. Thus there is a ‘transformative’ potential in conflict, which allows us to move towards a more ‘just society’ (Cooley, 1999: 4; see also, Sullivan and Tiftt, 1998). Here we encounter a significant promise that resounds through restorative justice discourses:

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 (Cooley, 1999: 4).

Resolving conflict is defined in terms of an ability to heal harmful acts in ‘community’ settings. This emphasis on mending the harms that crime and conflict mete out to communities as an expression of justice can be understood on at least three levels (see Braithwaite, 1998: 331ff). First, at a ‘micro’ level, restorative justice centres on the ways in which an offence disrupts individual relationships within a community setting. Here, restorative justice pays most attention to the grassroots (Putney, 1997) in the sense that it attempts to establish procedures to address the needs of those affected by the act. Its primary goal is to ‘restore’, ‘replenish’ and ‘heal’ the damage done by harmful acts through inclusive (integrative) procedures that do not resort to stigmatising labels, coercive punishments, and other forms of social exclusion. It aims to restore victims and their trust by directly addressing their fears, concerns, losses, images of what needs to be done, and so on. At the same time, restorative justice procedures try to encourage offenders to face up to what they have done, to see their wrongs, grasp the pains they have inflicted on victims, and rectify these through physical restitutions as well as community obligations (e.g., through ‘reintegrative shaming’ rather than retributive punishment, public humiliation, or individually prescribed treatments – see Braithwaite, 1989). It also seeks to ‘repair’ the lost dignity of offenders and to involve the community as widely and meaningfully as possible. At this level, restorative justice entails a somewhat modest recognition that it cannot address structural injustices:

It settles for the procedural requirement that parties talk until they feel that harmony has been restored on the basis of discussion of all the injustices they see as relevant to the case (Braithwaite, 1998: 329-330).

Secondly, at a ‘medium’ level, restorative justice enlists and develops supportive community agencies, including churches, community organisations, non-governmental organisations, and the like. It nurtures the support of framing institutions to underpin the operations of restorative justice at a micro level. The point is to support community development, either conceptualised in communitarian terms (Etzioni, 1998), or through community development frameworks (See Merry and Milner, 1993). Thirdly, there is a macro dimension to restorative justice in that it aims to forge strong, peaceful and functional communities that actively vitalize democratic institutions by empowering members to exercise, and take responsibility for, their political freedoms. For some decades now, protagonists of community justice initiatives have advocated ideas of strengthening communities to develop effective public institutions and a civil society that allows the “people” to rightfully control the state in a functioning democracy.<sup>13</sup> Communitarians have further accepted this precept in their attempts to argue for an expansion of the community and a concomitant reduction of state control (see Pavlich, forthcoming). Braithwaite (1998, 1999) echoes the sentiment arguing that restorative justice should help to develop institutions of a “deliberative democracy” in which individual and communities are encouraged to deliberate responsibly on how to address the harms of crime.<sup>14</sup>

Although brief, such reflections indicate key restorative justice concepts and imply at least two of the discourse’s legitimating promises. These promises are articulated in various ways, but one could viably use Braithwaite’s (1999) detailed review of restorative justice as an illustrative reference point. First, there is the promise of a ‘deliberative’ *justice* – beyond the law’s justice – that centres on restoring the dignity of, and relationships between, individuals, communities and victims through their involved participation (‘ownership’) of a given conflict (or criminal) situation:

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<sup>13</sup> See review in Pavlich (1996a); see also Shonholtz (1988/89)

<sup>14</sup> As well, one could note the connections between some aspects of restorative justice discourse and the abolitionist perspective in criminology, as thoughtfully enunciated by Mathiesen (1998).

Restorative Justice is deliberative justice; it is about people deliberating over the consequences of crime, and how to deal with them and prevent their recurrence (Braithwaite, 1998: 329)

Secondly, this deliberative justice is evoked as a means of instituting supports to develop viable *communities* in a functioning civil society. Embracing this promise is wider one: building strong communities in a civil society will nurture the backbone of a thriving and free democracy. Thus, for Braithwaite,

If we take restorative justice seriously, it involves a very different way of thinking about traditional notions such as deterrence, rehabilitation, incapacitation, and crime prevention. It also means transformed foundations of criminal jurisprudence and of our notions of freedom, democracy, and community (1999: 2).

At the heart of these promises is a claim that restorative justice offers an alternative form of justice that can institute viable communities. I want now to explore some potential dangers that lie in such seemingly innocuous promises, and to use this as an opening for more radical alternatives than are possible within the limits of current restorative justice discourses.

### **Promises of Popular Justice Beyond Law**

The basic problem is of course whether we consider restorative justice as merely a series of techniques which are to be integrated into the existing systems of penal or re-educative responses to crime or restorative justice has to become a fully fledged alternative which should in the longer term replace maximally the existing systems (Walgrave, 1997: 12).

As the above statement implies, restorative justice discourse encounters a basic problem: on the one hand, it claims legitimacy by pledging allegiance to fundamental social transformations; on the other, its images of justice are not necessarily capable of the 'maximal' replacements advocated above, driving it to emerge as an 'integrated', or complementary element of existing legal practices. This apparent paradox is reflected in the ambiguity of the term 'restoration'. Restoration can connote ideas of 'replenishment', and even 'refurbishment', thus implying levels of change. However, it is often, perhaps even most often, conceived in terms of 'reinstatement', 'return' (as in returning to the way things were before), infusing a conservative dimension to its very foundations. This seeming paradox gains momentum through the discourse's underlying approach to the question of *justice*; namely, it views justice as something to be lived (e.g., a 'lived experience' – Cooley, 1999) but then counters this with a static view that defines justice through principles (even 'commandments' – Zehr, 1990). Such an approach is only marginally different from the very professional, legal ideas of justice that restorative justice was supposed to overcome. This leads me to suggest that the promise of providing an *alternative* justice may well require a radically different approach to the question of justice, such as the one indicated by Derrida's (1992) deconstructive images. How so?

As noted, much restorative justice discourse begins with the aims of changing, and providing an alternative to, professional courtroom justice (i.e., with its costly, time-consuming, inefficient, alienating, etc., processes that frequently escalate conflict). In this regard, Walgrave's statement is clear: the present system of justice must be 'maximally' replaced with institutions that embrace the 'restoring' or 'healing' principles of restorative justice. This implies not only an alternative philosophy of justice<sup>15</sup>; it also includes developing new institutions to claim its mantle (e.g. Nicholl, 2000; Umbreit, 1994). Both quests suggest social changes capable of replacing law's justice. Rhetorically, at least, this commits restorative justice protagonists to fairly significant transformations of the *status quo*. Here, the discourse's justice demands substantive social change and/or community development to empower individuals to exercise deliberative freedoms over conflict (see Bush and Folger, 1994). There are various conceptions of this call for change, including those centred on spiritual fellowship, the redressing of harm, communitarian calls for empowered moral communities, as well as political calls for viable civil societies and democracies (Braithwaite, 1999). Despite their differences, all accept that restorative justice should present an alternative vision and practise of justice, thus placing the discourse firmly on the side of bringing about changes to the communities/societies currently associated with professional legal justice and institutions.

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<sup>15</sup> Relating to this point, some aspects of the discourse claim that restorative justice is not so much a philosophy as a framework for specific practices (Braithwaite, 1999; Cooley, 1999: 19; Zehr, 1992, etc.). In my view, however, it seems somewhat disingenuous to claim that restorative justice offers alternate principles and visions of justice, as well as a series of guides on how to live justly, and then claiming that this is not a philosophy or theory. Restorative justice's formulate expressly arranges signs into a discourse that give meaning to particular practices, advocating one view of the world rather than another – this constitutes, at the very least, the rudiments of a philosophy of justice.

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At the same time, however, many protagonists place restorative justice in the service of redressing wrongs. For instance, reflecting a common enough theme in the discourse, Cooley argues that restorative justice proceeds from the basic premise that, “the most effective response to conflict is to repair the harm done by the wrongful act” (1999: 5). But if restorative justice is premised on repairing harms done, then in what sense can it accommodate calls for significant social change? That is, developing restorative justice discourses on the assumption of wrong (usually conceived in individual – or sometimes community – terms), commits one to endorsing the view that conflict generates harm, and moreover harm that is amenable to resolution through restoration practices. Cooley, on behalf of the Law Commission of Canada, puts it thus:

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...For restorative justice, because the culpability of the wrongdoer is taken for granted, determining what happened is important only to address the wrong (1999: 38).

Although Cooley raises this point to ponder whether restorative justice can be used in civil jurisdictions, it could equally be used for another purpose; namely, to signal just how much restorative justice’s promise to provide alternative frameworks of justice is compromised by a dogged allegiance to (mostly individual) conceptions of harm, and harming doing. What, asks someone like R. Morris (1995), about the harms expressed by the sometimes tragic lives of offenders? Does this image of justice fundamentally challenge existing incarnations, or is it merely an extension of what already exists in criminal law to any ‘harm’? Many have pointed to the net-widening dangers of restorative justice (see Levrant, et al, 1999) and community justice (Cohen, 1985), but there is also the danger of a self-imposed limitation that would see restorative justice as a mere servant to state justice, as a way to mop up its overt failures. The latter radically reverses the spirit of restorative justice’s promise to provide a ‘maximal’ replacement to law’s crime and punishment model.

In sum, the emphasis on ‘repairing individual harms’ in communities through narrowly conceived and limited practices of restorative justice (e.g. FGC, mediation, conciliation, etc.) has the effect of radically limiting what sorts of changes can be introduced into a given context. Can restorative justice significantly challenge the ‘norms’ that define ‘harm’ in a given context, or challenge the idea of harm enunciated in individual/community terms? And if it cannot do this, then is restorative justice really all that different from the criminal justice systems it seeks to ‘maximally’ replace? In what sense does it breathe life into an alternative that promises an actively lived justice? By focusing on how to restore harms done, protagonists do not fundamentally oppose criminal justice practices; on the contrary, they develop political arenas (FGCs, mediations) that help to contain, isolate and redress conflict that could threaten the stability of an existing set of relations. And restorative justice does this by focusing on individual cases of conflict. It may be that restorative justice shifts attention away from state concerns of legal guilt, but it does so on the assumption that some wrong *has* occurred, that there is an individual offender who is responsible for that harm, and a victim/community who is recipient thereof. Adjudication is replaced with consensus-seeking restorative devices (e.g. mediation), which seek to bring the parties to peaceable agreements, and make the ‘community’ own its response to the problem (Bazemore, 1998).

The latter implies a spirit quite at odds with the reformist/radical promise of restorative justice advocates. Indeed, various fundamental auspices of adjudication are not overcome by its quest to restore harms; namely, assumptions about individual (or communal) culpability for harm, endorsing a responsibility towards reasonable, law-abiding individuals in communities, the focus on suitable outcomes, seeking to change offenders, and so on. Although specific practices do differ (e.g. adjudication versus mediation), the homologies between the assumptions of existing criminal justice practices and restorative justice are transparent. Restorative justice ends up relying – perhaps even parasitically – upon the very thought systems it was supposed to eschew. Restorative justice promises are made not so much by carving out new conceptual horizons, as by delineating what restorative justice is not (i.e., it is not repressive, not reactive, reparative, distributive, etc). Furthermore, the basis for conceiving of what it is not lies in current criminal justice provisions, making for a mutually constitutive relation between restorative justice and state law (Pavlich, 1996a; Fitzpatrick, 1988).

Adding to this, and following some of Foucault's precepts, various authors have argued that medieval 'law and sovereign' models of power survived in modern societies by the constituting support of disciplinary powers designed to create normal individuals in society.<sup>16</sup> It may be that under postmodern conditions, law and discipline are increasingly subjected to governmental priorities, such as the rise of restorative justice's attempts to restore selves to peaceful, harmonious and secure communities (Pavlich, 2000). Regardless, restorative justice and its supposed opponent – the law – is a deceptive ruse. The homologies, mutual constitutions and common assumptions are far greater than their differences. Those who argue that many liberal legal assumptions are correct readily concede the point; but that concession comes at the cost of effectively diluting the appeal of restorative justice's promise to nurture fundamental alternatives.<sup>17</sup> From the above, one could argue that law's justice is not restorative justice's opponent. Instead, both law and restorative justice fall on the side of liberal and/or communitarian images of justice; in turn, both could be situated against a deconstructive vision of justice as a promise that endlessly invites its own recalculation.

Derrida (1992) and Lyotard and Thébaud (1985) elaborate upon the possibility of such an open-ended notion of justice.<sup>18</sup> It is not here the place to entertain the details of that vision, but only to intimate that a different approach to professional calculations of justice could better fulfill the promise of an alternative approach to justice. Most fundamentally, Derrida insists that justice does not exist as such; it is not present, an absolute entity, a reality or even a definable ideal to which our institutions might strive. Justice instead implies,

..non-gathering, dissociation, heterogeneity, non-identity with itself, endless inadequation, infinite transcendence. That is why the call to justice is never, never fully answered. That is why no one can say 'I am just'. If someone tells you 'I am just', you can be sure that he or she is wrong, because being just is not a matter of theoretical determination (Derrida, 1997: 17).

If it is anything, justice is an incalculable, non-definable 'there being', that forever calls us from the mists of the future. Its promise is always on the way, always in the future, always beyond what is presently calculated in its name. Thus, justice is an incalculable promise that encourages calculations in its name; law and restorative justice are two such calculations, but neither is just, for justice remains forever outside them. This recognition calls us to recognise justice as a promise, and to continuously calculate in its name, realising that no formulation/practice ever embraces justice.

In turn, this alternative image implies the value of approaching restorative justice with a sense of disquiet, with vigilance to the inevitable dangers of any calculations of justice, and a healthy openness to 'otherness' beyond the limits enunciated by such calculations. This welcoming of what is to come is one way of trying to prevent any calculations of justice's promise from closing themselves off as necessary events, as unquestionably better than another. It would insist that a primary responsibility be granted to what lies outside, what is other to, a given calculation. In other words, this sense of justice demands that we welcome alterity, never portraying the present as necessary or even necessarily better. This places the quest for justice on the side of ongoing reflection, recalculation and change, and always against conserving limit formations. It also provides an alternative way to approach justice that could involve continuing struggles for an open, and always moving, democracy (Derrida, 1994, 1997).

### **Promises of Community versus Hospitality**

Central to restorative Justice is recognition of the community, rather than criminal justice agencies, as the prime site of control (New Zealand, Ministry of Justice, 1996: 1)

If by community one implies, as is often the case, a harmonious group, consensus, and fundamental agreement beneath phenomena of discord or war, then I don't believe in it very much and I sense in it as much threat as promise (Derrida, 1995: 355)

Restorative justice's promise to develop/restore/replenish harmonious, peaceful, warm community relations is closely tied to the legitimizing rationales of the discourse. So too are its calls to return justice to the community.

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<sup>16</sup> See Pavlich (1996a, 1996b), Fitzpatrick (1988), Matthews (1988) and Foucault (1977).

<sup>17</sup> Related to this point, Braithwaite (1999: 93) accepts the claim that law and restorative justice are mutually constituted, but fails to then recognise that this acceptance compromises the claims to alternation that he uses to legitimate the concept.

<sup>18</sup> See also Pavlich (1996a: chapter 2).

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I have elsewhere echoed Derrida's worry about promises that centre on the concept of 'community' (Pavlich, forthcoming, 1996b). Appeals to amorphous, consensual and unified images of community harbour serious dangers to do with their quest for identity through exclusion. For instance, the assumption of harm to be restored is always issued from within the terms of a given community, and the responsibility of that definition is to its self-defined members; not to 'others' pushed to the margins of (and so constituting) that identity formation. This argument rests on the view that a universal community, one that includes everybody, cannot be specified – it is meaningless (Young, 1990). Communities always have members and outsiders; the ability to identify a community rests on the assumption of insiders who are somehow not the same as its images of the stranger, the other, the offender, etc (Bauman, 1997).

This basic definitional requirement of community, for all its warm connotations, involves a responsibility to the like, effectively fortifying them from the unlike. The unity (*unum*), being with (*com*), the identity, the common, is made present through successful exclusions that brace limits, specify boundaries.<sup>19</sup> It is perhaps then not surprising that community should be related to the Latin *municeps* (from whence we have 'municipal') that referred to those who were citizens of a Roman city (the *municipium*), but not permitted to be magistrates. Restorative justice's community is like the citizen, who serves the state, but not as a sanctioned official. The walled city keeps strangers outside through the coercions of law's empires, but the community operates through limits carved by its own double-edged sword, its fist in the velvet glove. This is community's secret, the secret of its subtle identification through exclusion. The dark side remains so long as a community does not face the continuous threat of a totalitarian refusal; namely, that of refusing to accept responsibility for the excluded others who allow specific community identities to be limited as a real, instituted present.

But let me be clear on this score. The promise of community is not necessarily totalitarian, nor something to be denounced out of hand. My point is just that a blind quest to develop communities at all costs is not an unequivocal good, devoid of severe dangers. Rather the threat of totalitarian closures around specific community identities can never be guarded against so long as one heralds, as do so many advocates of restorative justice, the (peaceful, secure, harmonious, etc.) community as panacea for the ills of contemporary state law. The quest for a closed identity that defines a given community and its harms involves closures around specific limits. Furthermore, this should not deceive us: such a community identity does not stand in necessary opposition to the state and its legal justice. As Agamben insightfully notes,

the state can recognise any claim for identity...What the state cannot tolerate in any way, however, is that the singularities form a community without affirming identity, that humans co-belong without any representable condition of belonging (1990: 86).

Agamben's point suggests an interesting alternative to the quest for a closed, identifiable community that can serve state justice, perhaps especially because it claims to oppose the state. He alludes to a way of calculating collective solidarity without resorting to the definitional closures of specific community images, or indeed those suggested by allied conceptions of 'society'. To be blunt, it may be possible to calculate promises of collective solidarity via meaning horizons beyond the ambit of state justice; perhaps by resisting the tendency to close off (unify) limits and to relentlessly open up particular instances of community. One could, furthermore, calculate collective solidarity differently by using the limitations of restorative justice's community promise to indicate new languages of open resistance to governance centred on closed (community, etc.) identifications.

Derrida alludes to the possibility in this passage:

There is doubtless this irrepressible desire for 'community' to form but also for it to know its limit – and for its limit to be its *opening*. Once it thinks it has understood, taken in, interpreted, *kept* the text, then something of this latter, something in its that is altogether *other* escapes or resists the community, it appeals for another community, it does not let itself be totally interiorised in the memory of a present community. The experience of mourning and promise that institutes that community but also forbids it from collecting itself, this experience stores in itself the reserve of another community that will sign, otherwise, completely new contracts. (Derrida, 1995: 355). ‘

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<sup>19</sup> Caputo (1997: 108) notes the relevance of the related *communio* and its intimations of defending and fortification – from *munis*, defence, fortification and *com*, common, etc.

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I interpret this statement in context thus: the very processes of instating a community (such as those advocated through restorative justice) always involves a dual mourning of past limits, and the promise of new ones. Hence, one could read restorative justice's critique of law's failures and the universality of restorative justice as 'mourning' for a timeless 'justice without law' (e.g., Braithwaite, 1998, 1999; Auerbach, 1983). At the same time, promises of an alternative justice, community and democracy herald new patterns of solidarity. In the interstice between the mourning and the promise, through which specific community identities are pursued, lies the impossibility of ever fully closing off a given calculation of community. The very process of identifying the limits of community, of specifying what it is not, its promise, etc., opens the floodgates of doubt, uncertainty – hence the ambiguity, ambivalence and ethereality of the communities to which restorative justice is addressed. The inability to specify 'community' is not a failure on the part of restorative justice advocates; on the contrary, it is the source of their deliverance. Indeed, this supposed failure brings community limits to the fore, presenting an opening from whence new images of solidarity may be countenanced and promised. This relentless opening up of limits disallows the 'community' from collecting itself into a totalitarian unity, a fortified exclusivity; it always calls for an escape to *other* calculations of collective solidarity.

Perhaps restorative justice's promise of community could be seen as succeeding through its failure to define and fortify the limits of community absolutely. But this is more a matter of circumstance than design, because the approach does not actively ward off the totalitarian dangers inherent to all discourses that champion absolute descriptive closure, and try to eliminate indecision. One could attempt calculations of collective solidarity through images of community that endorse uncertainty, and explicitly disallow fixed closures. Corlett (1993), for example, provides a lengthy analysis of the possibilities of seeking, as its title conveys, a *Community Without Unity*. Nancy (1991) too explores various ways of calculating community as an open (and therefore inoperative) frontier of possibility, as one always on guard against the totalitarian dangers attendant upon attempts to close off particular limits as necessary, ordered, etc. Without discounting the value of these attempts to calculate collective solidarity through open images of community, I still wonder whether another concept – less tarnished with the brushstrokes of fascist totalities – might better serve such calculations.

And what candidate concept do I have in mind? Perhaps images of collective solidarity could be rephrased through one that is scattered around Derrida's work; namely, *hospitality*. I suggest this possibility because it invites us to calculate collective solidarity without implying that the host give up an identity, and yet emphasize a responsibility to the other as guest, the terms of which must always be negotiated in specific contexts. Etymologically, the term derives from the Latin *hospitale* that connotes 'place where guests are received' (Ayoto, 1993: 287). The host is one who receives guests in such a place. In this place too, unlike community, hospitality calls for an approach to others not centred on closing off identities to include or exclude; instead it intimates a welcoming, an invitation to the other to cross the threshold of place, a *domus* perhaps. This gesture simultaneously opens the limit of that threshold to otherness and accepts an undecided negotiation of the terms of the host relationship. It extends an invitation to the stranger at various levels, from the guest in my home, to the negotiations of host countries for refugees, immigrants, and so on (Barkan, 2000).

But it is important to stress that as a host one does not give up having and maintaining levels of control over the place where guests are received. No doubt, to welcome is to remain open to the means by which mastery over place is negotiated, even to allow for the dissociation of mastery as presently understood. It cannot require a gathering of limits, an eternal closing of place that demands strangers to play by set rules, or risk eternal exclusion. Hospitality, instead, opens these limits without requiring the host to relinquish the 'place' of his or her identity. It requires only an open welcome to the other that is to come, to a future that does not settle within boundaries closed off as necessary by past incarnations of the place where guests have been received. Indeed, for a host to give up mastery over this place is to go beyond the limits of what it is to be a host, to exceed the limited mandate of hospitality. Hospitality is limited to that degree.

This introduces a productive tension at the heart of hospitality: to limit its gift-giving reduces the extent of the hospitality on offer, but to allow for unlimited hospitality is to cede being a host. The tension is reflected, as Ayoto indicates (1993: 287), in the way 'host' has always contained traces of its opposite. That is, the word host derives from the Indo-European *ghostis* (stranger), the Greek *xenos* (guest, stranger – as in 'xenophobia') and the Latin *hostis* (stranger, enemy – as in 'hostility'). The welcoming host who invites the stranger is built upon footings of the hostile warrior who sees the stranger as enemy (*hostilis*) and who has power of the place where the stranger is met (*petis, potis, potes*). Through this tension, one comes to see that:

The *hospes* is someone who has the power to host someone, so that neither the alterity (*hostis*) of the stranger, nor the power (*potentia*) of the host is annulled by the hospitality (Caputo, 1997: 110)

Hospitality is then negotiated through the undecided 'place' where the host invites, welcomes and meets the other. The meeting at that place is always undecided, and so never settled, fixed or closed in advance for all time. Calculating collective solidarity in this way is without end – hospitality's promise is never wholly present.

Such tensions paralyse one from ever fully attaining hospitality, for to host without any constraint is to yield hospitality to some other arena (asceticism, sainthood?); and yet to host with constraint is to limit the gift that might be expected of unrestrained hospitality. This inability to secure hospitality within stable limits, to fix its identity, is the basis for understanding its promise. That is, hospitality's promise gestures beyond given claims to being hospitable. It never actually exists, is never fully there in a given instance. It is a promise that never ceases to call forth, beckon, from impossible futures, or futures that cannot be contemplated within current limits. Like justice described above, hospitality never 'is'; its presence, if that is what it is (for it may be but an elusive experience) is a promise that beckons from the murky outlines of the 'to come'. Its call is to welcome others without yielding mastery over the place where the gathering takes place, *and* without annulling, denying, the alterity of those who gather. Hospitality's open-ended negotiation allows us to calculate collective solidarity without gathering fixed unities (say community). This stance aligns rather well with restorative justice's call for a deliberative, and hence open, justice that gives expression to yet another open term: democracy.

### Openings....

Not wishing to collect the above into the bindings of a fixed summary, and so reverse its dissociated spirit, I shall instead call for restorative justice to echo its early promise to gaze past what is, towards new calculations of how to be just. This opening gesture continuously explores unexpressed possibilities of a given present, calling for justice as elusive promise and inviting ongoing calculations in its name. As well, a reliance on community could be reversed to incorporate notions of hospitality in which restorative justice's promise is relentlessly calculated by negotiating host and other responsibilities without relying on fixed (necessary) patterns of being. If this endorses an ambient uncertainty, it also intimates opening gestures that welcome what is to come, that embrace – rather than annul – the changing possibilities that current realities deem impossible. Out of the undecidable spaces that release impossibility one might hospitably affirm the continual replenishment of restorative justice.

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## 5.8. Corrections Population Report -2000 <sup>20</sup>

### Words of Caution:

The recent interest in restorative justice activities brings both opportunities and dangers. There may be a tendency for superficial replication of programs, and for the core values of restorative justice to be diluted as government agencies seek to quickly institutionalize restorative justice practices. At the same time, growing public awareness and acceptance of restorative approaches to justice is countered by continued public calls for more retributive responses to crime.

Another key need in the development of restorative justice in Canada at this time is to more fully understand the experiences and address the needs of victims of crime. Although restorative justice activities offer benefits to victims, these approaches may also hold some dangers, and there is a perception held by some that to date restorative justice has been driven more by concern for offenders than for victims.

Critics fear that government adoption of restorative justice will result in it simply being appended to the existing system. Restorative justice may come to be seen as a *program* or *model* rather than an approach or

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<sup>20</sup> Corrections Population Report, Fourth Edition for the Federal/Provincial/Territorial Ministers Responsible for Justice, Iqaluit, Nunavut, September 2000 <http://www.sgc.gc.ca/EPub/Corr/eCorrectionPop2000/eCorrectionPop2000.htm>

paradigm. Or it will be equated with diversion of “minor” cases. There may even be a tendency to simply rename the status quo, without a deeper examination of attitudes, assumptions, and goals.

In recent years, people’s understanding of restorative justice has broadened beyond a particular program model or technique. However, there is still a strong tendency to think of restorative justice as a program rather than an approach. Some would push this even further to describe restorative justice as a way of life, or an area where spirituality is essential. Clearly, issues around institutionalizing restorative justice will be paramount in the coming decade.

Regardless of how good or desirable an idea this might be, the result is no better than the implementation. Concerns such as the subtle or direct coercion to participate in programs, or the danger of dealing only with “good victims” and “good offenders” are examples of the risk of good ideas being implemented badly. When used for “minor” offences, restorative justice can contribute to “widening the net” of social control, and increased taxpayer costs. Proper implementation of restorative justice is extremely time and labour-intensive. There is a temptation to try short-cuts, to rely on volunteers to deliver services without the proper training and backup from professional staff.

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## **5.9. Developing & Evaluating Justice Projects in Aboriginal Communities- 1998<sup>21</sup>**

### **Need to prepare for the implementation of the project**

Developing new justice initiatives requires time, planning, community collaboration and resources. Where there has been little pre-implementation development work Aboriginal justice programs have often been less successful than hoped for (e.g. the Shubenacadie Band Diversion Program, South Vancouver Island program, diversion programs in Sandy Lake and Attawapiskat). On the other hand where much effort was expended on activities such as community preparedness, spelling out objectives and procedures and clarifying accountability, the programs have usually fared well (e.g. self-administered First Nations policing services, the Hollow Water Healing Program, the diversion program of Aboriginal Legal Services in Toronto). Unfortunately the funding context often limits necessary preparatory work since funding is usually for a specified time period, for a specific objective entailing a specific hiring. There is then a tendency to rush into a service activity whereas clearly both government funders and community advocates must recognize that developing efficient effective justice initiatives in typically small communities with limited resources usually requires a pre-implementation development phase.

### **Need to select the right staff**

Past justice initiatives typically have entailed the hiring of one or two staff persons to coordinate developments, provide services and the like. With the limited resources made available, the short-term time frame, and the combination often of high expectations and 'lots to do' (either because of little other programming or lack of effective collaboration of community programs), the need to select the right person(s) is very crucial; often the wrong choice is fatal for the project. A selection committee should determine the kind of program/project objectives and processes desired, the kind of person(s) most suitable under those circumstances, and then arrange for a selection process.

### **Equity in carrying out a program is a key to the legitimation of authority**

While it is expected that all Aboriginal justice initiatives will have the formal approval of chief and council, the legitimation of their authority in the community (and certainly the level of respect for the program and its staff) will also depend upon how effective the staff have been in treating cases and persons equitably (i.e. being fair to all participants and treating all persons equally insofar as the case circumstances and community-sanctioned bio-social statuses are similar) and in communicating that accomplishment to the community at

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<sup>21</sup> Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, *Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature*, March 1998 <http://www.sgc.gc.ca/epub/abocor/c199805/c199805.htm>



large. This accomplishment is always difficult and perhaps especially so in small communities where kinship ties are dense and where formality and distant relations between staff and service users are less likely. Where equity has not been seen to have been achieved (e.g. several diversion projects) the Aboriginal justice initiatives have faltered but its achievement can effectively cancel out many other project shortcomings.

**Need to buffer the project's operations from political issues whether local or between First Nations and the wider society**

Unless the initiative is buffered from direct local political pressure it may not survive electoral changes in chief and council membership (as has happened in several instances) and/or will not achieve equity, efficiency and effectiveness. In the case of policing services, a well functioning board accomplishes this buffer function whereas for other justice initiatives a representative community justice committee can perform this valuable function. Written guidelines (conflict of interest guidelines and other operating procedures) and program mission statements and service philosophy statements can also be helpful and are the hallmark of some of the best Aboriginal justice initiatives. Of course projects can sometimes also become hostages in conflicts between community authorities and outside governments; indeed, a common reason for a project's demise has frequently been this kind of political conflict. It may not be possible or even desirable to buffer a project from these conflicts since clearly the larger political agendas may well represent more important priorities. Nevertheless a well-managed operation with a good communication system and practised networking can sometimes carry on in the midst of significant larger conflict.

**Involve the community at large**

It is important to involve the community at large and not simply the few persons involved directly in the justice initiative whether as staff or committee members. Reaching out to the larger community facilitates the development of a strong community, and the legitimization of the program; it provides access to further ideas and resources, and helps the organization avoid burn-out; in small communities it is often the case that only a small handful of people serve on all committees. This objective of involving the community at large can be achieved through community information sessions, newsletters, and expanded committees or panels.

**Assess and communicate**

A well-run program is one where the staff is regularly assessing its activities in relation to the program's mission statements, goals and objectives, AND reporting on these assessments to target groups and the community in general. Preparing regular reports (they need be only a few pages in length) focuses staff on its main tasks and enables it to see the forest as well as the trees. Communicating such reports beyond the organization establishes the willingness of project leaders to be accountable to their constituency.

**Avoid being spread too thin**

Developing an efficient, effective and equitable Aboriginal justice initiative is usually a demanding task, requiring significant institution building at the local level even while operating in a situation where objectives may be unclear, jurisdiction ambiguous and funding short-term. There is tremendous pressure to pursue other funding leads and to expand the mandate and core activities/services rather than dealing with shortcomings and problems basic to the tasks at hand. Getting involved in too many activities and services has been one of the chief problems in Aboriginal justice projects, an understandable, though often fatal, response to the absence of service infrastructure in the community, the funding constraints, and the lack of management expertise.

**Youth programming is always popular**

Studies, program evaluations and basic research, generally point to the widespread view in Aboriginal communities that justice initiatives of diverse sorts are especially needed for youth. Youth-oriented programs typically receive strong community support. These initiatives might include school programs such as the RCMP's Aboriginal Shield Program, alternative measures for youth (e.g. sentence advisory groups in Alberta), and family group conferencing. Sentence dispositions can range from wilderness experience to more

conventional community service orders. While a strong case can be made for emphasizing youth-oriented initiatives, it is unfortunate that few programs are directed at the chief offenders (according to police and court statistics) namely young male adults; virtually all research on crime and social disorder in Aboriginal communities has consistently identified the young male adults as disproportionately involved and a small subset of them as constituting a major recidivist grouping; yet few programs are directed at this subgroup.

### **Raising the issues and dealing with criticisms**

It is important to remember that criticism does not mean disapproval of the program.

Evaluations of many Aboriginal diversion projects for example revealed much victim and community criticisms but the respondents still valued the initiative. Criticisms can be used to develop a better program. Also sometimes it is important to discuss with people to remind people why the initiative is being undertaken and what the alternatives are; for example many persons may say that diversion is only a slap on the wrist but at least the offender does something for the victim and/or the community whereas in the mainstream justice system one cannot even guarantee that kind of action. Raising the issues and dealing with criticisms allow for program clarification, reflects an openness to ideas, a willingness to be accountable, and conveys clearly to community members that "it's their project too". This collaborative partnering can be accomplished by special discussion sessions with special groups (focus groups), by periodic review of project protocols, and by regularly scheduled community sessions.

### **Need to retain a balanced perspective**

Patience is clearly a requirement in the process of developing new justice initiatives. Community expectations may be very demanding, and even unrealistic in the short-run (e.g. a common experience of self-administered First Nation police services). Sometimes there may be much ambiguity about an initiative in the community and also among mainstream justice system collaborators (e.g. a common occurrence in Aboriginal adult diversion programs); this is to be expected when projects are 'breaking new ground'. As the old saying goes, "Rome was not built in a day"; certainly the Canadian Justice system was not, and a distinctive, well-functioning Aboriginal alternative will not be. At the same time complacency must be avoided since resources have to be carefully husbanded (they generally fall short of staff's perceived levels of need) and rarely does project funding carry a long time frame (virtually all previous Aboriginal justice projects have received only short-term funding); accordingly, it is necessary for project managers to be 'on top of the situation', able to marshal evidence for implementation and impact, to make a case for project continuance if desirable, and/or to build on accomplishments and pursue other related possibilities. In other words there is a need for balance, for patience tempered with preparedness and activism.

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## **5.10. Planning/Evaluating Community Projects - 1998 <sup>22</sup>**

### **Issues in Restorative Justice**

The restorative justice movement is becoming very popular in North America. There are several reasons for this popularity including the escalating costs of incarceration, the social conditions inside prisons, the perceived failure of institutional rehabilitation programs, and dissatisfaction with a justice system that does not deal with the needs of the victim and the community. However, despite the apparent demand for restorative justice initiatives, many programs have fallen short of their goals.

The restorative justice approach has great potential but many difficult issues must be addressed before this potential can be fulfilled. Among these issues are: the relationship between restorative justice and the formal

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<sup>22</sup> Solicitor General Canada, Rick Linden University of Manitoba and Don Clairmont Dalhousie University, Making It Work: Planning And Evaluating Community Corrections & Healing Projects In Aboriginal Communities, 1998 <http://www.sgc.gc.ca/epub/Abocor/e199805b/e199805b.htm>

justice system; the risk of widening the net by including offenders who otherwise would have been diverted from the system; the extent to which programs are fair to victims, offenders, and the community; and the degree of public support for restorative justice.

### **Are Programs Fair?**

Restorative justice programs must be fair and must be seen to be fair by all members of the community. Those who participate in such programs should represent the community. If participants are self-selected the process may include only supporters of the offender or the victim. This will lead to the perception that justice only benefits certain people and your program will not be seen as legitimate by community members, victims, or offenders (LaPrairie, 1997a). Even where all segments of the community are represented, those responsible for running programs must ensure that everyone gets a chance to participate. Experience with some sentencing circles has shown that there was a reluctance by victims and other participants to speak and that the discussion was dominated by a few high-profile community members. Further, the discussion tended to focus on the accused rather than the victim. For proper healing the needs of both must be addressed (LaPrairie, 1997a).

The need to ensure fairness is particularly evident in cases involving the victimization of women. Mary Crnkovich, a lawyer who worked as a consultant to Pauktuutit's Justice Project, attended the first sentencing circle held in Nunavik, Quebec in 1993 (Canadian Broadcasting Corporation, 1996). The offender was a man who had assaulted his wife. He had been convicted of this behaviour three times before and had been imprisoned. Rather than ordering another prison term, the circle decided that the couple should meet weekly with three community members who were to act as counsellors. The counselling group was not successful and the man resumed drinking and beating his wife. He finally went to jail for sexually assaulting his sister-in-law. According to Crnkovich there was no preparation, no follow-up, and little consideration for the rights of the victim. She feels there is a danger that circles will simply enable offenders to escape punishment and will discriminate against victims who are often women. If wife abuse is not seen as a serious offense in some communities, and if community members who are themselves abusive sit on justice committees, victims will have difficulty receiving justice. Rupert Ross, has called these programs "abuse protection plans" that do nothing to deal with the dynamics of the offense and that additionally are unfair to victims.

A final fairness issue is the reaction of victims, offenders, and community members to the possibility that people who commit similar offenses may receive quite different dispositions. Equity is an important principle of the conventional justice system and many offenders have successfully appealed dispositions that vary from the sentence typically given for a particular offense. By its very nature, restorative justice is individualized so the outcomes of restorative proceedings may be very different from case to case. It may be difficult for offenders and community members to understand why one person must leave the community and go to prison, while another is dealt with in a community correctional program.

To avoid these problems, community leaders and program organizers must ensure that community members understand the restorative philosophy. Also, it is absolutely critical that they participate in the planning and operation of restorative justice programs and that organizers learn how the community feels about the program. Only in this way will programs be truly accountable to the community.

### **Learning from Other Community Justice Programs**

- Experience is the best teacher and we can learn from the successes and failures of community justice projects conducted in other communities.
  - o There are few completely new programs as most are borrowed from other places.
    - However, as they are implemented in different communities the programs change to fit new circumstances.
    - This means that programs evolve over time.
      - Some disappear because they are not effective, are too costly, or do not receive community support.
      - Others change and grow into important new ways of administering justice.
    - Restorative justice programs are now spreading from community to community across Canada.

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- The successes and failures of these programs teach important lessons that should be learned by those organizing restorative justice initiatives.
- Before considering some of those lessons, you can read Figure 4 to see why one promising program was unsuccessful.

**FIGURE 4**

**WHY PROJECTS FAIL: A CASE STUDY**

The objectives of the South Island Tribal Council program in British Columbia were to improve the delivery of justice services to the eight Tribal Council communities by involving the elders' council in justice-related programs and by applying traditional Aboriginal practices through several community programs (Griffiths and Hamilton, 1996). However, the project ended prematurely after two years of operation. Sheila Clark, who evaluated the project, praised the community-based and culturally-grounded foundations of the program. She concluded the initiative had failed because of serious weaknesses in planning and implementation. Among these were:

Community consultation was insufficient as community residents and front-line personnel were excluded from the initial planning process.

Many of the key program organizers did not have credibility in the communities.

The programs did not address the specific needs of the communities or of victims and offenders.

There was political unrest in the communities and during the program there was intervention by tribal council members and elders in the cases of family members.

The program did not take into account the fact that not all community residents shared the same cultural values.

There are several lessons we can learn from this project. For example, those who would assume key roles in the restorative justice process must themselves have been healed. Also, the rights of victims, particularly those who are vulnerable, must be protected to prevent them from being further victimized by family and political power hierarchies in the community (Griffiths and Hamilton, 1996)

The South Island Tribal Council project did not achieve its goals. However, some failures are to be expected when new ground is being broken, and the effort made by those responsible for the South Island project will not be wasted if others can learn from their experience.

**Lessons For Restorative Justice Projects**

**1. Prepare for the implementation of the project**

Developing new justice initiatives requires time, planning, community collaboration, and resources. Where there has been little pre-implementation development work Aboriginal justice programs have often been less successful than hoped for (e.g. the Shubenacadie Band Diversion Program, South Island Tribal Council program, and diversion programs in Sandy Lake and Attawapiskat). On the other hand, where much effort was expended on activities such as community preparedness, spelling out objectives and procedures, and clarifying accountability, the programs have usually fared well (e.g. the Waseskun House programs, self-administered First Nations policing services, the Hollow Water program, the diversion program of Aboriginal Legal Services in Toronto). Unfortunately the funding context often limits necessary preparatory work since funding is usually for a specified time period and for a specific objective. There is then a tendency to rush into a service activity without carrying out the pre-implementation development phase that is so important in small communities with limited resources.

**2. Select the right staff**

Local restorative justice initiatives typically have involved the hiring of one or two staff persons to coordinate programs and provide services. With limited resources, a short-term time frame, and a typical combination of high expectations and a heavy workload, the need to select the right staff is crucial. The wrong choice can be fatal for the project. A selection committee should consider the objectives of the program and the community context, determine the kind of people most suitable to run that program, and then conduct a proper selection

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process to ensure the right people are hired.

It must be kept in mind that program staff will act as guides and teachers for other community members so they must be people who are comfortable with this role and who have the trust of other community members. One lesson learned from several programs has been the importance of ensuring that people responsible for restorative justice programs be those who have resolved their own personal issues. Those who have not been healed themselves may have difficulty working with other victims and offenders and may be subject to "burn-out" more quickly than other potential staff members. If staff are hired who have unresolved problems, they should go through the healing process before working with other members of the community. This was done very successfully in Hollow Water.

### **3. Work with the mainstream criminal justice system**

Virtually all Aboriginal justice initiatives will require collaboration with mainstream justice officials. Whether it be the corrections officials who sponsor various parole alternatives the judge who facilitates sentencing circles, the prosecutor who channels cases to a diversion program, or the police who provide backup and special services to First Nation police services and/or First Nation communities, mainstream justice officials are crucial contact points and regular networking must be done with them in order to ensure a program's success. Local agreements are necessary, because there is little explicit constitutional basis for most Aboriginal justice initiatives. The evidence from interviews with those involved with Aboriginal restorative justice programs has typically been that many mainstream justice officials are fairly positive about the new initiatives, but they are often confused about the project's objectives and procedures, and about the role of their front line staff such as community justice workers. The officials often refer to the need for more communication with project staff. Successful Aboriginal justice initiatives such as Waseskun House, Aboriginal Legal Services, Hollow Water Healing, and Six Nations Police Service all have excellent networks with mainstream justice officials.

### **4. Ensure your restorative justice program is fair and equitable**

While it is expected that all Aboriginal restorative justice initiatives will have the formal approval of chief and council, the legitimization of the program in the community, and certainly the level of respect for the program and its staff, will also depend upon how effective the staff have been in treating cases and persons equitably. This means that the program must be seen to be fair to all participants and in communicating that fairness to the community at large. This is always difficult and may be especially so in small communities where kinship ties are dense, where formality and distant relations between staff and service users are less likely, and where equity has not been seen to have been achieved. The South Island Tribal Council project showed that programs will not succeed if the community does not believe they are fair.

### **5. Buffer the program's operations from local and external political pressures**

Unless the initiative is buffered from direct local political pressure it may not survive electoral changes in chief and council membership and will not achieve equity, efficiency, and effectiveness. In the case of policing services, an effective police board acts as a buffer while for other justice initiatives a representative community justice committee can perform this valuable function. Written guidelines concerning conflict of interest guidelines and other operating procedures and program mission statements and service philosophy statements can also be helpful and are the hallmark of some of the best Aboriginal justice initiatives. Of course, sometimes projects can also be affected by conflicts between community authorities and outside governments. Indeed, a common reason for a project's demise has frequently been this kind of political conflict. Nevertheless a well-managed program with a good communication system and good network with local and external agencies can sometimes carry on despite the presence of political conflict.

### **6. Involve the entire community**

It is important to involve the community at large and not simply the few persons directly involved with the justice initiative. One of the important lessons learned at Hollow Water was that the vision of a better future must be rooted in the hearts and minds of the people in the community. In other words, it must be their vision if it is to be successful. Reaching out to the people facilitates the development of a strong community, and

the legitimization of the program. It also provides access to further ideas and resources, and helps the organization avoid the staff burn-out that is inevitable if only a small handful of people serve on all committees. The objective of involving the community can be achieved through community information sessions, newsletters, and expanded committees or panels.

#### **7. Assess your program and communicate the results**

A well-run program is one where the staff regularly assesses its activities in relation to the program's mission statements, goals, and objectives, and reports on these assessments to target groups and to the community. Preparing regular reports that need be only a few pages in length focuses staff on their main tasks and enables them to see the forest as well as the trees. Communicating information about the program beyond the organization establishes the willingness of project leaders to be accountable to their community. The Waseskun House site on the Internet is an outstanding example of how program information can be disseminated widely (<http://www.waseskun.net>).

#### **8. Avoid being spread too thinly**

Developing an efficient, effective, and equitable restorative justice initiative is a demanding task. You must work very hard to build your program at the community level while operating in a situation where objectives may be unclear, jurisdiction ambiguous, and funding short-term. There is tremendous pressure to pursue sources of additional funding and to expand the mandate and core activities and services rather than focusing on implementing your program. Getting involved in too many activities and services has been one of the major problems in Aboriginal justice projects. This is an understandable, though often fatal, response to the absence of a service infrastructure in the community, to the inevitable funding constraints, and to the lack of management expertise. The consequences will be to burn out your volunteers and program staff and to spread your resources so thinly that your program will have no impact.

#### **9. Consider programs for young people**

Studies, program evaluations, and basic research suggest that a variety of justice initiatives are especially needed for youth in Aboriginal communities and that youth-oriented programs typically receive strong community support. Sentence dispositions can range from wilderness experience to more conventional community service orders. Other initiatives include school programs such as the RCMP's Aboriginal Shield Program, alternative measures for youth (e.g. sentence advisory groups in Alberta), and family group conferencing.

#### **10. Be open to raising the issues and dealing with criticisms**

It is important to remember that criticism does not mean disapproval of the program. For example, evaluations of several Aboriginal diversion projects revealed that many victims and other community members had criticisms but that most of the respondents still valued the initiative. Criticisms can be used to develop a better program. In addition it is important to discuss these issues with community members to remind people why the initiative is being undertaken and what the alternatives are. While many people may feel that diversion is only a slap on the wrist you can explain that at least the offender does something for the victim and/or the community whereas in the mainstream justice system one cannot even guarantee that kind of action. Raising the issues and dealing with criticisms allows for program clarification, reflects an openness to ideas and a willingness to be accountable, and conveys clearly to community members that "it's their project too". This collaborative partnering can be accomplished through discussion sessions with community groups, periodic review of project protocols, and regularly scheduled community sessions.

#### **11. Retain a balanced perspective**

Patience is clearly required when developing new justice initiatives. Community expectations may be not only demanding, but even unrealistic in the short-run. This has been a common experience of self-administered First Nation police services. Sometimes there may be a good deal of ambiguity about an initiative in the community and also among mainstream justice system collaborators but this is to be expected when projects are breaking new ground. The Canadian justice system evolved over a long period of time and a distinctive, well-

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functioning Aboriginal alternative will not develop overnight. Scarce resources have to be used carefully because most Aboriginal justice projects have received only short-term funding. Accordingly, it is necessary for project managers to be on top of the situation and be able to marshal evidence for implementation and impact and to make a case for continuing or expanding the project if it is successful. In other words, there is a need for balance, that is for patience tempered with preparedness and activism.

While any means of keeping offenders out of institutions without increasing the risk to the community is a good thing, these programs have several problems. One is net-widening – offenders who might otherwise be kept out of the formal justice system may be dealt with by these programs. Another is that the agencies that must implement these programs may not have sufficient resources to do the job so they may not be effective. Further, because they do not give a role to the victim and the community, they do not provide justice that the community finds satisfying (Church Council on Justice and Corrections, 1997) and may not receive strong community support.

By returning to the traditional concept of crime as injury to the victim and to the community rather than as an offence against the state, restorative justice seeks to restore social relationships rather than simply to punish. Proponents of restorative justice feel that harm to the victim and to the community can be repaired by involving the victim and members of the community as participants in the justice process. The key to the approach is the reconciliation of victims and offenders and their reintegration into the community. The active involvement of the community in resolving conflict may help to rebuild communities that have been weakened by crime and other social ills. Restorative justice seeks to prevent crime in the future by repairing past harms and by restoring social relationships.

The conventional justice system has not worked well in Aboriginal communities and restorative justice programs are compatible with traditional Aboriginal justice practices that have always taken a holistic approach emphasizing healing and the importance of community involvement in the justice process.

Moving to restorative justice programs will require a change in our understanding of the nature of justice (Zehr, 1990). Restorative justice does not simply mean adding programs to supplement the conventional justice system, but means changing the values that underlie the justice system. A restorative approach is grounded in an alternative set of values in which victims regain their important role in the justice system and in which healing replaces punishment.

While restorative programs have a great deal of potential, they are not a quick fix to a community's crime problems let alone an easy means of rebuilding community institutions. LaPrairie has noted that "an enormous amount of hope is being vested in restorative justice and by extension, in the ability and willingness of communities to assume justice responsibilities and by doing so, to provide better justice to offenders, victims, and the community itself. But hope will not, by itself, necessarily achieve these ends" (1997a:15). We should remember that the prison system was built less than 200 years ago in the hope of creating a better society just as today's advocates hope to use restorative justice to help rebuild troubled communities. However, few today would hold the prison system up as a model organization. Despite the hopes of reformers, it has failed in all but its custodial function. If we are to prevent the restorative justice movement from suffering a similar fate, we must ensure that programs are carefully planned and implemented and that the results are carefully evaluated. In this manual we have tried to help you to plan and to implement effective restorative justice/corrections programs that will begin to achieve some of the results that advocates hope to see. Following the steps presented here will help you to develop successful programs that serve the needs of victims, offenders, and their communities.

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## 5.11. The Incorporation of Dispute Resolution into the Criminal Justice System - 1998 <sup>23</sup>

### Lack of Understanding of Change

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<sup>23</sup> 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>

- It has already been argued elsewhere that restorative justice represents enormous change in our perceptions of community, justice, criminal behaviour and, individual and collective responsibility.
- Advocates of restorative justice are not simply talking about "new ways" of treating offenders, or even "new ways" of helping victims of offenders.
  - o At its roots, *restorative justice*, offers a new paradigm for how we *think* and *behave* as a society.
  - o It suggests that anti-social or criminal behaviour arises from within society and that it is, at least on some level, the product of systemic inequities and injustices in society for which we are collectively responsible.
  - o Crime represents a breach in the community, a fracture in relationship that requires healing.
  - o Much the same as with the physical body, when a particular part malfunctions, rather than cutting out the offending part, we strive to bring the dysfunction back into harmony with the rest of the body.
  - o The analogy is illustrative of how *restorative justice* views community, and anti-social or criminal behaviour that arises within it.
  - o Healthy communities, the *restorative justice* paradigm teaches, are those in which the breach is healed i.e., victims are given restitution, offenders are reconciled, and community wholeness is restored.
    - But the paradigm, by definition - since it focuses primarily on community -demands an informed response from the community.
    - It requires that we individually and collectively embrace the new way of thinking.
      - Herein lies a serious risk of failure.
    - If governments believe that the simple articulation of the concepts, or the introduction of a few new programs, will achieve the required change they may be sadly mistaken.
    - Fundamental, *grass roots work* is required at the community level to achieve the order of change required.
    - The public needs to be effectively educated to a clearer understanding of the causal factors contributing to crime, the principles of restorative justice and the methodology of its implementation.
    - There is little evidence of a coordinated effort to introduce these concepts to our population to-date and one is left wondering if the time and resources required by such an investment has simply been determined by government to be unnecessary or unaffordable?

#### **5.12. The Incorporation of Dispute Resolution into the Criminal Justice System: Playing Devil's Advocate - 1998<sup>24</sup>**

- o The momentum that the *restorative justice* campaign is building globally carries with it a number of serious risks.

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<sup>24</sup> 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>



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- Perhaps the most serious risk is the potential backlash against justice reform that will surely accompany the failure of the initiative if it should prove unable to deliver on its promised results (i.e., victim-offender reconciliation, reduced recidivism, reduced crime, community healing).
- If *restorative justice* is to succeed (and it is the contention of the author that it can and must succeed or it may be a long time before support for reform can be garnered again), what are some of the potential pitfalls and risks associated with the magnitude of change being considered?

### **Restorative Justice: Understanding the Magnitude of the Change**

In summary, it is clear from a comparison of the old and the new paradigms, that the changes being advocated are both fundamental and sweeping.

- Understanding the magnitude of change being considered by justice reformists is vitally important.
- *Restorative justice*, at its roots, is qualitatively and fundamentally different from the historic western approach to justice.
- Implementing *restorative justice* has enormous implications for our present system that is deeply entrenched, centuries old and, expensive.
- Advocates of *restorative justice* do not talk in terms of adding new programs to the system, nor of fine-tuning, adjusting, or modifying the current system.
- Rather, *restorative justice* involves a fundamental shift in the way we perceive ourselves, perceive criminal behaviour, behave as a community and act to redress the harm done in the community.

### **Fundamental Change:**

The degree and quality of the change being advocated should not be underestimated.

Failure to recognize the degree of change leaves the *restorative justice* campaign for reform vulnerable to at least two negative outcomes: Collapse under the weight of resistance and inertia in the old system, or Superficial changes that will, in the long term, leave the old system essentially intact but dressed in the garb of change.

John Braithwaite (1997)<sup>25</sup> states boldly: "... all Western criminal justice systems are brutal, institutionally vengeful, and dishonest to their stated intents"<sup>26</sup>. By contrast, Braithwaite goes on to suggest "*Restoring community is advanced by a proliferation of restorative justice rituals in which social support around specific victims and offenders is restored At this micro level, restorative justice is an utterly bottom-up approach to restoring community.*"<sup>27</sup> Braithwaite, in effect, turns our concept of justice on its head making it primarily the responsibility of individuals in community and not the responsibility of an impersonal state actor. By any measure, this must be regarded as antithetical to our current system of justice.

### **Restorative Justice: Consequences of Underestimating the Change**

#### **The Nature of the Risk/Pitfalls**

Given the magnitude of the change being envisioned, and the potential implications *restorative justice* holds for the current system of criminal justice, it is imperative that the possible risks and pitfalls be identified clearly in advance. While there is no shortage of published information on the positive side of *restorative justice*, there has been comparatively little written about the potential shortcomings of the concept<sup>28</sup>. While it is true, that there is

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<sup>25</sup> Braithwaite, J. 1996. *Restorative Justice and a Better Future*, Dorothy J. Killam Memorial Lecture, Dalhousie University, 17 October, 1996, at p. 5

<sup>26</sup> Braithwaite, J. 1996. *Restorative Justice and a Better Future*, Dorothy J. Killam Memorial Lecture, Dalhousie University, 17 October, 1996, at p. 5

<sup>27</sup> Braithwaite, J. 1996. *Restorative Justice and a Better Future*, Dorothy J. Killam Memorial Lecture, Dalhousie University, 17 October, 1996, footnote 22, at p. 14.

<sup>28</sup> A simple search on *restorative justice* on the World Wide Web generates hundreds of sites that, conservatively, are 80-90% in favour of restorative justice to the exclusion of any substantive risk analysis.

a significant body of feminist literature on the risks of ADR for women in specific contexts (see for example Astor (1996)<sup>29</sup> and Astor (1996)<sup>30</sup>) there is no comprehensive and coherent body of literature on the risks associated with the implementation of *restorative justice* in general. Nonetheless, it is clear that even in the absence of a suitable critique *restorative justice* is gaining significant political and social momentum. While this may provide understandable encouragement for advocates of *restorative justice*, we should be cautioned to examine its complexities more carefully.

**Political momentum** can be a double-edged sword for it can produce shallow understanding and fragile adherence to what should be deep and profound changes. At its worst, political momentum can mask ulterior motives which appear supportive of change but which can ultimately prove antithetical to the long term objectives of restorative justice advocates. Thus, it is the author's opinion that if we are to make an informed assessment of the true value of the *restorative justice* approach to crime in our society, this can only be accomplished by playing *devil's advocate*. In other words, we must critically analyze the risks and the pitfalls associated with the implementation of the concept. In so doing, we may discover that much of what is being promulgated as *reform* is at best shallowly conceived theory or, at worst, is being advocated with ulterior motives.

In a study<sup>31</sup> commissioned for the Ministry of Justice in New Zealand, one particular public respondent stated:

One of the hallmarks of a civilized society is a criminal legal system which is fair, reasonable, predictable and dispassionate. Restorative justice abandons all those aims in favor of a system which would be inconsistent, capricious and emotional. Far from being "new" this would be a giant leap backwards."<sup>32</sup>

While it is difficult to argue with the theoretical tenets of *restorative justice* (e.g., victim-offender reconciliation, victim/offender/community healing, reduced crime, etceteras), there are cogent reasons to be concerned with how and whether its objectives are going to be met in practice. What is the nature of the risk embodied in the *restorative justice* paradigm that might justify the strength of the objection referred to above?

**Inherent and External Risk** The risks are both inherent to the concept on the one hand, and external on the other. They are inherent in the sense that they are risks associated with the substantive content of the new paradigm. But they are also external in the sense that they concern the approach taken to implementing *restorative justice*; that is, even if the concept is internally sound, the approach taken to implementing it may so compromise its integrity as to jeopardize its success. Assuming that these may be negated, or at least minimized, the external risks will be subsequently shown capable of reviving internal risks or, of fatally compromising the integrity of the initiative as a whole.

**Internal and Systemic Risks** The potential pitfalls and risks that are internal to the implementation of restorative justice are numerous. While it may be argued that, with proper safeguards, the risks can be minimized if not negated, many of the risks have the potential to be fatal, if not to the concept as a whole, certainly to its application in specific circumstances. To determine the potential risks involved, there are a number of critical issues to examine: How do we know it works? (Predictability, consistency, quality control Evolution of law Victim participation Re-victimization Privatization of women's issues Socio-cultural insensitivities Inability to control power dynamics Insensitivities to cognitive or social differences amongst participants Inadvertent discrimination Net broadening Unrealistic expectations Lack of expertise in community-based, volunteer organizations)

How Do We Know it Works? The answer to the question of "does ADR and restorative justice work?", in the context of criminal justice, has two basic requirements.

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<sup>29</sup> Astor, H. 1996. *Gender Issues in Dispute Resolution*, located on the internet at [http://www.anu.edu.au/law/pub/teaching\\_material/genderissues/civilprocedure.html](http://www.anu.edu.au/law/pub/teaching_material/genderissues/civilprocedure.html)

<sup>30</sup> Astor, H. 1996. *Gender and Dispute Resolution in Family Law*, located on the internet at [http://www.edu.au/law/pub/teaching\\_materials/genderissues/FAMILYLAW.html](http://www.edu.au/law/pub/teaching_materials/genderissues/FAMILYLAW.html)

<sup>31</sup> Graham, Douglas, 1994. *Restorative Justice: The Public Submissions*, Ministry of Justice Publications, New Zealand, report located on the internet at <http://www.justice.govt.nz/pubs/rep.8/restorativejustice.html>

<sup>32</sup> Graham, Douglas, 1994. *Restorative Justice: The Public Submissions*, Ministry of Justice Publications, New Zealand, report located on the internet at <http://www.justice.govt.nz/pubs/rep...8/restorativejustice/html>, at p. 3 of the introduction.

**Lack of Empirical Data:** The problem in evaluating restorative justice programs in existence today lies in the absence of empirical data and study. Schiff (1998) has observed: "One of the important issues in studying restorative justice is understanding whether restorative interventions are having the desired effects on victims, communities and offenders. At present it is difficult to know whether and how well restorative justice is working. There is a lack of empirical research that uses valid and reliable effectiveness measures to evaluate restorative justice interventions."<sup>33</sup>

**Definition of Community:** The problems with measuring impacts of restorative justice at the community level are even more difficult due to the uncertainty of what community means and how it is to be defined, particularly in large urban settings.<sup>34</sup>

**Pre-Sentence:** With respect to the incorporation of restorative justice into pre-sentencing considerations for offenders who have been processed through court, the evidence concerning impact on sentencing is inconclusive. Marshall (1990)<sup>35</sup> reports in Great Britain that victim-offender mediation resulted in a decreased use of custody, while Marshall and Merry (1990)<sup>36</sup> report that, in cases where a mediation goes wrong, the offender's sentence can just as likely be increased.

The answer to the question of how do we know restorative justice works, is best summarized by Schiff (1998) who suggests that the lack of controlled studies; the lack of consistently applied performance indicators and, the recency of many restorative interventions precludes making definitive statements about the long term efficacy of restorative justice.<sup>37</sup>

This state of affairs, begs the question of "why the groundswell of support, in the absence of definitive results-oriented research" and further, "why the absence of clearly stated performance indicators and structured evaluation protocols in most restorative justice initiatives (including Nova Scotia's program)<sup>38</sup>

**Predictability, Consistency and Quality** Among the hallmark characteristics of the criminal justice process are the principles that citizens of a state: should know what constitutes a criminal offence; should know with certainty what the outcomes of the criminal justice process will be; should be able to predict, under a given set of circumstances and procedures, what range of outcomes are possible and, should be assured of consistency in outcomes for offences of a similar nature under similar circumstances.

In this context, one submission to Nova Scotia's Restorative Justice Steering Committee stated: "*We must, however, be vigilant in avoiding wholesale changes that sacrifice valuable principles of the existing justice system that have developed over many generations. The current system effectively guarantees the protection of individual rights, it recognizes the importance of conducting a fair hearing and making objective supportable decisions.*"

In Australia, Zariski (1997)<sup>47</sup> has surveyed the legal profession with respect to beliefs about alternate dispute resolution in general. He suggests: "*[m]any lawyers may distrust or lack respect for resolution methods which are informal, unfettered by legal norms and which lack coercive power. Lawyers may consider such alternative forms of dispute resolution to be second class justice.*"<sup>39</sup>

In the context of business law (but not unrelated to criminal justice) one Australian Judge, Sir Gerard Brennan, has observed: "*At present there is some misgiving about the capacity of the courts to deal with business disputes with the understanding, speed and expertise which the business community desires. It must be admitted that in some instances this concern is*

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<sup>33</sup> Schiff Mara F. 1998. *Restorative Justice Interventions for Juvenile Offenders: A Research Agenda for the Next Decade*. Western Criminology Review 1(1). Located on the internet at <http://wcr.sonoma.edu/v1n1/schiff.html>, at p. 1.

<sup>34</sup> Bazemore, G and Mara Schiff, 1996. *Community Justice/Restorative Justice: Prospects for a New Social Ecology for Community Corrections*. International Journal of Comparative and Applied Criminal Justice. 20(1): 311-335.

<sup>35</sup> Marshall, Tony. 1990. Results From British Experiments in Restorative Justice in Criminal Justice, Restitution and Reconciliation, edited by B. Galaway and J. Hudson. New York: Willow Tree Press

<sup>36</sup> Marshall, Tony and Sally Merry. 1990. *Crime and Accountability: Victim Offender Mediation in Practice*. London, U.K.: Home Office.

<sup>37</sup> Schiff, Mara F. 1998. *Restorative Justice Interventions for Juvenile Offenders: A Research Agenda for the Next Decade*. Western Criminology Review 1(1). Located on the internet at <http://wcr.sonoma.edu/v1n1/schiff.html>, at p. 9 1998.

<sup>38</sup> *Restorative Justice: A Program for Nova Scotia*, published by the Nova Scotia Department of Justice through Communications Nova Scotia, at page 20.

<sup>39</sup> Zariski, Archie. 1997. Lawyers and Dispute Resolution: What Do They Think and Know (And Think They Know)?- Finding Out Through Survey Research, Murdoch University Electronic Journal of Law, v.4 n.2, located on the internet at <http://www.murdoch.edu.au/elaw/issues/v4n2/zaris422.html>, at p. 3.

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*justified But the answer is not to turn away from the courts and to seek alternative methods of dispute resolution: such a course weakens the very institution on which the orderly conduct of trade and commerce depends.*"<sup>40</sup>

Essentially, the concerns that are being voiced focus primarily on the impacts that moving the locus of control of the justice system out of the courts and into the community will have on the quality and consistency of justice. This question of course has far reaching implications in the context of criminal justice where the objective of protecting society is one of the principal aims.

In a discussion paper prepared for the Ministry of Justice in New Zealand, one public submission stated: *"Restorative justice denies the inherent interest the rest of society has in the relationship between a criminal and his or her victim. Every individual is part of a society, and society, as a whole is affected by agreements between individuals. For example, if a criminal and a victim agreed to only a slight penalty for committing a particular crime, others could be less deterred from committing the same crime. The incidence of that crime may increase. The whole of society is made worse off because of the agreement made by one particular criminal and victim. For this reason, societies demand a say in the punishments meted out to particular offenders. The appropriate punishment is not a matter for criminals and victims to settle between themselves.*"<sup>41</sup>

If, indeed, the increasing use of *restorative justice* and ADR in the criminal justice system results in moving greater numbers of (and more serious) offences out of the court system into the community, what assurances will there be of predictability, consistency, fairness and equity? What will happen to precedent? What does it mean if similar offenders, involved in similar offences, in two different communities receive dramatically different dispositions through community-based justice? Will the one receiving the harsher treatment have an avenue of appeal? What if a community-based disposition is comparatively out of proportion, with respect to the offence, as compared with a disposition that might be expected from court?

Clearly there is concern being expressed in a number of countries, both in and outside the legal profession, about the impacts of *restorative justice* and ADR on a justice system that has been constructed carefully over hundreds of years and countless numbers of cases. In essence, that concern is that we should be careful, in our dissatisfaction with the current system and our zeal for reform, not to "throw the proverbial baby out with the bath water".

Evolution of Law: Law, in western society, has developed over generations by a combination of judicial decisions and government legislation. With *restorative justice*, significant elements of the criminal justice system are intended to be moved out into the community<sup>42</sup>. Beyond dealing with simple misdemeanors, *restorative justice* advocates talk of moving more serious offences such as assaults (not causing bodily harm) out of the courts at either the pre or post-charge stage<sup>43</sup>. Offences such as robbery, aggravated assault, kidnapping, manslaughter, spousal/partner violence would be introduced to a *restorative justice* forum at the post-conviction/pre-sentencing point<sup>44</sup>, presumably with a view to mitigating the severity of the sentence if the mediation goes well.

If, in the context of business law, there are those who question the use of ADR as threatening the orderly evolution of the law<sup>45</sup>, how much more significant a question will this be in the context of criminal justice. The essence of the concern is captured by Zariski's analysis of the remarks of an eminent Australian judge: *"[h]e saw danger for the administration of justice if business lawyers refrained from bringing important legal principles and pressing practical issues to the courts, thereby depriving judges of the opportunity to keep the law up to date with the needs of society.*"<sup>46</sup>

<sup>40</sup> Brennan, Gerard, Hon. Sir. 1990. *Professional Orientation: Business or Law?* Australian Dispute Resolution Journal, vol.1, no.2, pp 225-226.

<sup>41</sup> Graham, Douglas. 1995. *Restorative Justice: The Public Submissions*, report of the New Zealand Ministry of Justice, located on the internet at [http://www.justice.govt.nz/pubs/rep...8/restorativejustice/chapter\\_1.html](http://www.justice.govt.nz/pubs/rep...8/restorativejustice/chapter_1.html) at p.2.

<sup>42</sup> 1996 Satisfying Justice: Safe Community Options that Attempt to Repair Harm From Crime and Reduce the Use or Length of Imprisonment. Published by the Church Council on Justice and Corrections, Ottawa Ontario, at p. ifi.

<sup>43</sup> 1998 *Restorative Justice: A Program for Nova Scotia*, published by the Nova Scotia Department of Justice through Communications Nova Scotia, at p. 16. 53 *Ibid*, footnote 52, at p. 16.

<sup>44</sup> 1998 *Restorative Justice: A Program for Nova Scotia*, published by the Nova Scotia Department of Justice through Communications Nova Scotia, footnote 52, at p. 16.

<sup>45</sup> Zariski, Archie. 1997. *Lawyers and Dispute Resolution: What do They Think and Know (And Think They Know)? - Finding Out Through Survey Research* Murdoch University Electronic Journal of Law, v4 n2, located on the internet at <http://www.murdoch.edu.au/elaw/issues/v4n2/zaris422.html>, at p. 3.

<sup>46</sup> Zariski, Archie. 1997. *Lawyers and Dispute Resolution: What do They Think and Know (And Think They Know)? - Finding Out Through Survey Research* Murdoch University Electronic Journal of Law, v4 n2, located on the Internet at <http://www.murdoch.edu.au/elaw/issues/v4n2/zaris422.html>, at p. 3.

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A similar argument can be found in the feminist literature on the use of ADR in the arena of family violence. While this perspective will be dealt with in detail in a later section of the paper, it can be pointed out here that concern has been expressed that one outcome of alternate dispute processes might be the "reprivatization"<sup>47</sup> of certain "women's issues".

Society's ability to respond to, and effectively deal with, domestic violence has been dramatically improved by having the problem brought into the "public arena" of the formal court process. In feminist thinking mediation, as a restorative justice practice, is seen as a regressive step which will take domestic violence back out of the public eye and into the private arena.

Concern about the evolution of the law obviously overlaps with the issues of consistency, quality control and predictability. If community based ADR alternatives to the court process are used to resolve minor to moderately serious criminal offences, what is the potential for system of law to develop parallel to that which is administered by the court? What if a disposition arrived at through community mediation differs substantially from what would result through court? Does it matter? At the very least, these questions need to be posed and answers sought.

Privatization of Women's Issues The history of ADR, particularly in the context of criminal and family law, has followed an interesting path in terms of the feminist literature. What was originally conceived of as an alternative to a "male controlled" and "male oriented" formal legal process, and thus heralded as a progressive option for providing a voice for women's interests and perspectives<sup>48</sup> has, with experience and time, become for many feminists nothing short of a proverbial leap from the "frying pan into the fire". Astor (1997) asks: *"Have women found ADR a good forum for the resolution of their disputes? The work of Rifkin and Menkel-Meadow represents a period of optimism about the potential of ADR for women which was comparatively short lived Many scholars have since suggested that, whatever potential mediation might have for women, the reality is much less promising. In particular it has been argued that, in practice, many women going to mediation will be disempowered compared to the men with whom they are negotiating."*<sup>49</sup>

The negative response to ADR amongst women's groups is multifaceted and will be referred to in a number of contexts within this paper (e.g., revictimization, power imbalances). One of the more interesting aspects, however, is the issue of *privatization* of domestic violence. Years of struggle have gone into bringing the specter of family violence out of the privacy of the home into the public arena of the courts. This has raised the profile of the problem and consequently attracted significant change in how society views domestic violence and the approaches that society will take to dealing with it. With pressures increasing to incorporate ADR into many areas of law, feminists are concerned that domestic violence will be returned to the private arena where incidents and solutions will remain hidden from public view<sup>73</sup>. The re-privatization of domestic violence, it is argued, can only lead to dulling society's awareness of the issues and the likely failure to deal effectively and decisively with it<sup>74</sup>.

Inability to Control Power Dynamics Seldom will it be the case that all parties involved in an ADR proceeding will be in precisely the same position of power. One of the goals of the mediator (and of the stated advantages of ADR), therefore, is to maintain the power balance or, more precisely, to neutralize the power imbalance. Is it realistic, however, to think that all power imbalances, particularly extreme imbalances, are amenable to control or can be effectively neutralized? This question is particularly pertinent in situations where protracted cycles of violence and abuse have characterized the relationship between the disputants, as is often the case in domestic violence. Astor (1994) observes: *'Mediation requires the parties to have the capacity to negotiate with each other. There must be at least some capacity for consensual decision making; a willingness to be honest; a desire to settle the dispute; some capacity to compromise. These types of behaviours are very unlikely to be within the repertoire of behaviours of perpetrators of violence. The*

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<sup>47</sup> Astor, Hillary. 1996. *Gender Issues in Dispute Resolution*, report located on the internet at [http://www.anu.edu.au/law/pub/teaching\\_material/genderissues/CIVILPROCEDURE.html](http://www.anu.edu.au/law/pub/teaching_material/genderissues/CIVILPROCEDURE.html)

<sup>48</sup> Rifkin, J. 1984. Mediation from a Feminist Perspective: Promise and Problems. *2 Law and Inequality*, 21 at 22.

<sup>49</sup> Astor, Hillary. 1996. *Gender Issues in Dispute Resolution*. Located on the internet at [http://www.anu.edu.au/law/pub/teaching\\_material/genderissues/CIVLPROCEDURE.html](http://www.anu.edu.au/law/pub/teaching_material/genderissues/CIVLPROCEDURE.html), at p. 9.

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*relationship between perpetrator and target is not characterized by consensuality, honesty, mutuality and compromise. It is characterized by coercion by the perpetrator and, almost certainly, by compliance to avoid violence by the target.*<sup>50</sup>

In as much as Astor's position can generally be regarded as representative of the feminist position on the use of ADR in domestic violence cases, it is not the only perspective. Advocates of ADR argue that neutralizing power imbalances is precisely what mediators are trained to do. Marthaler (1989)<sup>51</sup> argues that a carefully controlled mediation process can effectively deal with all concerns associated with power imbalances between disputants even in cases exhibiting a long history of domestic violence. *"We think... special procedures can address the fears and concerns of those who claim such couples are inappropriate for mediation because of their history of abuse and propensity for further violence toward each other."*<sup>52</sup>84

Although we may not be able to draw a definitive conclusion from the literature, it is clear that mediating disputes involving strong power imbalances (and specifically power imbalances involving abuse and violence) requires a number of prerequisites that are not always evident in many mediation programs. These prerequisites include: highly skilled and experienced mediators; mediators with special awareness of the dynamics and impacts of violence and abuse; sufficient time to prepare both victims and perpetrators in advance of the mediation session (suggested by Price(1997)<sup>53</sup> to, in some cases, require months and maybe even years of preparation). The provision of counselling services as adjunct to the mediation process, that will serve to deal effectively with deeply entrenched patterns of behaviour and root causes Adequate guarantees for the security of the victim.

Given the importance of the above criteria to the dispute resolution process, it should be recognized that an implementation plan which gives inadequate consideration to these factors could prove devastating to the participants.

#### Cognitive and Other Social Disparities

In Nova Scotia, mediation in the criminal justice context has been used most extensively with *Young Offenders*. Following a comprehensive study of the alternative measures program, and a number of years experience in mediating with young persons accused of offences, Montgomery (1997)<sup>86</sup> found that referral to the program, all other things being equal, usually came as a result of the investigating officer's assessment of the youth's attitude which was invariably determined on the basis of some indication of remorse and shame. This gives rise to the question of the average officer's ability to determine sincerity of attitude in a young offender, not to mention his or her degree of knowledge regarding other differences among youth, e.g., social disparities, cognitions and, cultural variables.

- This author's experience in mediating young offender offences has indicated that differences in social development, cognitive skills and even physical/mental health can easily be misinterpreted as lack of remorse, refusal to accept responsibility, or absence of empathy.
- Detecting and distinguishing socio-cognitive functionality, from anti-social behaviour is not easy, particularly for volunteer mediators and even experienced police officers who have had little training in, or exposure to, child development psychology.

80 Montgomery, A.N. 1997. *Alternative Measures in Nova Scotia: A Comprehensive Review*. Report of the Nova Scotia Department of Justice, Halifax, 143 pages.

Schiff, Mara F. 1998. *Restorative Justice Interventions for Juvenile Offenders: A Research Agenda for the Next Decade*. Western Criminology Review 1(1). Located on the internet at <http://lwcr.sonoma.edu/v1n1/schiff.html>, at p. 10.

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<sup>50</sup> Astor, Hillary, 1994. *Swimming against the Tide: Keeping Violent Men Out of Mediation*, as referenced in Astor, Hillary, 1996. *Gender Issues in Dispute Resolution*, located on the internet at [http://www.anuedu.au/law/pub/teaching\\_material/genderissues/CIVILPROCEDURE.html](http://www.anuedu.au/law/pub/teaching_material/genderissues/CIVILPROCEDURE.html), at p. 11,

<sup>51</sup> Marthaler, Dennis. 1989. *Successful Mediation with Abusive Couples in Legal Issues Affecting the Practice of Mediation*, S.K. Erickson (ed.), Mediation Quarterly, no.23. San Francisco: JosseyBass, Spring 1989, pp. 53 to 66.

<sup>52</sup> 84 *Ibid*, footnote 83, at p. 66.

<sup>53</sup> 85 Price, Marty. 1997. *Crime and Punishment: Can Mediation Produce Restorative Justice for Victims and Offenders*. Victim-Offender Reconciliation Program Information and Resource Centre, located on the internet at <http://www.vorp.com/articles/crime.html>, at p. 3,

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91 *Loc. cit.*, footnote 89.

Unrealistic Expectations Anti-social behaviour that goes on to assume the character of criminal behaviour is an age-old problem that has defied effective control in all western societies.

- The punitive approach to controlling criminal behaviour has proven ineffective.
- It has increasingly become the subject of indictment at all levels of society.
- The question is "will *restorative justice* prove any more effective in the long run?"
  - The contention of the author is that so long as our approach to criminal behaviour remains remedial (i.e., reacting after the event), and clearly *restorative justice* programs as they are currently conceived remain largely remedial in approach, the problem of reducing criminal behaviour will continue to be intractable.
- *Restorative justice* is undoubtedly a major step forward in the approach taken to dealing with offenders, victims and communities.
- Nevertheless, the problem lies in the unrealistic expectations advocates of *restorative justice* have, of the new paradigm's likelihood of making serious inroads on levels of criminal behaviour in general.
  - Reacting after the fact, no matter how sophisticated and progressive the approach used, will not get at the root causes of social dysfunction that lead to criminal lifestyles in the first place.
  - *Restorative justice*, alone, cannot be a panacea for all the social ills that contribute to the development of criminal behaviour through the early and adolescent childhood years.
- Failure to recognize this may well result in unreasonable expectations which could well result in a backlash against justice reform leading to a return to even more punitive approaches to dealing with crime.

Lack of Expertise in Community-Based. Volunteer Organizations One of the primary elements of many *restorative justice*, and other ADR alternatives to the conventional criminal justice system, is simultaneously a strength and, an *Achilles' heel*. Advocates proclaim the new paradigm as a return of the administration of criminal justice, at least in part, to the community. Since many ADR programs are designed to be community based, community volunteers will be at the heart of most *restorative justice* initiatives.

Yet, historically, most volunteer programs have dealt with minor and simple offences such as shoplifting, minor property damage and even minor assaults. Dealing with such offences through volunteer mediators, who have received the most basic of training, has proven reasonably effective in terms of agreements negotiated, victim satisfaction and offender restitution. Serious questions arise, however, as to whether the volunteer model is capable of dealing effectively with more serious and more complex situations that *restorative justice* programs propose to introduce. Multiple offences, serious assault cases, major property damage, or chronic offending are some of the types of cases that volunteer mediators may not be equipped to deal with? Once an offence situation begins to encompass serious, deeply entrenched behavioural dysfunction, psychological elements of fear, revictimization, manipulation and control, is it really fair or realistic to believe that a volunteer model will be effective given the limited training? This presents serious implications for the human resource and fiscal requirements of alternatives to the conventional justice system as they begin to encounter more serious and more complex cases. Very little is evident in the design of programs to-date, to indicate that such questions are being systematically addressed.

External and Administrative Risks Even if it is possible to minimize the risks which are inherent or internal to the *restorative justice* concept, external risks can be even more insidious and, potentially more destructive.

External risks do not relate so much to the substance or concept of *restorative justice* as they do to the *approach* taken to its implementation. Principle amongst these risks are: A lack of understanding of the magnitude and

fundamental nature of the change involved; The historic, and on-going, absence of stable funding for alternative programs to the conventional justice system. The threat of "window dressing"<sup>97</sup> The possible existence of ulterior motives for implementing restorative justice.

Umbreit, Mark S., 1998. *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment*. Western Criminology Review 1(1). Located on the internet at <http://wcr.sonoma>.

Window Dressing: Window dressing, which is not unrelated to the earlier discussion on "understanding the magnitude of change", has been aptly described by Umbreit <sup>54</sup>(1998) as the single greatest risk faced by advocates of *restorative justice*.

- *"The restorative justice movement ...face a number of important risks. Perhaps the greatest risk is that of window dressing in which criminal andjuvenile justice systems redefine what they have always done with more professionally acceptable and humane language while not really changing their policies and procedures."*<sup>55</sup>103
- In Nova Scotia, by way of example again, alternative measures has often been regarded, however unintentionally, as an experimental *add-on* to the real justice system<sup>56</sup>.
  - If *it* does not work, little is lost since the program costs are minimal and the real justice system is always there to deal with offenders.
  - So long as alternatives are regarded as experimental, there will be little incentive to direct significant resources to their development and, no incentive to change older, established programs.
  - The fact that Nova Scotia is talking about "new community-based programs" without redressing the serious resourcing problems associated with existing community-based ADR programs, and without signaling an intention for major changes across the criminal justice system as a whole, does not inspire confidence that the *restorative justice* initiative will be adequately resourced.
  - Nor does it inspire confidence that the new initiative will be considered more than an experiment or, will result in substantive change to the way in which criminal justice is administered in the province.

<sup>102</sup> *Ibid.* footnote 86, at pp. 30 and 115. Comments received from society board members and a Crown attorney.

<sup>104</sup> Report of the Nova Scotia Department of Justice, at p. 7.

- The dangers associated with window dressing can be subtle and yet far-reaching.
  - An analogy to immunization may be apt in this context as an illustration of the risk.
    - In a very simplistic way, the concept behind immunization is that by introducing a small amount of a virus into the body, it is possible to stimulate the body's protective mechanisms so that the *full fledged* condition will not be caught.
    - While it is obviously not the intention of the author to equate *restorative justice* to a virus, is it possible, that by talking extensively about the theory and concepts of *restorative justice*, while not actually doing the substantive work of *restorative justice*, we could somehow be convincing ourselves that we have acquired it?

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<sup>54</sup> Umbreit, Mark, S. 1998. *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment*. Western Criminology Review, 1(1). Located on the internet at <http://wcr.sonoma.edu/v1n1/umbreit.html>, at p.25.

<sup>55</sup> <sup>103</sup> *Ibid.* footnote 97, at p. 25.

<sup>56</sup> Montgomery, A.N. 1997. *Alternative Measures in Nova Scotia: a Comprehensive Review*.



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- Could it be that we would, in effect, have immunized ourselves against ever *catching the real thing*?
- This is the threat of "window dressing".

#### Ulterior Motives

- Of all the potential risks associated with the implementation of *restorative justice* and other forms of ADR in the context of criminal justice, none are more insidious and difficult to deal with than ulterior motives.
  - The move to "community-based delivery" of programs and policies that were once clearly within the purview of provincial or federal governments has become pervasive at the close of the twentieth century. Environmental, economic and now justice responsibilities are being inexorably off-loaded by higher government levels to lower government levels and communities.
  - This phenomenon is unprecedented and is being fueled by fixation on balanced budgets and deficit fighting.
  - The problem comes when responsibilities are being transferred without a concomitant transfer of the resources required to assume them competently.
  - The insidious part of this process is that there are cogent and demonstrable reasons for transferring government responsibilities out into the communities.
  - Communities have demonstrated that they are indeed capable of accomplishing measurable results in environmental remediation, local economic development and, probably as well, the administration of justice and crime prevention. Communities are limited, however, in what can be accomplished, not by any lack of resolve, or even necessarily by a lack of expertise, but by a lack of financial and human resources.
- It costs approximately \$10 billion a year to operate the justice system in Canada (including policing, courts, prison system, etcetera)<sup>57</sup>.
  - Governments, which are cash strapped and intent on fighting deficits, have embarked on offloading responsibilities for programs such as health, education and, justice from the federal government on down.
  - Those responsibilities ratchet down through the system until they land at the door step of communities whose hospitals now have huge operating deficits, whose school system operates under a cloud of deficit and, whose social service agencies struggle to survive with each passing year.
- With *restorative justice*, and its emphasis on community based ownership, the temptation for governments to embrace the concept, not so much for its inherent "soundness" as for its price tag, is all too real. Our prisons our full, our court dockets crammed and, *restorative justice* appears to offer a relatively inexpensive *way out*.

#### **Conclusion: Restorative Justice "A concept whose time has come?"<sup>58</sup>**

Certainly if the level of government activity currently underway across Canada, being carried out under the label of *restorative justice*, is any indication, Bontrager's declaration would appear to be true. However, cautious

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<sup>57</sup> Canadian Centre for Justice Statistics, *Justice Spending in Canada*, vol. 17, no. 3, 1994-1995.

<sup>58</sup> Bontrager, B., ID. 1997. *Restorative Justice: A concept whose time has come*. International Institute of Christian Studies. Located on the internet at <http://www.goshen.net>

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optimism is probably more appropriately called for. It is not clear, based on the evidence gathered, that sufficient thought has gone into designing *restorative justice* initiatives in order to: Identify the risks and ensure that they are eliminated or at least minimized. Ensure that there is broad-based community understanding and support. Adequately assess human and fiscal resource requirements to ensure a high probability of success.

Effectively monitor and evaluate new programs to ensure that they are delivering on anticipated results and not inadvertently creating new sources of abuse and disadvantage. Arguably, it could be said that *restorative justice* has actually arrived too early or, before its time. While the concepts and ideas are laudable, it is not clear that they enjoy a broad base of support across society as a whole and, as already stated, little effort has been invested to-date in developing support and understanding at the grass roots level in communities.

Nor is it clear that governments are embracing *restorative justice* with a full grasp of its implications for the administration of criminal justice. Of greater concern, is the likelihood that governments are advocating for its implementation as a means of reducing the costs of administering the existing system rather than as a result of a genuine understanding of and, commitment to, the new paradigm's spiritual and philosophical underpinnings.

Perhaps it is even more regrettable that the most likely consequence of a poorly implemented, misunderstood justice reform initiative will be a dramatic swing back to punitive and retributive responses to crime which will never afford society the opportunity to address the actual root causes of criminal behaviour which have been consistently neglected by past and present governments (e.g., poverty, racism, family violence, unemployment, educational inequities). If this writer is correct in his assessment of the real nature and level of commitment to *restorative justice*, the greatest tragedy is that reform of the justice system (the need for which is undisputed) may be set back years in the wake of the failure of *restorative justice* initiatives. A failure that is not necessarily inevitable, but highly probable if the rhetoric of change is not transformed into substantive change evidenced by significant changes in government resource allocation and, program and policy development.

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## 6. Relevant Documents, Studies and Practices – USA

### 6.1. Making Restorative Justice Routine <sup>59</sup>

- Restorative justice programs are used in every region of the world.
  - They are applied in virtually every phase of the criminal justice system.
  - With appropriate adaptations, they have been used in every category of offense from minor crimes to the most serious.
  - They have worked with juveniles and adults, with first time offenders and repeat offenders.
  - UN and Council of Europe resolutions encourage governments to make use of restorative justice programs
- Nevertheless, restorative processes and outcomes are hardly routine in any government's response to crime.

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<sup>59</sup> Restorative Justice Online, Making Restorative Justice Routine [http://www.restorativejustice.org/rj3/campaign\\_default.htm](http://www.restorativejustice.org/rj3/campaign_default.htm)

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- In many cases restorative initiatives work at the margins of criminal justice, and restorative programs struggle for funding and support
  - In spite of impressive gains over the last decade, one could hardly say that there has been a paradigm shift in thinking and acting when it comes to crime
  - What will it take to change this? What kind of campaign would be needed to make restorative responses to crime the rule, rather than the exception? What strategies and resources would be needed for such a campaign? What coalitions will be required?
  - It is time to answer these questions; to prepare for a campaign to completely change societal responses to crime.
- To help start the discussion, RJ Online presents three initial suggestions about how to begin developing such a campaign. Sir Charles Pollard is the Chief Constable of the Thames Valley Police Department in the UK, and has championed the use of restorative conferencing in entire categories of cases rather than traditional police cautioning. Mark Carey is Deputy Commissioner of the Minnesota Department of Corrections, and an innovator in instilling restorative values in community corrections and probation. Dan Van Ness works for Prison Fellowship International, an association of national NGOs helping Christian volunteers implement community-based responses to crime.

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### 6.2. Working Together for A Common Goal <sup>60 61</sup>

Sir Charles addresses the need for a problem statement that speaks not only to restorative justice advocates, but to policymakers and the general public as well. He does this by drawing from his experience in policing and law enforcement and by the success his police force has had in incorporating restorative conferencing into the day-to-day conduct of police business.

It is most important to start the process of working out what will be needed, in the future, to make restorative justice the dominant ideology within criminal justice.

Whilst I'm happy to leave to others the job of working up in detail how a criminal justice system based on restorative justice might look, what I do know is this: I've been a police officer for 36 years, including 11 years as Chief Constable of one of Britain's largest police forces, and in that time I've become increasingly ill at ease with the way our traditional Anglo-Saxon criminal justice systems adopt an ever more adversarial approach, emphasizing legal technicalities over substance, and retribution over sentences that reduce re-offending. This approach is also totally failing to address the needs of those most affected by crime, namely crime victims, their families and local communities.

In recent years a new approach to the crime problem has started to emerge, based on methods of conflict resolution that pre-date our so-called 'traditional' criminal justice systems. This new approach has come to be known as restorative justice, and all the evidence is that it can, when done properly and backed-up by other relevant intervention programmes, reduce re-offending significantly, provide satisfaction for victims of crime to a very high level, and motivate communities to take ownership of the problems that generate crime in their localities.

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<sup>60</sup> Restorative Justice Online, Making Restorative Justice Routine [http://www.restorativejustice.org/rj3/campaign\\_default.htm](http://www.restorativejustice.org/rj3/campaign_default.htm)

<sup>61</sup> Sir Charles Pollard is the Chief Constable of Thames Valley Police, the largest non-metropolitan police service in associated with policing modern society, exaggerated by its close proximity to London. Since 1995 Sir Charles has been a leading advocate of Restorative Justice, pioneering the holding of restorative conferences between victims, offenders and community representatives in place of the traditional police caution when dealing with young offenders. These developments in Thames Valley have strongly influenced government policy, with Restorative Justice principles being adopted as a key element of the reformed national Youth Justice system now being rolled out across the UK. In fact, he was appointed as one of ten Board Members of the Youth Justice Board for England & Wales in 1998, which oversees the youth justice system of England & Wales. Sir Charles will be leaving Thames Valley Police on 1 February 2002. He will continue with his work on Youth Restorative Justice from outside the police service, and undertake consultancy work on leadership and management in the public sector, and continue and expand his work with the Youth Justice Board. He will also continue his work on Restorative Justice with a number of organizations, in the UK [\[1\]](#)

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In addition to these huge gains, moreover, restorative justice encourages all those involved in criminal justice to work together to a common goal. As John Braithwaite noted during the international conference on restorative justice held in England earlier this year, research evidence suggests that whilst court orders - whether to compensate victims, do community service, join rehabilitation programmes, or otherwise - are legally enforceable, it is the voluntary agreements entered into via restorative justice that are more likely to be complied with. Restorative justice builds, as John puts it, 'superior motivation to actually do what is decided in criminal justice processes'. In short, restorative justice could serve as the professional 'glue' which brings cohesion and a much more responsible sense of purpose to all who work or are involved in criminal justice, including the judiciary, police, prosecutors, defense lawyers, court staff, corrections agencies and social services.

Nurturing this unique quality of restorative justice should enable it to start moving from a position on the sidelines of mainstream criminal justice, to one where it serves as a fundamental underlying philosophy. Central to this there will need to be the development of a strategy in which criminal justice is transformed from being an adversarial, process-based 'conveyor belt', focusing simplistically on closely defined offences, into a far more inclusive and fair method of conflict resolution that meets the needs of all those involved.

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I fully support the need for a forum enabling those committed to change to work together and discuss how the new approach is to be promoted and implemented. Restorative justice has the potential to reform criminal justice in

Western democratic societies as never before. I hope that the discussion and debate facilitated by the 'Campaign' site will make a significant contribution towards this goal.

### **6.3. Vision Weaving: Proposed Mission & Strategies for a Restorative Justice Campaign**<sup>62</sup>

Mark Cary proposes a draft strategic plan for a national or international campaign to firmly establish restorative justice in a justice system still dominated by adversarial, due process, and system-goals thinking. To do that he imagines an international coalition of many groups and individuals, and suggests what that coalition's mission and key strategic goals might be.

The International Restorative Justice Coalition is committed to fulfilling the following mission, goals, and strategies indicated below. The Coalition is made up of .... This "action plan" was conceived through numerous discussions with individuals involved in advancing the principles and values of restorative justice. It is not a static plan, rather one that will need to bend and reshape as more and different voices are brought in.

The restorative justice "movement" is moving to a new stage of development, one with different challenges and required strategies than when it first began in earnest just a few years ago. The first forays into the justice system during the movement's infancy were hesitant ones, filled with a strong commitment toward the need for change and an underlying fire in the belly, but with some trepidation and uncertainty that the philosophy embedded in the ideas would succeed.

After a few years of courageous efforts and risk taking, the early pioneers have emerged emboldened and confident that the restorative concepts were not pollyannaish and impractical but rather quite insightful and respectful of humanity's past traditions and values. One wonders how the justice system wandered so far off this path of restoring harm and trusting in communities' willingness to get involved.

Despite advancements in adopting restorative philosophies and programs in justice systems, schools, communities, and other areas, an ominous concern still lingers. Most restorative inroads exist as fringe elements to systems and

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<sup>62</sup> Mark Cary Vision Weaving: Proposed Mission & Strategies for a Restorative Justice Campaign Restorative Justice Online, Making Restorative Justice Routine [http://www.restorativejustice.org/rj3/campaign\\_default.htm](http://www.restorativejustice.org/rj3/campaign_default.htm) Mark Cary is Deputy Commissioner of the Minnesota Department of Corrections. He has served as Director of Dakota County Community Corrections, and as Director of Dodge, Fillmore, and Olmsted Counties Community Corrections, both in Minnesota. He has over 20 years of experience in the correctional field, serving as a counselor, probation officer, planner and consultant. He taught juvenile justice at Rochester Community College and has written numerous articles. He is currently on the American Probation and Parole Association (APPA) Board of Directors, and in 1996 he received APPA's Sam Houston University Award. In 1993, Mark was selected as Corrections Person of the Year by the Minnesota Corrections Association.

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processes that remain largely non-restorative. That is, they are unreformed and the core drivers and activities proceed under a due process, adversarial, systems-goal focus.

While the core methods used by the legal system to handle disputes that cannot be resolved elsewhere are critical to retain, an over-reliance on its methods has unnecessarily usurped and dominated the approach or passiveness of other systems. Too often, neighbors don't know each other, and therefore cannot support or confront one another. Calling 911 is usually the preferred option to conflict. Justice system personnel have been pre-occupied with moving cases through the system and surveillance instead of true, long-term conflict resolution and repair of harm. Victims and community members affected by crime are too often forgotten or given perfunctory attention. And, offenders talk of feeling like a side player watching a system duke it out as if they were an impassionate observer.

As the modern day restorative justice movement enters its second decade, new strategies are called for. New approaches must be taken if the principles are going to be driven deeper in individual and community psyche and if they are ever to become second nature.

Mission: To improve the experience of criminal justice so that victims, offenders, and communities are informed, involved, empowered, restored, and satisfied, to the degree possible.

Note: each of these words (informed, involved, empowered, and satisfied) needs defining.

Increase the likelihood that restorative ideals are practiced and put forth by policy and legislation.

**Strategies for Goal Three:**

Increase the likelihood that restorative ideals are practiced and put forth by policy and legislation.

Organize a state-by-state campaign to find existing elected officials that are restorative in policy positions and acknowledge their contributions.

Recruit and support restorative minded candidates to run for office.

When new governors or mayors are elected, seek ways to place restorative volunteer on search committees for judges, commissioners, police chiefs, and directors.

Appoint and support an agency in each state that serves as a "policy watchdog" to support or alert officials when policy is passed that could hold restorative features.

Approach APPA to establish national outcome measures for restorative goals (Dennis Maloney has already put this forth. Needs follow through.)

etc.

Other things to consider:

Changing names and titles to reflect restoration. (eg, change names of judge, probation officer, prosecutor, victim advocate, etc.)

#### **6.4. Doing One Thing Well: Applying Restorative Justice to A Specific Crime<sup>63</sup>**

Dan Van Ness proposes that a broad-based international coalition select a particular crime that would

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<sup>63</sup> Daniel Van Ness- Doing One Thing Well: Applying Restorative Justice to A Specific Crime Restorative Justice Online, Making Restorative Justice Routine [http://www.restorativejustice.org/rj3/campaign\\_default.htm](http://www.restorativejustice.org/rj3/campaign_default.htm)

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become the subject of a global campaign to reduce its incidence and the harm resulting from it. He suggests burglary might be a likely candidate and outlines a process for laying the groundwork for such a campaign. The basic premise underlying his proposal is that most countries have not made significant commitments to restorative justice. Firmly establishing restorative justice in a part of the criminal justice system that cannot be marginalized (as might juvenile cases, for example) will make wholesale adoption of restorative justice more likely.

Momentum is growing for the United Nations to adopt a Declaration of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. An Expert Group will shortly be proposing specific language for such an instrument to the UN's Commission on Crime Prevention and Criminal Justice. If the Commission approves the Expert Group's recommendation, action by the Economic and Social Council could take place by mid-2002.

This is an important moment for the restorative justice movement. UN action does two things: it signals how far restorative justice has come, and it provides an impetus and guidance for further expansion.

The need for further expansion is evident. While restorative justice interventions and thinking have made surprising and impressive inroads, they are still in many respects marginal to "justice as usual". Restorative justice is used for minor offenses or offenders in many jurisdictions, or are available as an adjunct to traditional criminal justice methods rather than as a replacement.

This is the right time, then, to be discussing a restorative justice campaign. It is important to build on what has happened, with the ultimate objective of firmly establishing restorative justice as society's primary response to crime.

That is the long-term objective. To reach that, a campaign must set tangible, intermediate goals. It must gain broad, lasting public support. It should draw together a diverse coalition of organizations, agencies and public officials, with each lending their particular insights and expertise to a common application of restorative justice. It should be capable of showing clear, beneficial results. It should be applicable in every nation of the world, regardless of legal system, economy or culture. It must demonstrate the effectiveness of restorative justice so effectively that policymakers will naturally begin to expand it into all parts of the justice system.

Mark Carey and Sir Charles Pollard come from jurisdictions in which restorative justice programs have taken hold in important ways, thanks in large part to their personal efforts. Their proposals address the need to expand restorative thinking throughout entire systems. Other jurisdictions have made similar commitments, but the countries in which restorative justice is well established even in juvenile or first-time nonviolent offenses are few in number compared to the overwhelming number of countries for which restorative justice is an occasional alternative or supplement to conventional criminal processes.

Perhaps what is needed is a global campaign targeting the same specific crime in every country. The goal would be to reduce both the incidence of, and harm resulting from, that crime by applying restorative principles. In the process we would seek to firmly establish restorative practices as the principal approach used by governmental agencies as well as civil society.

**Example: A Campaign Against Burglary**

Consider, for example, a global restorative justice campaign against burglary:<sup>21</sup>

1. Burglary is a serious crime but not a violent crime. (Of course, violence may take place in the course of a burglary, but let us exclude those situations). The emotional, spiritual and economic impact on victims can be profound, particularly when the burglary is of a residence or small business. International victimization surveys have found that crime victims, when given a list of 17 crimes, ranked burglary as the seventh most serious, higher than assault and robbery without a weapon.
2. On average, one out of five urban residents was a burglary victim over a five year period around the world. The percentages ranged from 35% in Africa to 11 % in Asia. It is a crime that affects many people.



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3. People report burglaries to the police. Two out of three burglary victims worldwide notify law enforcement. The reasons they give for reporting fall into two general categories: (1) to recover the property or get insurance, and (2) catch the offender or stop further burglaries. This high rate of reporting is not equal throughout the world, however. It ranges from 42% in Asia to 86% in North America. Nevertheless, knowing the reporting rates for each region of the world should make it easier to assess the significance of rises or falls in reported burglary. This in turn will help assess whether new restorative interventions contribute to reduced numbers of burglaries.
4. Because of public concern about burglaries and high reporting rates, this crime is one in which police are actively involved. Roughly half of victims worldwide report being satisfied with the police response, with victims in North America and Western Europe most satisfied (nearly 3 out of 4) and those in Latin America, Africa and Central and Eastern Europe least satisfied (25%, 29% and 35%, respectively). Reasons for dissatisfaction overwhelmingly relate to the perceived indifference of the police and their failure to apprehend the suspect or recover missing property. This suggests that police innovations such as community policing may have appeal and usefulness to law enforcement not only because they improve their performance, but because this improvement would lead to increased public respect.
5. Few burglary victims (only 4% around the world) receive any assistance from victim support and assistance organizations. This number would be even lower were it not for the 10% of Western European victims that receive such assistance. This means that there is a dramatic need for victim assistance, raising the potential for productive coalitions among victim advocates and restorative justice supporters.
6. According to a survey covering 60 countries, just over 40% of all respondents said that imprisonment was the appropriate sanction for a 21 year old man found guilty of burglary for the second time. People from industrialized countries made that choice 41% of the time, those from countries in transition made it 39% of the time, and those from developing countries chose prison 65% of the time. This means that a restorative approach emphasizing accountability in the form of restitution, community service and other measures will have significant public support (since 6 out of 10 people believed that non-prison sanctions were most appropriate). However, a campaign to apply restorative processes will also need to engage in education of the significant minority of the public who may question using new approaches.

### **Preparing for the Campaign**

How would we develop such a campaign? Preparation will require expertise in research, public policy, and marketing/promotion:

First, clarify what is known about restorative interventions in the case of burglary. It would be useful, for example, for researchers to review their data sets to see what we can learn about victims and perpetrators of burglary. Here are some of the questions worth answering:

- What are the factors that make restorative encounters effective? Do those appear to be consistent in different regions of the world, or are there informative differences?
- What about court ordered restitution or community service in cases of burglary? Are they effective?
- What do we know about recidivism rates of burglars who become involved in restorative programs? How does that compare with those of burglars who are treated conventionally?
- What are the needs of victims of burglaries? What kind of median economic costs are associated with that crime, and what compensation funds or social services are available through public or private means?
- What is the satisfaction rate of burglary victims who participate in restorative programs? Are there factors that seem to contribute to increased or decreased satisfaction?
- What policing strategies seem to be effective or ineffective in reducing the incidence of burglary? Does restorative justice thinking or analysis help us understand why those interventions are useful?
- What community-based strategies are effective (for example, Neighborhood Watch programs). Does restorative justice thinking help us understand this better.

Second, develop a portfolio of interventions that can responsibly be presented as reducing either the amount of burglary or the harmful effects of that crime. Accumulate research on each of these, and also on the projected costs and benefits of using them. Consider how these might be used in combination to produce a package of proposals

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addressing the problem of burglary at multiple levels. (For example, certain strategies that should be taken by neighborhoods, others by the police, and still others by courts and probation.)

Third, clarify the public policy implications of these approaches. Is there a need for change of laws or can these interventions be applied under current law? Will this require an increase or decrease in governmental budget, or will there be no change? How can the various agencies of law enforcement be made to work together under a common philosophy toward common goals?

Fourth, identify the best arguments for shifting to restorative practices in dealing with burglary. It is important not to over promise, but also not to undersell. What research evidence is currently available to bolster the claims made, and how can those be communicated to the key audiences? Who are the likely allies and opponents?

Finally, how should success be defined? Can one predict a reduction in crime will follow implementation? How will the reduction in harm caused by burglaries that do occur be quantified, captured and reported?

### **Other Issues**

What kind of international coalition might be drawn together to give leadership to the campaign? In addition to the expertise required to do the research mentioned above, it would be very important to find representatives from every aspect of law enforcement, the judiciary, and executive and legislative officials. Resistance to new ideas or approaches often comes from those who have a vested interest in the status quo, and even those who are open to change may be suspicious of proposals made by a group that does not include representatives of their professions.

Initially it would be wise to target specific countries that hold promise of being willing to implement wholesale reform in addressing burglary. There are a number of factors to consider in making that assessment, but a key one would be the presence of a person or group of people willing to provide strong leadership to the effort. A reasonable objective might be to select one or two countries per region of the world in which the initial efforts would be made.

A coalition will be needed within each country in addition to the international coalition. This should be made up of representatives of the parties who have a stake in making this change, but there should also be strong representation of people with a strong background with restorative justice as well.

Mark Carey's paper has outlined some of the implementation and evaluation issues that will need to be addressed. It will be important to remember that success is not winning agreement by governments and members of civil society to make the change. Success lies in those changes being effectively accomplished and in a reduction in the incidence of, and harm caused by, crime.

<sup>[1]</sup> Dan Van Ness is Vice President at Prison Fellowship International, an association of 93 national affiliates making up the largest volunteer-based prison outreach in the world. Dan has written books and articles on restorative justice, including Restoring Justice (2nd Edition) with Karen Strong. His is general editor of RJOnline ([www.restorativejustice.org](http://www.restorativejustice.org)).

<sup>[2]</sup> The definition used here is one employed by the Fifth UN Survey of Crime Trends and Operation of Criminal Justice Systems: "Burglary refers to unlawful entry into someone else's property with an intention to commit a crime." The statistics cited are from Global Report on Crime and Justice, edited by Graeme Newman, and published by Oxford University Press, 1999.

## **6.5. National Institute of Justice**

### **Barriers <sup>64</sup>**

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<sup>64</sup> US Department of Justice, National Institute of Justice, [http://www.ojp.usdoj.gov/nij/rest-just/ch2\\_toc.htm](http://www.ojp.usdoj.gov/nij/rest-just/ch2_toc.htm)

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In assessing barriers, it is important to identify all possible challenges to the implementation of restorative justice programs and practices. The results of a "barrier assessment" can assist in:

- Early identification of potential opponents' arguments against restorative justice approaches.
- Focusing planning and implementation on reducing or eliminating possible barriers.
- Evaluating program effectiveness based upon success in overcoming any barriers.

It is important to note that no barrier is insurmountable. They should simply be viewed as "challenges" to be addressed up-front, and not avoided through the program planning, implementation and evaluation process.

### **How to Change Your Local System<sup>65</sup>**

#### **Tips on Action Planning (Where Community is the Primary Partner)**

##### **The Community Needs To:**

- Go to where the energy is (80/20 rule)
- Reclaim their moral authority
- Be guided by shared principles
- Establish collaborative, diverse, and multi-disciplinary teams

##### **The Government Needs To:**

- Delegate power to shape and decide
- Be patient and listen
- Give information (e.g. effective PSI strategies, reducing risk, increasing protective factors)
- Practice restraint
- Be clear on roles and expectations

##### **System Features that Isolate and Insulate**

- Data privacy and access to information
- Sterilization of information
- Removal of emotion from process
- Intimidating and foreign structures
- Professionalism
- Public service convenience

##### **Crime Provokes Community Responsibility by:**

- Calling attention to social problems and harmful social conditions.

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<sup>65</sup> US Department of Justice, National Institute of Justice, [http://www.ojp.usdoj.gov/nij/rest-just/ch6/chg\\_sys.html](http://www.ojp.usdoj.gov/nij/rest-just/ch6/chg_sys.html)

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- Providing opportunity for the community to affirm its values and behavioral norms.
- Causing a community obligation to provide a process through which this conflict can be resolved.

***Thus, Crime is a form of "social fuel."***

### **Sustaining Community Involvement**

#### **Solutions:**

- Must win support of public, not assume
- Train citizens, not just practitioners
- Get organizations involved

#### **Challenges:**

- History of justice system-citizen cooperation
- Lack of organizational involvement
- Lack of understanding—i.e., message
- Previous victim experiences
- Community diversity

### **Four General Principles About Behavioral Change:**

1. Behavior is derived from thoughts
2. Relationships count
3. Community accountability counts
4. Humans do not always follow principles

### **Change Action: A 12-Step Process**

Key words to remember about a change process:

- Communication, communication, communication
- Involvement and access to decision-making
- Persistence by the leadership

**1. Gain Information.** Read and learn as much as you can about restorative justice. Understand the concept well enough that you can introduce it properly, and be able to set the tone for the rest of the agency to want to hear more about it. Recognize that a comprehensive change process will take a long time, and that every agency is doing some restorative practice now. The intent is to make your agency more restorative over time, to examine your existing beliefs about the purpose of crime intervention, and to shape your practice so that it more closely reflects restoration.

**2. Provide Introductory Training.** Arrange for initial training for all staff, not just management. Make sure that the management team has gained early knowledge about restorative justice before the training is offered to others. The managers' perceptions of the concept and initial training is key to how open others will be in being

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open minded. Be careful who you select for doing the training, and in its timing. Early, negative impressions can be difficult to overcome.

**3. Set Up a Planning Team(s).** Once the initial training is completed, and it is clear that the concept has some merit for possible implementation in your agency, set up one or more planning teams. These teams should be made up of a vertical slice of your agency. Multiple teams may be advisable depending on the type and size of your agency. Including representatives from services to the three customers (victims, offenders, and the community are extremely important). This feedback can come from direct participation on the planning team, focus groups, or other means. Decide whether to keep the planning only to your agency, or to include other stakeholders. If you select an internal-only team, decide how you will get other agency involvement. Select a chairperson(s) who does not have some hidden or overt agenda that would prevent a candid and frank discussion of the issues.

**4. Conduct an Organizational Audit.** An audit of your existing agency practices can identify what additional or enhanced restorative practices can be added, at the same time it reinforces existing restorative activities. Make sure the audit is conducted by multiple disciplines and employee status to ensure that a cross representative sample gives you a fuller picture of the perceived state of affairs.

**5. Determine Readiness for Change.** Assess how ready your agency, or the justice system as a whole, is for change. Examine what forces exist which support the possible change, and which resist the change. Determine how the different stakeholders might respond to the changes. This analysis will help you prepare a strategic plan for initiating action steps.

**6. Provide Additional, More Targeted Training.** Introductory restorative justice training is rarely enough. Usually, many questions and struggles arise after efforts to understand and implement the concept are attempted. Additional training that is specific to the agency's unique needs will provide targeted technical assistance.

**7. Develop an Action Plan.** The planning teams will devise a number of possible actions to be considered for implementation. The action steps can be organized into an action plan that specifically details what the agency hopes to accomplish in the months to come. That plan provides the agency with a type of vision that helps guide resource allocation and prioritization.

**8. Develop a Strategy and Timelines.** The action plan should have realistic timelines and specific strategies to ensure successful implementation. Preferably, it will include action steps which guarantee early success. The strategies will need to be revised as unexpected events and perceptions arise.

**9. Review and Revise Agency Mission and Outcome Measures.** Early changes in the agency practices can occur without whole-scale changes in the mission. Over time, however, it will become evident to most agencies that the existing agency mission needs changes to reflect the emerging restorative practices and values. In addition, the specific outcome measures (which reflect why the agency exists) will need to be changed. As the outcomes change, more of the agency resources and attention will be directed to the new mission.

**10. Redefine Agency Values, Roles, Supports, and Expectations.** Staff will need a great deal of additional information about how the agency expectations are changing. They need to know what values are espoused, what roles they are to play, what new expectations exist, and how they can get support. Without clarification, staff will be confused as to how to prioritize their time, and what additional skills they need to acquire. In essence, the organizational culture will have changed, which creates anxiety. This culture change will likely disturb relationships, job security, individual competence, and other concerns.

**11. Review and Revise Job Descriptions and Reward System.** A complete organizational culture change requires that the leadership review the reward system. People gravitate to that which is rewarding to them, to what they gain some value from. This includes at least their relationship/recognition of their supervisor and peers, and their financial compensation.

**12. Evaluate the New Practices.** The changes must be evaluated to determine whether the new outcomes are being met. Upon this evaluation, the processes, policies, and programs can be refined in order to make further improvements.

**Remember the "Re-" Factor.** Each step above will need to be redone at some time (re-learned, re-audited, re-planned, re-determined, re-developed, etc.), the number of times dependent on the extent to which restorative justice practices and values do not coincide with existing organizational culture, values, and practices.

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## 6.6. Restorative Justice: Implications for Organizational Change<sup>66</sup>

### Introduction

Moving a corrections system to embrace a new paradigm of justice is no easy task. It requires creative leadership and vision. It also requires a highly disciplined, long-term commitment to implementing a new approach through a collaborative process involving all staff members. This article reports on the journey toward restorative justice through systemic change in the Dakota County Community Corrections Department in Minnesota.

Correctional systems are offender-driven, with little attention given to the needs facing individual victims or the victimized community. Even in those jurisdictions attempting to respond more effectively to victim needs, the emphasis tends to be upon the importance of offenders paying restitution to victims, often in the context of restitution payment being therapeutic for the offender. Rarely are victims given the opportunity to play a more active role in the justice process (Marshall & Merry; 1990; Umbreit, 1994b, 1991; Wright, 1991; Zehr, 1990).

The criminal justice system is focused upon the state as the victim, with the actual individual victim being placed in a very passive role and having little input. In the criminal justice system, adversarial relationships and processes are normative, as is the imposition of severe punishment in order to deter or prevent future crime. The fact that criminal behavior represents interpersonal conflict is ignored. The manner in which the criminal justice system frequently deals with victims and offenders often heightens the conflict.

There is an increasing national interest, however, in embracing the principles of a different paradigm of justice. "Restorative justice" (Bazemore, 1994; Umbreit, 1994a; Zehr, 1990) views crime as a violation of one person by another, rather than as a violation against the state. Dialogue and negotiation are typical, with a focus upon problem-solving for the future rather than establishing blame for past behavior.

Severely punishing offenders is less important than providing opportunities to empower victims in their search for closure through gaining a better understanding of what happened and being able to move on with their lives, to impress upon offenders the real human impact of their behavior, and to promote restitution to victims (Umbreit, 1994a). Zehr (1990) notes that instead of ignoring victims and placing both victims and offenders in passive roles, restorative justice principles place both the victim and the offender in active and interpersonal problem-solving roles.

These principles of restorative justice are now being seen in a growing number of communities throughout North America and Europe. In the past, advocates of restorative justice tended to focus on specific program initiatives in local communities. Today, restorative justice is more frequently being advocated in the context of broad systemic change in entire correctional systems. The Balanced and Restorative Justice (BARJ) project, supported by the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice, is the clearest example of such system change advocacy. The BARJ project is working intensively with five juvenile corrections systems in various parts of the country in an effort to initiate fundamental change in the manner in which those justice systems operate.

Restorative justice has tapped into a stream of energy and excitement within corrections departments nationwide. For many, this energy has remained inert for years under the pressures of changing public expectations, legislative mandates, public safety demands, and escalating probation caseloads. Probation departments are re-discovering the personal and professional motivations for their staffs entering the corrections field. Typically, those motivations are to promote offender change, to assist crime victims toward wholeness, and to make individual communities safer. For too long, the emphasis has been on surveillance and monitoring instead of those tenets brought forth by restorative justice principles such as competency

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<sup>66</sup> Mark S. Umbreit, Ph.D., and Mark Carey, Deschutes County Community Corrections <http://www.ojp.usdoj.gov/nij/rest-just/ch3/implications.html>

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development within the offender, victim participation and services, offender accountability, and community involvement and responsibility. Discovering this energy is a promising beginning for productive changes in corrections, but it is not enough. Planning for system changes in a bureaucratic organization is not easy even in the most fertile environments. Multiple barriers exist, ranging from workload to politics.

Dakota County is part of the Minneapolis/St. Paul metropolitan area, located just south of Minneapolis. With a population of 310,000, it is one of the fastest growing counties in the state. The Dakota County Community Corrections Department was selected as one of five jurisdictions nationwide to receive technical assistance through the BARJ project. Consultation services and training were provided for the purpose of helping the department learn about and adopt policies and programs consistent with restorative justice principles.

Dakota County is now one year into its planning process and is about to implement a number of practical restorative justice recommendations. The purpose of this article is to illustrate some of the planning activities needed to prepare the department for fundamental changes in the approach to and delivery of restorative services. That is not to suggest that there is only one way. Each agency has different resources, assets, deficits, priorities, motivations, and system environments that require varying approaches to planning changes. The authors hope this article will help flesh out some of the issues that agencies should think through and the activities they should undertake in a restorative justice planning process.

### **Preparing for Change**

Perhaps the biggest mistake many organizations make when attempting to adopt restorative justice principles is miscalculating what a restorative justice agency is. Too often, restorative justice is viewed as a program, such as victim-offender mediation or community work service, or seen as a politically correct way of naming the activities already in place in probation departments. As a result, real changes don't take place. A new program is developed or an existing program is renamed and yet the desired outcomes are only achieved superficially, if at all.

Restorative justice is a way of thinking. It is a fundamentally different framework for understanding and responding to crime and victimization in communities. Correctional systems adopting a restorative justice approach are no longer driven by offender concerns only. Instead, they acknowledge the need for a three-dimensional response involving victims, offenders, and the community. Once correctional agencies clearly understand restorative justice, their activities will naturally follow it. However, agencies can't plunk down the latest restorative justice program and think that they are now performing restorative corrections. The transition is easier if agencies have staff members who "think restorative justice" and if they develop policies that have a clear purpose which brings about wholeness in victims, offenders, and communities.

An illustration might be helpful. A supervisor of a probation intake unit has hired a new probation officer who will be writing pre-sentence investigation reports. Often in such a situation, the tendency is to train the officer by explaining what the headings are in the report, when the report is due, and the various do's and don'ts. When we do this, we are describing the activities we want accomplished. We also do this when explaining probation contact standards. The probation officer is told how often each offender is required to be seen for the corresponding risk level. Rarely do we discuss what is the purpose of the investigative report or the offender contact. What is the outcome we are looking for? How does the desired outcome respond to needs of individual victims and the victimized community? If we simply describe the activities we expect the new officer to complete, we are not encouraging the new officer to think independently. Therefore, every time a new circumstance arises, the officer needs to consult with the supervisor in order to determine what the supervisor expects in that circumstance. We free up our personnel when we allow them to understand and work toward the restorative justice outcome and not simply perform a set of tasks.

Staff members in correctional agencies will not behave the way we want them to until we stop telling them how to act and instead tell them who they are and what outcomes we are looking for in their work. When we tell the probation officer that he or she is a restoration officer who is responsible for bringing about repair to the victim, competency development in the offender, and safety to the community, we have defined who the officer is and what outcomes we expect. That individual then is freed up to do his or her job and is less preoccupied with the specific activities which may or may not bring the department closer to meeting restorative justice goals. Despite the volatile nature of crime, there are very few circumstances where the restorative justice "roadmap" won't allow the officer to determine the best course of action.

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Restorative justice is a way of thinking, a way of behaving, and a way of measuring. Until we change the way we think about why probation exists, we can't change our behavior. We can't measure the changes until our behavior changes.

One of the first steps in preparing for a restorative justice planning process is making sure that the agency leadership understands what restorative justice is. On the surface, the concept seems simple enough. In practice, it is much more difficult. Often, people grasp the concept but are not sure how the concept is put into practice. As with so many conceptual frameworks, one can justify most activities depending on one's understanding and emphasis on parts of the framework. Understanding a new conceptual framework requires careful study and discussion, thorough readings, conferences, and intrastaff dialogue. It is often the skeptics of the organization who can be most helpful in the preparation stage. The skeptic might be the one to ask, "Why are we doing this? What is not working properly and needs to be fixed? How is this really different from what we are doing now?" These questions test the leadership's knowledge of the concept and help identify the concerns agency staff might have.

It is useful for the agency leadership to examine the existing organizational readiness for change. Is the agency ripe for positive change? What are the risks that might result in triggering momentum toward negative change? How motivated is the staff for change of any kind? What pressures exist that might make the timing for the planning process good or bad? Janssen (1987) speaks of organizational change in the context of a "Four-Room Apartment." These "apartments" or stages are: (1) contentment, (2) renewal, (3) denial, and (4) confusion. The collective staff attitude about the agency mission and direction and the staff understanding of the need for change are usually predominantly in one of these stages. When organizational change occurs, it tends to move in a circular motion from the upper left to the bottom right (i.e., from contentment to denial to confusion to renewal and back to contentment again). Naturally, the organization is most motivated for change in the confusion and renewal stages. Restorative justice provides a compelling reason for an organization to move into the renewal stage, which is often characterized by vibrancy, excitement, energy, and creativity. The actual organizational approach to restorative justice, however, should differ depending on the current stage of the organization. For example, if the agency is in the denial stage, the organization will need a great deal of time to discuss what isn't working well and the reasons to initiate change.

Agency workload can be a major barrier to an open discussion of the merits of a restorative justice planning process. When staff members are burdened by ever increasing workloads, it can be extremely difficult even to initiate the discussion. Staff members tend to view it as yet another meeting added to their workday which prevents them from getting their done. On the other hand, workload can be a motivating factor. Many probation officers have begun to realize that the caseload pressures have taken away job satisfaction and overall probation effectiveness. Given tight budgets and limited resources, relief from the burgeoning workload is not likely to be provided soon. These circumstances can be a major motivating factor, making an organization ready for change. Agency circumstances must be considered before initiating a planning process. The question of how the time invested in restorative justice planning will benefit the department, the clients served, and individual staff work must be answered before a planning process may successfully be launched.

### **The Trial Balloon**

After agency leaders make an organizational assessment of readiness, they must introduce the restorative justice concept to the agency staff through a variety of presentations and smaller discussion groups. Since such a planning effort will affect every staff position represented both horizontally and vertically across the department, all staff members need to be exposed to an overview of the restorative justice framework, preferably simultaneously. It is helpful to answer the question "Why?" at this point. Why would the department undergo a large-scale planning process and invest up to hundreds of hours of staff time for what appears to be an abstract concept? Possible questions for management to expect include: What needs to be changed? How would this improve services? How would this help me with my workload? Am I going to be expected to increase services to victims when I can't deliver sufficient services to offenders? If the community is supposed to be more involved, who is going to take the responsibility to foster that involvement? Are my day-to-day job responsibilities going to change? Is this planning process voluntary on my part?

These questions should not imply that the workforce will view restorative justice in a negative light. More often, probation staffs respond with enthusiasm and hope. It makes sense to them, especially as it becomes obvious that the social problems are becoming more complex and the criminal justice system can't be expected to be the sole response to the problem. Nonetheless, the agency director should expect a number of practical



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questions that seek to bridge the intellectual gap between the abstract concept which delivers well on promise and the detailed answers to "how does it affect me?"

At this introduction stage the agency may be most vulnerable to adopting quick fixes. The staff members most excited by the restorative justice framework will want to channel their energy into work products. Those intrigued by the concept but overwhelmed by current day-to-day activities will seek short-term solutions such as replicating a successful program started in another jurisdiction. Managers will be attracted to quick responses to avoid protracted planning processes that consume inordinate amounts of time. However, this is the time to exercise maximum discipline and self-restraint. The agency director can recognize staff time constraints by offering a longer planning timeframe. Many staff members will welcome a longer timeframe so that they can study the matter further and be involved in the planning process if they are offered the opportunity. Since restorative justice is a new way of thinking and organizing agency activities, it requires a lengthy period of time to understand and implement. It takes time to anticipate and plan for the fallout of major changes. Quick changes will result in problematic chain reactions that can jeopardize the positive change environment. The challenge to the agency director is to keep the excitement vibrant while holding back any "quick fixes."

### **Setting the Stage**

Changing the way we think as individuals is not easy. We have a patterned way of conceptualizing and responding to events. It is no different with an agency and can be exacerbated by the diversity of the staff. Each organization has a culture of its own, a milieu which tends to perpetuate certain behaviors and attitudes and to discourage others. To alter this culture takes time and forethought. There are three cultural shift rules of thumb that can help in the planning process.

*1. Involve all the staff members and support them.*

Agency leadership cannot sustain a long-term cultural shift by fiat. It is the staff members who deliver the core services. They will either agree with, and act on, restorative justice or they won't. An internally motivated individual is nearly always better at delivering the product than one externally motivated. Ownership of an agency mission and its outcome is best accomplished when the "stakeholders" in that agency have been a part of defining that mission and outcome.

It's not enough to encourage staff members to participate. Often, barriers exist which prevent full participation. They may be large workloads or inconvenient scheduled meeting times. Staff members may require management reassurance that input is genuinely sought, even if the staff members' ideas are contrary to those of the administration. Most of us as employees seek both formal and informal permission to get involved and express opinions openly without fear of retaliation or labeling. Staff members need to know that the agency is interested in improving services, that staff members are in the best position to offer ideas that work given their direct experience, and that management is willing to reduce barriers that might prohibit them from participating. It is not necessary for all staff members to be involved in the planning process, but involvement of a large portion of the agency is helpful. These staff members will later become the groundswell of support and initiative.

There will always be, however, a small percentage of employees who will not offer input and who will disparage attempts to improve services. It's important to give these employees a chance to express their views and to attempt to accommodate any legitimate concerns, but not to allow unproductive criticism to lead to erosion of the planning process.

*2. Take time.*

There are no shortcuts to good planning, especially when it involves a foundational change (or enhancement) of correctional philosophy or principles. Restorative justice threatens existing thinking patterns and staff members need time to reflect on its principles, challenge its assumptions, and test its application.

For some, concepts must come from different sources in order to be credible. The technical assistance provided to Dakota County through the BARJ project was invaluable. Consultants from other jurisdictions presented information and demonstrated that restorative justice principles can be put into practice with positive results. Newspaper accounts, quotes from non-correctional personnel, and other sources all helped convey the

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message that restorative justice is not a whimsical fancy but a concept that has captured the curiosity, and often the support, of professionals of many disciplines.

*3. Communicate, communicate, and communicate.*

There can be no substitute for consistent and thorough communication. When workload increases, often the communication flow gets clogged and ineffective. Probation staff may be unaware of administrative planning activities and the time devoted to them. Assumptions are made about what is, or is not, happening. The administration makes assumptions about what is important to the staff. Constant communication is the only sure way to know how restorative justice is being received by personnel. This communication includes giving information, keeping the staff aware of planning efforts, and listening to staff observations, concerns, and ideas.

It is helpful to set up both formal and informal avenues for discussions on restorative justice. Staff members can be encouraged to attend outside training on the subject. Brown bag luncheons can be organized. Also, spontaneous discussions about restorative justice can often lead to excellent innovative thoughts. As one staff member noted, even "bad ideas are better than no ideas at all."

**The Wind Test**

The planners who are exploring the ideas and implications of restorative justice for the department will become the internal experts. They will understand the concept and begin to imagine how it can be implemented. A collective vision will begin to emerge. As the staff planners spend more time on the subject, the tendency will be to lose touch with those staff members who chose not to participate in the planning process. Periodic "wind tests" are helpful to assess whether the planners are getting too far ahead of the staff body.

These wind tests might include sending out a memo describing the status of the planning project and inviting staff members either to sit in on a planning meeting or to express thoughts in writing or verbally. The agency might want to send out a survey (with a quick checklist format, along with an open-ended section for those who want to elaborate) to gauge how well staff members understand the restorative justice concept, whether they agree with it, and whether they have any other thoughts that would be useful to the planners. This reality check helps the planning group determine whether additional information is needed or if certain barriers or opportunities exist that need to be attended to. Some examples of Dakota County staff comments on such a survey early in the planning process included:

- In my opinion, restorative justice not only aids the victim, community and the offender, but also would help unify this department. It would give us all a clearer mission and therefore a more consistent response from us.
- I think it is away of thinking about correctional practice that is respectful toward offenders and victims.
- We shouldn't do the Victim Services piece.
- I agree with the general concepts but still question how this will be put into practice.
- Restorative justice tends to be simplistic. A cure-all answer/replacement to direct supervision, punitive consequences, and to supervising or monitoring increasingly large numbers of clients with insufficient staff.
- I am encouraged that the department is headed in this direction.
- Victims should have as much service as possible. I hope we will have a unit to specifically deal with restitution and additional informational services to be provided for them.
- Thanks for the opportunity to speak out as a department and wanting our input.

Communicating the results of the staff feedback is helpful. Staff members may or may not know how the rest of their colleagues are viewing the planning direction. It is useful to let them know that they are not alone in

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their concerns or to make them aware that there is a great deal of excitement about the potential benefits to the department.

The longer an agency studies restorative justice and considers possible recommendations, the more some staff members will want someone to come out and announce the changes that are to take place. Most of us don't like working in an environment in which there is an awareness that "something" is about to take place, but what that something is, and when it will happen, is unclear. Such an atmosphere is anxiety-producing. Management must resist this pressure to make quick decisions, to "decide and move on," or it can undermine the grassroots ownership process of the planning efforts. However, staff members must be given reassurances that the planning process will not be prolonged beyond a reasonable timeframe and that they will receive opportunities to have their input considered before any final recommendations are implemented. Failure to provide some of these reassurances will create department-wide anxiety that could grow into paranoia.

### **The Big Kick-Off**

Perhaps what contributed most to the Dakota County BARJ Project success was the use of all-day "kick-offs" or training sessions with national consultants who were credible, who were knowledgeable about corrections, and who had implemented restorative justice principles in programs and policies within their agencies. The BARJ model emphasizes the need for greater balance in corrections by focusing on the objectives of offender competency development, offender accountability, and community safety while concurrently focusing on the emotional and material needs of individual victims and victimized communities. Dakota County scheduled two all-day sessions (about 9 weeks apart), one with the director of the Deschutes County, Oregon, Community Corrections Department on competency development, and one with the chief probation officer in Quincy, Massachusetts, on accountability and community safety.

The consultants both provided an overview of what restorative justice means to a corrections agency. These overviews helped reiterate the basic tenets of the framework, which need to be repeated in order ensure more comprehensive learning. Both consultants provided practical examples of how restorative justice was implemented in their regions in order promote one of the three objectives. It was useful to use two different consultants, as both had different approaches to the concepts and different presentation styles, which meant that both reached a different segment of the staff attending.

The all-day sessions were divided into 1) a presentation of how restorative justice can promote specific objectives within the BARJ approach and 2) a brainstorming process on how Dakota County might implement policy and program changes. The brain storming served the following purposes:

1. It actively involved all members of the staff.
2. It required staff members to think about how restorative justice could help the agency in practical ways.
3. It gave staff members power over the department's future.
4. It tested the staff's understanding of restorative justice.
5. It provided the base from which to start action groups.

At the end of the second all-day consultation, the department staff had a more complete understanding of restorative justice and was beginning to envision how the department might deliver services differently if restorative justice provided the philosophical underpinnings of the agency's activities. At this time, staff members were solicited to volunteer for one of three action groups focusing on either competency development, accountability, or community safety. Approximately 50 percent of the department staff volunteered to serve on one of the action groups.

### **Nuts and Bolts**

One way to organize the staff planning effort is to divide the assignment into smaller, more focused work groups such as groups on community safety, competency development, and accountability. Dakota County staff members volunteered for a specific action group depending on which topic they thought they could contribute the most toward. Each group was to take the list of brainstormed ideas from the two all-day training sessions, debate the merits of them, and refine or reject them. The groups were to expand upon the recommendations that they believed had merit and submit them to management. The groups described each

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proposed action step in more detail, gave a means to reach the objective, and provided a timeline by which the action was to be completed and assigned to an individual department staff member who would be given the authority and responsibility to implement it.

The management provided each action group with a booklet that summarized the ideas generated and a list of guidelines designed to assist group members in staying on task and completing assignments. As few "rules" as possible were given in order to maximize the creativity of the staff groups. Some rules were necessary. For example, many ideas were expressed which may have benefited the department but were not linked to restorative justice. To keep the tasks focused, the groups understood that each recommendation was to somehow bring the department closer to a restorative justice corrections system. If an idea could not be articulated in that context, the idea was set aside for further consideration outside of the BARJ project.

Of particular importance was that resource constraints were removed. Creativity can be stifled when lack of resources is mentioned each time an idea is expressed. A well-designed concept that appears, on the surface, to necessitate a large infusion of time or money can often be implemented with few additional resources. This can be done by carrying out the idea in stages or shifting the existing resource allocation priorities. Removing the resource consideration freed up the staff to concentrate on restorative recommendations.

Given the breadth of the staff planning effort, Dakota County set up a Restorative Justice Steering Committee made up of two action group representatives from each of the three groups and administrative staff. The steering committee solicited thoughts, concerns, and ideas from the staff, explored common themes, and served as troubleshooters to address potential problems. When confusion arose, the steering committee discussed the issue and clarified the matter through the action group representative. In addition, it was discovered that some restorative justice action steps did not fit neatly into any of the three action groups established. For example, the proposals for determining outcome measures and promoting community involvement required discussion outside of the action groups. Therefore, the steering committee took on the roles of consultant to the action groups, addressing potential problems and devising department-wide recommendations that were greater in scope.

### **Creating a Vision**

Once the restorative justice recommendations are developed enough to explain their practicality to all staff, the groundwork for the next stage is laid. In Dakota County, a vision of where the department wanted to be 5 years later was needed. It was not enough to understand restorative justice and to have a series of recommended action steps to implement. The department needed a compelling vision of what the staff activities and outcomes should look like further ahead. This vision would help carry the agency toward its goal. Rather than just a potpourri of restorative justice recommendations, the staff needed to visualize what services would actually be like if the staff pushed ahead as planned.

All staff members involved in the action groups were invited to a "vision assembly." It was an all-day event at which staff members were to create a vision using the ideas proposed by the three action groups. The invitees were given this task:

Imagine that the Dakota County Community Corrections Department no longer exists. All of you have mysteriously evaporated. There are no units. All of the equipment remains, but the staff is gone. There is no history. There is only the future. You have been asked to create a community corrections department that is restorative in design. All other parts of the criminal justice system remain the same—the same judges, attorneys, social services, etc. The "system" practices remain the same, but how you might respond to those practices may change. You can keep the same organizational structure or alter it altogether. Whatever your model looks like, the only requirement is that it must fit a restorative justice framework.

The staff was divided into three groups, with each group assigned the same task. Staff members divided themselves into groups depending on how they classified their current views on what the department should look like in five years. The three groups were: The Tinkerers (those who ascribed to the opinion that the agency only needed to tinker with existing services, organizational structure, and policies), The Radicals (those who wanted to sharply diverge from existing practice), and The Moderates (those in between the two extremes). Each group then documented its vision.

Surprisingly, the similarities in how the three groups viewed the vision were far more common than the differences. More amazing was the fact that the Tinkerers were more apt to sharply change the department

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than the Radicals were. A collective vision began to emerge with the group as items of agreement were pulled together. This consensus became the foundation for the proposed vision and ultimately the final action plan. The vision was given to the steering committee to finalize the details before presenting it to the full staff.

**Preparing for the Unveiling**

The final stage of the change process included a session with one of the national consultants who had undergone similar planning efforts and a presentation to all of the staff for feedback and further refinement. By now in the process, there should be no surprises. Management has communicated with staff members all through the process. Opportunities for input and feedback have been provided. The staff has been anticipating the final recommendations for some time. The time is right.

It is at this stage that things can unravel. Up to this point, no staff member has been immediately threatened with a change in his or her day-to-day work activities. No manager has been asked to change the way he or she manages the unit or supervises the unit staff. It is not uncommon for many of us to delay consideration of, or ignore altogether, those events that may never come to pass until they actually happen. At this stage it will be increasingly apparent that a staff member might be asked to do something that he or she has not done before or is not immediately competent to do without training and additional experience. For example, the probation officer may be requested to provide to the client competency development instruction instead of the traditional monitoring of the client's activities. This shift in emphasis means that the probation officer must learn a new set of skills. For many, this will represent an exciting change for the betterment of staff, client, and public. For others, it will cause anxiety and possibly fear.

Management should take into account these real concerns when it proposes the recommendations. It may appear as if the process has to start over, but such action won't be necessary. It does mean that some staff will once again need some time to think through the implications that change will have for them. Patience and reassurance is helpful to get staff and supervisors through this stage. Piloting a significant change with a subset of the staff can be a way of working through both the potential pitfalls that come with any change and the anxieties.

**What About the Rest of the System?**

This article was written for the corrections administrator or planner who is seeking to initiate a planning effort in his or her corrections agency. Beginning a planning process for an entire criminal justice system would be a good subject for a different article. It would, however, be useful to comment here on the importance of including all the agencies in the criminal justice system when planning for restorative justice. Corrections is part of an interdependent system. Change in one part of the system affects other agencies in that system. Attempts to accomplish objectives can be thwarted or enhanced depending on the level of understanding and cooperation between each of the agencies.

Judicial commitment to restoration, for example, can be a key factor in how well a corrections agency meets its restorative objectives. If a corrections agency develops a victim/offender mediation program, for example, which is not supported by the judiciary, the program can fail quickly. On the other hand, if the court supports restorative concepts, a type of synergy can occur, resulting in system-wide application of restorative principles.

Any thorough planning effort should include efforts at educating system representatives on restorative justice and provide opportunities for their input. These efforts should not be limited to the criminal justice system. A key tenet in restorative justice is that the community become more involved in correctional matters at all stages. The community contains the primary players who can prevent crime. And, when crime does occur, the community can intercede in 1) providing the victim assistance, support, and security, and 2) providing for offender accountability and opportunities for productive change.

In fact, restorative justice planning without significant involvement of community leaders and neighborhood activists falls short of comprehensive restoration. Communities are more motivated to get involved in crime matters today than perhaps ever before in modern history. As do corrections professionals, citizens need a framework from which to think about crime, its causes, and effective interventions. Although citizens are an important resource for corrections, they have not been tapped to a significant extent until recently.

**Concluding Remarks**

Restorative justice provides a helpful framework for understanding crime and its consequences in a far more balanced perspective. Instead of being offender driven, it leads to policies and interventions that also address the needs of individual victims and victimized communities. Restorative justice emphasizes the importance of

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holding offenders personally accountable for their criminal behavior while maximizing opportunities for the active involvement of victims and community members in the justice process (Bazemore, 1994, 1992; Dignan, 1990; Maloney, Romig, & Armstrong, 1988; Marshall & Merry, 1990; Umbreit & Coates, 1993 ' 1992; Umbreit, 1994a, 1994b, 1989; Wright, 1991; Zehr, 1990).

Moving a corrections department to adopt restorative justice as its mission requires creative leadership, vision, and maximum involvement of all agency staff through continual two-way communication. The journey toward a more balanced and restorative justice system also requires a deep commitment to long-term systemic change that is grounded in a spirit of collaboration, renewal and hope.

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## 6.7. Adolescence/Restorative Justice: The Timing of Strategies in Promoting Organizational Change toward Restoration <sup>67</sup>

### Introduction

The modern-day application of restorative justice is now a few years old and, in some jurisdictions, is approaching its first decade anniversary. Many correctional and victim organizations, criminal justice systems, social service agencies, and community groups have discovered the power of clear language and principles that direct policies, programs, and priorities toward one that seeks, above all else, to correct the harm caused by crime.

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<sup>67</sup> Carey, Mark, *Infancy, Adolescence and Restorative Justice: The Timing of Strategies in Promoting Organizational Change toward Restoration*, Dakota County Community Corrections, Minnesota, <http://www.ojp.usdoj.gov/nij/rest-just/ch3/infancy.htm>

This attempt at changing agency practice of traditional probation, however, encountered significant barriers. As one examines the experiences of early efforts to create system-wide movement from a retributive model of corrections to those that promote restorative principles, one discovers a wide range of success and failure. Even in areas where major changes have been made, struggles to alter long-standing system cultures are commonplace. Agencies and systems which have made a fuller transition to a restorative driven practice have at least one thing in common: they have sustained the drive for change over the developmental stages and have modified their techniques based on their changing developmental state.

It is this author's contention that agencies tend to go through three developmental stages that parallel those of human development (i.e., infancy, adolescence, and adulthood). As such, an agency's response to these changing needs must be adapted accordingly. Failure to make these adaptations would likely result in an organizational return to traditional practice, much like a rubber band naturally returning to its original shape. This article is written to assist organizations seeking long term, cultural changes toward restorative justice principles and practice.

### **Organizational Culture**

Since restorative justice emphasizes fundamentally different values, roles, and expectations, it is helpful to examine why organizational culture exists and why it is so hard to change it. Schein describes culture as:

"The set of basic assumptions which members of a group invent to solve the basic problems of physical survival in the external environment (adaptation) and social survival in the internal environment (internal integration)."

The three components that make up organizational culture are:

1. *Artifacts*: visible creations produced in organizations such as language, art, stratification, and status symbols. There is a high level of awareness of their existence as employees see and/or use them.
2. *Values*: ideals, goals, and means to achieve them. They are typically passed on to successive generations by the old timers in an organization. The artifacts are reflections of these values.
3. *Basic Assumptions*: rules of interaction between members of the agency. They are more difficult to ascertain because they tend to be invisible, taken for granted, and unconsciously held.

The assumptions help agency staff to avoid or reduce anxiety by reducing cognitive overload through developing and communicating a consistent set of work related expectations. The employees and agency benefit by passing these assumptions and practices to successive generations rather than reinventing new ones whenever staff are added or replaced. An existing organizational culture creates a sense of predictability that allows employees to feel comfortable, establish meaningful relationships, and understanding of what it takes to gain career advancements, and to enjoy work competence. It provides employees with rules for behavior and norms that, in effect, shape the behavior of employees and therefore define the organizational culture (Schwartz and Davis, 1981). New values and expectations upset this stability and naturally cause anxiety and consternation. Even under the best of circumstances and processes, one should expect resistance and conflict when new values, roles, and expectations are introduced because of their effect on human relationships and emotions.

### **Hard Side and Soft Side**

In "The Search of Excellence," Peters and Waterman (1982) use the McKinsey's Seven S model to evaluate companies. The model identifies managerial activities used to operate a company. The seven activities (strategy, structure, skills, staff, style, systems, and shared values) can be divided into two groups: those that represent the Hard side of management, and those of the Soft side. The hard side consists of those activities that are tangible and reflect hierarchy and procedure (such as strategy, structure, and systems). The soft side contains those components that are less tangible but usually more important (i.e., style, staff, skills, and shared values). Pascale and Athos (1981) point out that American companies tend to manipulate the hard side when seeking change, and the Japanese concentrate on the soft side. It is precisely the soft side that needs to be given prominent attention, as these are factors that ultimately shape the organizational values and culture.

### **Developmental Stages Toward Cultural Shift**

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An organization which attempts to transform its existing practices to a restorative one is likely to find agency and criminal/juvenile justice system values at least partly incongruent with restorative values. The court and corrections system is derived from an English system which contains many elements inconsistent with restorative principles. This system has focused almost exclusively on the rights and punishment of the offender. Therefore, most agencies find that they must confront the collision of differing value systems. Early agency attempts at systemic and cultural change to this end reveal the evolution of an organization's developmental stages that parallel human development. These agencies are discovering a simultaneously exciting-terrifying roller coaster ride as the value systems clash through the change process. Fundamental cultural change in any setting (societal, religious, racial, or organizational) is bound to be wrought with turmoil, confusion, and (hopefully) renewal. Figure 2 lists, for example, some characteristics that arise in human development change:

### Characteristics of Human Developmental Stages

#### Infancy:

- Dependency
- Rapid growth
- Need for basic nourishment
- Need for nurturing environment
- Small muscle and eye-hand coordination
- High energy level

#### Adolescence:

- Growth through discovery
- Time of testing rules
- Formulates and tests hypothesis
- Rebellion
- Seeking identity
- Increasing independence
- Confusion
- Experimentation
- Emotional fluctuation
- Need for clear boundaries
- Takes less calculated risks
- Emergency of independent, critical thinking

#### Adulthood:

- Settling down
- Takes on responsibilities
- Stability
- Takes calculated risks

Correctional agencies can expect to go through similar stages of development, as the existing culture is challenged to become more restorative directed. Indeed, social psychologist Kurt Lewin first developed a three phase change model in 1958 by describing three distinct states: the present state, the transition state, and the desired state. For example, the transition state parallels the adolescent stage of organizational change. Once an organization embarks on a restorative change process, it can expect to encounter the following three developmental stages:

**Stage One: infancy-** like characteristics found in early stages of human development, an agency seeking to make fundamental value and role shifts finds that by providing basic restorative training and encouragement from the agency's leadership, major growth spurts can be expected. In areas where dissatisfaction with current outcomes exist, many employees will quickly embrace the principles. It is common for staff to point out that they entered the correctional field out of a desire to make a difference in people's lives, only to be disenchanted over the years with an emphasis on processes, monitoring activities, and paperwork. Growth can be exciting and visible as new ideas are expressed with enthusiasm. Not all staff, of course, will initially support the restorative concepts, and will offer reasons why their support will not be forthcoming. Management needs to encourage those who wish to venture out and take those first baby steps. The organization is gathering information, learning how restorative justice would redefine outcomes and expectations. Many grow excited over the prospect of a better future and the role corrections can play in involving partnerships with others to



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deal with crime. During this stage, agencies typically devise action plans and anticipate how those plans might transform their work.

Agency leadership must pay attention to both the hard and soft side activities in order to bring about a cultural change toward restorative justice, but the timing of when and how those activities are employed is paramount to purposeful and guided directed agency evolution. During stage one (infancy), agency staff is in need of time to absorb the content and context of the new restorative framework, to explore how it might benefit the agency and/or themselves. They need some reassurance that their well-being is also being considered. They need to know what role they would play, and how they fit into this newly defined agency mission. In short, the soft side techniques should dominate management's efforts.

### **PRIMARY AGENCY EMPHASIS AND ACTIVITIES**

#### **Stage One: Infancy**

- Training
- Generate excitement
- Media coverage
- Survey of staff
- Action planning teams
- Massive staff input
- Brown bag luncheons
- Communication vehicles
- Vision exercises

**Stage Two: adolescence**- the excitement and rapid growth of the infancy stage gives way to conflict when the practicality of clashing with the culture becomes evident, and the obstacles begin to frustrate efforts. Concepts are often easy to agree to. It's when these concepts begin to be converted to practice changes that affect long-standing employee relationship to their jobs and each other that questioning or even rebellion sets in. Stage one is characterized by discussion, theory, visions of how things could be better, and exciting initial first steps of success. Stage two, however, is dominated by clarifying expectations of performance and visible practice changes. Two types of troubling reactions may occur: either 1) resistance by those who didn't understand the day-to-day changes that would be expected of them, or who didn't think it would eventually affect them; or 2) elevated expectations of how the agency would institute these changes and the resulting frustrations when attempts to change were too slow or were met with daunting obstacles. These reactions may be exacerbated when limited resources (either existing or new) are redirected to non-traditional customers (i.e., victims and the community) in order to achieve balance between the now-three customers. To the administrator or line staff, it feels like the unsettled shifting of sand underneath their feet. It can be marked by discomfort, anxiety, or anger. It can be most helpful to remember that adolescence, marked by this period of unrest, discomfort, and conflict, is a normal process of development and should be expected. Rather than being angered by the natural course of events that transpire at this time, leadership should attempt to steer the agency through these difficult times in a persistent but non-judgmental way. This is the time of change when most failures occur. The pressure from both sides (those who embrace the change and are frustrated by the obstacles, and those resistive to the change and who create some of the implementation obstacles) can be extreme. It can be inviting for those under the pressure to buckle under or over compromise to restore peace and comfort. Yet, this is the time when insistence and persistence is most needed.

The length of the adolescence period varies tremendously on a number of factors including, but not limited to, the degree to which the pre-existing organizational values conflicted with restorative values, the flexibility of management and staff to think and act differently, the type and style of leadership, key position turnover, and how well an agency can make the transition out of adolescence without reverting to traditional values and practice. Small but visible victories are extremely helpful at this time. It will embolden those taking the risks, and help tone down the noise of the resistance, which can cause discouragement to those on the front line of the change process.

To stay solely in the soft side throughout stage 2 (adolescence) would be a mistake. Given the assumption that some in the agency will find the changes threatening to their comfort or self-interest, the agency can become stalled in its change efforts. The agency structure, systems, and strategies must line up with the expected practice changes or inconsistent messages, reward mechanisms, and other incongruencies would create organizational chaos. While in the hard side, however, the emphasis on these changes (such as those listed in

figure 4) still needs to be balanced by activities and techniques that address soft side issues such as relationships, staff roles, skill development, etc.

**PRIMARY AGENCY EMPHASIS AND ACTIVITIES**

**Stage Two: Adolescence**

- Change of mission statement
- New staff orientation and training sessions
- Change of employee civil service exams
- Use of different interview questions
- New promotional criteria and other reward mechanisms
- Different outcome measures
- Change in job performance measures
- Organizational structure change
- Shift in how resources are allocated
- Use of restorative justice guided case plans and reports

The need for discussion, negotiation, support, and reassurance does not evaporate during this period; it actually increases. However, the agency needs to balance its change activities given the stage of development it is in. Figure 5 illustrates how the agency needs to emphasize the corresponding activities at the appropriate developmental stage.

Timing of Hard and Soft Side Activities

Phase 1

Phase 2

Phase 3

Timing is critical to long term change success. To implement the hard side changes before opportunities are provided for staff input, buy-in, support, etc. will likely create issues around staff morale, trust, and ownership. The failure to emphasize the hard side in the adolescent stage can result in mixed messages, frustrations, confusion, and failed outcomes. And, neglect of the soft side during the whole process is almost always counterproductive in acquiring desired results.

**Stage Three: adulthood-** After this period of adolescence, the organization finally begins to settle into its new practice. Procedures that appeared to take tremendous effort to begin now start to become routine. Staff and managers begin to forget the intricacies of prior practice and have accepted the new course of action as normal. A new set of concerns arises around the danger of settling into a form of complacency. Correctional practice can take on a new form of rigidity, and eventually need another renewal period. Once again, management can take action to avoid this from happening. Since there are so few, if any, agencies in this stage of restorative justice, it does not appear to be a matter of immediate concern. Agencies are expected to cycle through stages and must be prepared to respond accordingly, depending on the needs at the moment.

**Moving Past Adolescence**

As noted earlier, agencies tend to seek changes in structural and system activities too early or fail to apply soft side techniques to the change process. A cultural shift in values that bring about long lasting and enthusiastic change takes time to accomplish. Agency leadership needs to provide a supportive environment to make it happen. However, the failure to apply these structural and system changes when the timing is appropriate can cause disastrous results. When agency staff have had sufficient time to understand what the cultural shift is and how it might apply to them, when the staff have had sufficient input, and when the agency has made adjustments based on that input and has decided to move ahead, the time to make these hard side changes is imminent. The failure to act decisively at this point causes frustration to those who have felt their own values supported by restorative justice, or to those who have made the philosophical shift and are ready to be supported by the rest of the agency. It is crucial that the entire agency's components "line up" in a consistent manner so that the cultural shift is fully supported, and new expectations are understood by all. The mission statement, policy manuals, organizational structure, hiring practices, training activities, performance measures, etc. should all be changed to communicate the same message about the agency objectives and staff expectations.

Selecting the most appropriate strategies to integrate restorative justice practice in an existing correctional culture which is not completely restorative can be difficult to determine. Most correctional agencies are providing traditional services (as defined by stated objectives such as monitoring of probation conditions,

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conducting assessments for the court, and application of sanctions for use by the courts). However, some restorative programs and features exist in all agencies. Some of these might include restitution assessment and collection, victim impact panels, treatment and competency development programs, community work service, etc. Even these restorative practices often are missing major features that would make them more fully restorative. For example, are the community work service projects providing meaningful work for the offenders which has value to the community and increases the bond of the offender to the community? Do restitution policies provide full victim input and communication to the victim on a regular basis? Do offenders have the opportunity to participate in the development of their competency development plans? Is the community fully informed and engaged to perform crime prevention and intervention activities?

At first blush, many correctional agencies perceive that restorative justice policies and programs are largely being practiced in their jurisdiction, and sparse little would need to change. Upon closer examination, however, it usually becomes evident that the agency does not balance the needs of the three customers (victim, offender, and community) equally, nor are the specific components of the services provided directed at the overarching goal of repairing harm and restoring relationships. It is more common for correctional agencies to emphasize offender needs over the community and victim needs, as illustrated in figure 6.

### **CUSTOMER EMPHASIS (Current Practice)**

The question for agencies, then, is not whether they are a restorative agency or not, but to what degree do their policies, practices, values, programs, and directions support restorative objectives. It is not a yes and no question, but one of degree. It is this extent of practice and value incongruence that determines how extensive the strategies for change need to be. Once an agency has determined its action plan (and are about to enter the second stage of development), it is helpful to examine how likely those strategies will or will not be accepted and carried out by correctional staff. Schwartz and Davis (1981) suggest that an agency compare its selected strategies to the level by which the existing organizational culture or values are compatible with the proposed change (figure 7).

Given the level of compatibility, an agency has four alternatives. They include:

1. **Ignore the Culture.** In most cases, this is not advised. When significant differences exist between the strategy and existing culture, it is most likely that ignoring the culture will result in no change and can cause devastating results.
2. **Manage around the Culture by Changing the Implementation Plan.** When major obstacles toward implementing the strategy exist, an agency may want to bypass the culture by changing the plan. The changed plan under this alternative does not, however, change the intent or focus.
3. **Attempt to Change the Culture by Changing the Implementation Plan.** This is the most difficult alternative of the four and takes the longest to accomplish. It can, however, result in the greatest likelihood of long term success. To quote Schwartz and Davis:

When a cultural change is explicitly intended, it should be coordinated with all the necessary internal changes in management systems and organizational structure to seek a mutual and positive reinforcement of overall strategic management infrastructure.

4. **Change the Strategy to Fit the Culture.** This can be done by reducing performance expectations.

### **Managers and Leaders**

Much has been written about management and leadership, and the differences between them. Certain characteristics are prevalent in each of them. The following lists some of these characteristics that differentiate between them:

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Manager

Focuses on policies  
Focuses on procedures  
Concerned with measurements  
Relies on guidelines  
Sets up rules  
Seeks consistency and predictability  
Concerned with structure  
Focuses on tools needed  
Process oriented  
Directs staff  
Seeks short term outcomes  
Seeks to minimize risks  
Seeks agency stability

Leader

Leads by inspiring interested in vision  
Seeks flexibility  
Values the ability to change  
Committed  
Concerned with attitude  
Values creativity and synergy  
Seeks to overcome resistance  
Self leader  
Empowers staff  
Draws broader conclusion  
Takes risks  
Pushes others beyond their comfort zone

Organizational change is more likely to be long lasting and comprehensive when the agency leadership is promoting it, expecting it, and supporting it. The spreading of broad based cultural change is more potent when non-management staff take the initiative, but this often does not happen due to hierarchical organizations, staff workload, and other factors. As noted earlier, leadership can greatly accelerate an agency's movement from Stage 2 to Stage 3 by ensuring that all of the organizational components (Hard and Soft side) line up with the restorative goals. Often, however, change gets applied to the organization in a fragmented way, particularly when the management team fails to adapt its leadership style to the needs of the organization. One of the most important characteristics of a leader is that of flexibility or the ability to provide whatever the organization needs at the particular time. The agency has different needs of its management staff at different stages in its restorative development. When, for example, administrative staff display management characteristics when leadership is needed, the best laid plans can lose their effectiveness. It is at this time that management staff need to communicate on a daily level what is expected of all agency staff, both verbally and through his/her modeling, and to do so in an inspiring way.

Employees are hired by an organization based on what is needed at a particular time. As an agency changes, what it needs from staff changes. It is imperative that the management staff be able to adopt different styles of management and leadership as the needs of the organization dictates. Figure 8 shows two corrections organizations along a continuum.

In this example, on the far left is common correctional practice which represents those practices and objectives provided and supported by the agency for many years. On the far right is the vision of where the organization would like to go. It is a restorative vision, which means that the practices and values (and therefore the culture) is different from traditional practice . Agency X on the continuum is far from the restorative vision, and agency Y is closer. In reviewing the characteristics of a manager and leader, it is evident that each agency has different needs from its management staff. Agency X needs strong leaders because the culture is not going to change without the leadership characteristics being employed. As the agency gets closer to the vision (such agency Y), the needs of that agency changes. It is less important to use leadership skills and more important to manage those practices already put in place to sustain a restorative agency.

The need for strong leadership by managers at the appropriate time is a key factor in helping move an organization out of the adolescent stage and into Stage 3, adulthood. Agency leadership can answer the following questions to determine what course of action is needed in order to move the agency on to fuller restorative justice implementation:

1. Describe your agency's artifacts, values, and basic assumptions. What does that tell you about your agency's culture?
2. Review your restorative justice action plan and strategies. How well do your strategies match your current culture?
3. Review your leadership style. Do tend to manage or lead? Given how closely your organizational values and activities match up with restorative justice, -what changes do you need to make? Taking into account your

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leadership skills and style, what is the best action choice(s) given your agency's level of incongruent strategy and culture?

4. Define your next steps within your selected strategic plan and action choices.

### **The Role of Joy**

We all perform better, and are more likely to adapt to changes, when we:

- Have a sense of purpose at work;
- Are appreciated for our contribution; and
- Have fun doing it.

Restorative justice can result in fundamental changes to the individual worker being asked to carry it out. It implies that the worker concentrate on three customers, not one; be concerned with healing; become a community organizer of sorts; and facilitate the face-to-face meetings between offenders, victims, and the community, often in an emotionally charged situation. Why would anyone sign up for such a job? Because the expected outcomes are better. In other words, it touches on that deep, abiding sense of purpose that brought well-meaning individuals to a corrections career.

Equally important, and closely related, is the role of joy. When people have fun meeting a deeper sense of purpose, a type of euphoria sets in. The mind is freed up, quicker to respond, more open to the creation and support of new ideas.

A revolution for change in society must be a joyful revolution. No whipping and grim looks. It must be a party so others will want to join in. Anonymous

Corporate America understands this too, as evidenced by their celebration and hoopla over positive outcomes.

### **Conclusion**

Correctional agencies seeking significant shifts in organizational culture toward restorative justice is both exciting and frustrating. Stages of development can be expected. The timing of agency strategies and leadership styles is a key consideration to making the kind of cultural shift needed to become a restorative correctional agency. The potential for improved outcomes are as immense as the obstacles facing correctional agencies enmeshed in a traditional justice system. Despite these challenges, major advancements are being made. Agencies would improve their chances to be successful in meeting the restorative outcomes by paying close attention to organizational culture, stages of development, and leadership needs.

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### **6.8. Building Community Support for Restorative Justice Principles/Strategies<sup>68</sup>**

- Though the restorative justice movement has recently experienced remarkable growth of awareness and interest, there are very serious problems ahead.
  - Even where there is a high level support for the restorative philosophy in the criminal justice system or community, the broader public policy trend around the nation is in the opposite direction. Prison populations are growing rapidly and the cost of that expansion threatens the availability of resources to work with victims and offenders in the community. Increasing dependence on incarceration may further paralyze the system making change much more difficult.
  - Practitioners are frequently so overloaded that it is very difficult for them to think about questions of underlying values or philosophy.
  - There is also the risk that a restorative approach might be unevenly applied, benefiting certain racial or ethnic groups but not others. Such an outcome would be exactly the opposite of the intention of the restorative justice initiative. Oversight by the state remains very important to minimize the likelihood of biased results.
  - The greatest risks identified by most critics involve implementation which fails to be true to the values underlying restorative justice. It is crucial that the values be clearly understood and frequently articulated to guard against the dangers of straying from them in practice.
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### **6.9. A Comparison of Four Restorative Conferencing Models - 2001<sup>69</sup>**

#### **Sharing and Balancing Power**

The restorative justice processes discussed in this Bulletin are often proposed as alternatives to the legal-procedural approach to dispositional decision-making by the juvenile court. Concerns have been raised, however, about the mechanisms of accountability in restorative justice decision-making. In considering the development of justice programs in aboriginal communities in Canada, Griffiths and Hamilton (1996) have raised concerns that are just as relevant in urban U.S. communities:

Care must be taken to ensure that family and kinship networks and the community power hierarchy do not compromise the administration of justice. As in any community, there is a danger of a tyranny of community in which certain individuals and groups of residents, particularly those who are members of vulnerable groups,

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<sup>68</sup> Pranis Kay, *Director of the Restorative Justice Program of Minnesota DOC*, Building Community Support for Restorative Justice Principles and Strategies

[http://www.restorativejustice.org/rj3/Action/Tutorial.1/BuildingSupport\\_Pranis.html](http://www.restorativejustice.org/rj3/Action/Tutorial.1/BuildingSupport_Pranis.html)

<sup>69</sup> Gordon Bazemore and Mark Umbreit "A Comparison of Four Restorative Conferencing Models" in *Juvenile Justice Bulletin* February 2001 [http://www.ncjrs.org/html/ojjdp/2001\\_2\\_1/contents.html](http://www.ncjrs.org/html/ojjdp/2001_2_1/contents.html)

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find themselves at the mercy of those in positions of power and influence. (Griffiths and Hamilton, 1996:187–188)

The often dramatic and dysfunctional power differentials within communities may make true participatory justice difficult to achieve and, in some settings, may instead produce harmful side effects (Griffiths and Corrado, 1998). Ironically, those communities most in need of holistic restorative justice programs that encourage residents to become involved in the disposition process are often precisely those communities that are the most dysfunctional. Also, residents of such communities may have only limited interest in and/or capacity for involvement, in part because they have never had the opportunity to develop meaningful partnerships with the juvenile justice system. If these communities are ever to benefit from a restorative approach to the problem of youth crime, proponents of restorative justice must direct specific attention to developing strategies for building a sense of community among residents and for recruiting and retaining resident volunteers.

A critical issue surrounding the development and implementation of restorative justice models is: “Who controls the agenda?” Traditionally, the formal justice system has maintained a tight rein on initiatives designed as alternatives to criminal and juvenile justice processes. This is evident in the origins and evolution of diversion programs, which in many jurisdictions appear to have become appendages to the formal justice process. In this context, the inability or unwillingness of decisionmakers in the formal juvenile justice system to share discretion and power with communities is likely to result in “net-widening” (expanding the number and types of youth brought under the supervision of the juvenile justice system) rather than the development of more effective alternative decisionmaking processes (Blomberg, 1983; Polk, 1994).

If the new restorative justice models follow the pattern of development of earlier neighborhood dispute resolution models (and to a lesser extent of victim-offender mediation, as the oldest of the new models), one would anticipate significant additions to the richness and diversity possible in alternative sanctioning but little impact on the formal system. Both victim-offender mediation and family group conferencing (except as practiced in New Zealand) ultimately depend on system decisionmakers for referrals; the potential for true sharing of power is minimal. If new models are to avoid net-widening, marginalization, and irrelevance, community advocates should begin to work with sympathetic justice professionals who are also committed to community-driven systemic reform.

Although a primary objective of proponents of restorative justice is to have new concepts institutionalized as part of the justice process, the danger is that system control will lead to top-down development of generic models. Hence, both promise and risk are implied in the degree of institutionalization that some new approaches have achieved in a relatively short time and in the rather dramatic system-community collaboration that appears to be possible with these approaches.

Clearly, the high profile given to restorative justice initiatives may result in grant funding for research and new programs. Yet, such support is no guarantee of long-term impact of the type envisioned in the restorative justice literature. Moreover, in the absence of substantive community input (including input from crime victims) at the design and implementation phases of specific initiatives, an administrative focus (i.e., one concerned primarily with grant-funding processes) may even result in cooptation or watering down of new approaches in ways that ultimately function to undermine the philosophy and objectives of restorative justice (Van Ness, 1993).

For example, from a restorative justice perspective, perhaps the biggest challenge to Vermont’s reparative boards is the fact that they have been implemented within the State’s formal justice system itself. On one hand, the boards may have the greatest potential for significant impact on the response of the formal system to nonviolent crimes. Moreover, the commitment of administrators to local control may also result in communities assuming and demanding a broader mandate. On the other hand, as a creation of the State corrections bureaucracy, the reparative boards may find themselves at the center of an ongoing struggle between efforts to give greater power and autonomy to citizens and needs of administrators to maintain control and ensure system accountability. Indeed, citizen board members may ultimately be challenged to decide the extent to which their primary client is the community or the probation and court system.

Of the four models considered in this Bulletin, circle sentencing appears to be the most advanced in terms of primacy of the community’s decision-making role. In its placement of neighborhood residents in the

gatekeeper role (see table 2), this model provides the most complete example of power sharing. Acting through the community justice committees, communities are clearly the “drivers” in determining which offenders will be admitted to the circle and what should be done in the collective effort to heal the community. Eligibility for circles is limited only by the ability of offenders to demonstrate to community justice committees their sincerity and willingness to change. Surprisingly, the most promising lesson of circle sentencing has been that, when given decision-making power, neighbor-hood residents often choose to include the most, rather than the least, serious offenders in restorative justice processes (Griffiths and Corrado, 1998; Stuart, 1996). As a result, however, certain tensions have developed within courts and other agencies in Canadian communities that are experimenting with circle sentencing. The tensions concern the extent to which power sharing with the community should be limited and the issue of whether statutes are being violated.

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#### 6.10. Dangers/Opportunities of restorative community justice-2001<sup>70</sup>

In this essay Schiff and Bazemore respond to challenges or criticisms leveled against restorative justice and community justice. They deal with four major critiques of these models and practices based on them: (1) the myth of community (i.e., ambiguity in the term “community” as well as in the realities of actual communities); (2) concerns that restorative community justice perpetuates or even fosters inequalities of culture, gender, and status; (3) concerns that restorative community justice programs are not satisfactorily flexible in being responsive to stakeholder needs (as against imposing one program or process on all); and (4) the question of the relevance or irrelevance of restorative community justice to structural problems and inequalities in contexts of socialization and social control (such as schools and the workplace). While noting the legitimacy of some of these arguments, Schiff and Bazemore respond to these challenges and criticisms along two lines of argument: (1) assessing the relative adequacy or inadequacy of restorative community justice in comparison to its alternatives; and (2) scrutinizing the research basis for critiques of restorative community justice. Their hope is that restorative community justice will not fail in the face of these issues but will, over time, be able to build on them as opportunities for development and increased significance of its ideas and practices.

#### 6.11. Community Justice: A Conceptual Framework -2000<sup>71</sup>

##### **Current Issues in Community Justice**

The integrity model sets high standards for an appropriate community justice practice, and it sets equally high standards for community justice achievements. The model is grounded in the idea that criminal justice agencies must make themselves accessible to the community, and the community must take an active role in the justice process. It emphasizes strategies that repair damage or solve problems in order to restore communities. Community justice also values strategies that integrate marginal members at risk for criminal behavior or criminal victimization. Ultimately, the success of community justice is predicated on the development of community capacity and community satisfaction. To achieve these ends, community activists and justice agencies must struggle to overcome numerous barriers in the implementation process. In this final section, we consider some of the issues that pose significant challenges.

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<sup>70</sup> Schiff, Mara, and Gordon Bazemore. 2001. Dangers and opportunities of restorative community justice: A response to critics. In *Restorative community justice: Repairing harm and transforming communities*, ed. Gordon Bazemore and Mara Schiff, 309-332. With an introduction by Gordon Bazemore and Mara Schiff. Cincinnati, OH: Anderson Publishing Co.

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<sup>71</sup> Karp, David and Todd Clear, “Community Justice: A Conceptual Framework” in *Boundary Changes in Criminal Justice Organizations*, Volume 2, p,323-368,2000 [http://www.ncjrs.org/criminal\\_justice2000/vol\\_2/02i2.pdf](http://www.ncjrs.org/criminal_justice2000/vol_2/02i2.pdf)



### **From due process to due consideration**

Contemporary judicial process is grounded in a set of procedural practices that attempt to protect the rights of the accused. Within this individualistic framework, it was inevitable that conflicts of rights would appear. Some now ask, "But what of the rights of victims?" Others, thinking about the neighborhood-level effects of crime, have asked, "But what of the community's right to live in peace and safety?" From a legal perspective, such questions are not logically parallel to the protections afforded to the accused, given their prosecution by the State. But from the perspective of community justice, the questions are not irrelevant. They speak less to procedural justice than to a broader concern for justice that is captured in substance as well as in process.

The view of justice proposed here is a very different one from the procedural ideal of justice in traditional Western jurisprudence. Rather than an adversarial contest between the State and an accused citizen, the idea of community justice concentrates on a problem-solving process designed to restore safety to the places people live. Under such an ideal, rights are not procedural; instead, they are substantive. Whereas an adversarial ideal extends rights of due process, a problem-solving ideal extends rights of due consideration. The elements of due process are well known: timely notice, physical presence, counsel, permission to confront the other side, and an opportunity to be heard. What would a set of rights to "due consideration" contain?

A right to due consideration based on problem solving becomes an obligation to consider as important a range of needs and interests of victims, offenders, and the communities in which they live. In contrast to an adversarial ceremony designed to demonstrate legal guilt, in which strict rules apply to the admissibility of evidence and the weight it receives, "consideration" permits parties to the process to offer whatever understandings they believe are necessary to resolve the problem. The problem in terms of community justice is expressed as a series of questions and interests:

- What is needed to restore the victim?
- What is needed to ensure the community's future safety?
- What is needed to foster the offender's return to constructive community life?

This does not mean an end to traditional procedural rights. Neither victims nor accused parties should be coerced into a problem-solving process they believe cannot apply to them. A defendant who claims innocence must be able to force the accusers to prove guilt. A victim should not be forced to engage in interaction with an admitted victimizer when this will only produce more pain and

suffering on the victim's part. Communities should not be forced to consider embracing offenders who show no willingness to address the problems that make them dangerous to others. It may take repeated efforts on the part of community justice practitioners to pave the way for an interactive, problem-solving process.

In reality, however, full-blown trials are comparatively rare events. Most criminal cases are concluded when the offender enters a guilty plea. For the vast majority of offenders who admit their guilt, community justice activities could begin with the entry of a guilty plea. After the offender has taken public responsibility for having committed the offense, a series of information-gathering activities can address these questions:

- What is the victim's loss, and how can that loss be compensated?
- What is the offender's risk, and how can that risk be managed and reduced?
- How can the community be equipped to become safe in the face of crime, especially in this offender's presence?
- What actions on the part of the offender can publicly symbolize atonement for the crime?

Facts and opinions related to these questions are reviewed by all parties, and a proposed plan is assembled that will meet the needs of the parties. If the plan is agreed to by the victim, offender, and community, it takes the form of a written sentencing recommendation that is submitted to the judge by the community justice panel. The business of the community justice panel would more closely resemble that of an administrative law tribunal than a criminal trial, and broad exploration of the various parties' needs would be undertaken.

A similar process could follow a conviction at trial, but it would face two additional obstacles. First, the task of promoting confidence in the offender's sincerity is undermined by the trial, in which the offender's claim of innocence is found hollow. Second, the victim's belief that a safe and meaningful outcome to the crime is possible is made more problematic by the offender forcing the system to prove its case. Thus, when a criminal trial results in a finding of guilt, a greater burden rests on the offender to find ways to convince a community justice panel that a new adjustment and a sense of personal responsibility is around the corner.

In this model of due consideration, one issue must be carefully considered. Should there be equality before the law? That is, should each person guilty of the same offense be sanctioned in the same (or, at least, equivalent) way? Under a model of due consideration, more variables are in play than simply the nature

of the offense. For example, the harm of a particular offense may have been more severe for one victim than another, perhaps materially, perhaps emotionally. An offense may have a greater impact on the quality of community life, given the particular circumstances of one neighborhood compared with another. Because the justice process demands consideration of such impacts, the offense alone is an insufficient basis for comparison. We argue that some variation in offender sanctioning is not only inevitable under a community justice model but also desirable. The most important criteria are that the justice process meets the needs of the parties involved and that the sanction is clearly tied to identified harms caused by the offense.

Thus, community justice would neither require replacing the existing justice system nor invalidate any existing procedural rights of offenders and victims. Instead, a new process would be inserted that would, upon the establishment of guilt, attempt to broadly arrange a sanction that is procedurally fair and substantively adequate to meeting the needs of the victim, the offender, and the community.

### **Limits of community control**

With increased authority, it is possible that communities will exercise that authority in ways that conflict with broader values of the culture; for example, with vigilantism or discrimination. When power is informal, how may actors (and communities) be held accountable? This problem is especially acute for autonomous community crime prevention efforts because they lack the formal oversight of criminal justice agencies.

We can illustrate these issues by describing a late 1980s police crackdown on prostitution in New Haven, Connecticut's, well-known red light district. One of its unfortunate effects was to displace the sex trade to the surrounding residential neighborhoods, including Edgewood Park, a racially and economically heterogeneous neighborhood. There, prostitutes began their work early in the morning, targeting those heading to work, and continued through the day and into the night. Used condoms littered the playgrounds, and school children waited for buses adjacent to prostitutes waiting for johns. In response, community members organized a campaign to reduce prostitution (Bass 1992).

When neighbors saw a car circling a block or picking up a prostitute, they took down the license plate number and traced the registration through the Department of Motor Vehicles (DMV). They quickly discovered most johns were not from Edgewood Park and came from other neighborhoods. Neighbors sent a letter to the car owner's address advising the owner that the car had been seen "cruising" the neighborhood. The letters detailed the community's campaign against

prostitution and urged recipients to be careful about whom they lent the car to in the future. The group also posted fliers around the neighborhood that noted the "john of the week" and reprinted the john's name, address, and phone number, based on information obtained from DMV. After some johns complained they were receiving anonymous, threatening phone calls, the group stopped including phone numbers on the fliers.

This community action raises important questions regarding the application of informal control. First, what should be the relationship between the community and the formal justice system? The Edgewood group operated completely autonomously. Obviously, this independence from a formal justice institution has implications for oversight. In other situations, autonomous community groups have been charged with racism (Skogan 1988) and vigilantism (Weisburd 1988). For example, all-Jewish citizen patrols in Brooklyn's Crown Heights have been known to target blacks, in some cases exercising summary justice on the street (Mitchell 1992). Also, when community members involve themselves directly with criminals, they place themselves at risk, probably without the necessary preparation. What, if any, situations are inappropriate for citizen groups to handle? Under a community justice model, community action is undertaken in collaboration with justice agencies. Typically, police departments work with citizen groups to train, supervise, and assist in the management of citizen patrols. Partnerships have problems (see the next section), but they are vital for community oversight.

Second, to what extent does a community effort represent the entire community? Informal actions by the Edgewood association were undertaken on behalf of the community. To what extent were they consistent with local normative standards? By definition, community actions are designed to tighten local standards and increase their enforcement. Community members thereby claim that what was once acceptable is no longer tolerable. But did the Edgewood group go through some democratic process that enabled community members to clarify their standards and identify appropriate methods of normative enforcement? Such norm affirmation processes are necessary to ensure that special interests in the community do not impose their moral will on those who have legitimate questions about the harmfulness of the sanctioned behavior. The distinction between a communitarian approach, which is consistent with the community justice ideal, and a socially conservative approach is the emphasis placed on democratic processes that ensure the opportunity to deliberate and disagree about communal priorities before informal social controls are introduced.

Third, are the rights of alleged offenders being violated? Clearly, the Edgewood campaign sanctioned individuals who were not formally convicted of any offense. There was no due process, no opportunity to profess innocence, no

opportunity to contest the community's norms. It was certainly possible that a misread license plate would lead to the targeting of innocent people. Police need more justification than "circling the neighborhood" to arrest a john: Should community groups be held to a lesser standard of evidence? What other protections are necessary to protect the innocent from informal sanctions by the community? The criminal justice system has its formal power fairly consolidated and has traditionally emphasized a procedural model to ensure fairness. Community justice advocates decentralization of this power, in part to increase the system's legitimacy in the eyes of the public, but more importantly to increase the effectiveness of local-level collective action. In so doing, community action and autonomy raise the specter of radical militias and the Ku Klux Klan. Community justice, as we have described it, specifies a framework and a set of values that could not result in such communal formations.

### **Voluntarism and democratic representation**

Crime control is a public good. In principle, we would like to reduce crime rather than increase it, but we also would like to reduce the costs (time, effort, and money) of fighting crime rather than increase them. The best strategy for individuals is, therefore, to ride on the crime prevention efforts of others. Unfortunately, when we all depend on others to do the work, nothing gets done. Self-interest overwhelms the public good. One question is: How can we get people to participate in crime control activities when it is not in their immediate self-interest to do so? Furthermore, given the disincentives to participation, it is not likely that volunteers are a random sample of the community. They are more likely to represent special interests. Is this problematic, and if so, how can fair representation be ensured?

Some collective efforts require enormous commitments and provide little return. Davis and Lurigio (1996) have observed that antidrug campaigns of the late 1980s and 1990s have been far more successful than other earlier crime prevention campaigns. This may be because drug sales take place in stationary, visible settings, whereas burglaries and robberies, for example, occur anywhere. Community surveillance is considerably easier in antidrug efforts because the targets are easily found. Washington, D.C.'s, citizen patrol, the Orange Hats, for instance, have targeted one street corner as the focal point of its efforts (Goldsmith-Hirsch 1998). Conducting cost-benefit analyses can resolve long-standing arguments about the likelihood of participation by certain income groups in crime prevention campaigns. Some have argued that those who need to organize the most are the least likely to do so (Dubow and Podolefsky 1982; Skogan 1988). Yet antidrug efforts in disorganized communities do seem to occur when the potential benefits and the efficiency of crime prevention efforts sufficiently outweigh their costs.

Some communities are better organized than are others at the outset. They have strong local institutions (for example, schools, churches, civic associations) and viable communication networks that quickly spread the word that a community campaign is under way. The predecessor to the Orange Hats patrol, for example, was a neighborhood watch program organized in conjunction with the police, and this effort created a local network with a block captain (Goldsmith-Hirsch 1998). Community capacity is often dependent on the social organization of communities (Chavis et al. 1993). To what extent do poverty, inequality, mobility, heterogeneity, urban density, family disruption, and other macrolevel variables have an effect on the stake an individual has in the community? To what extent does this stake, in turn, affect mobilization? Owners, for example, are more likely to be mobilized than renters (Skogan 1988). Thus, the ratio of owners to renters and other such macrolevel characteristics may be important predictors of mobilization. However, the same factors that make an area difficult to mobilize are also likely to identify it as in greater need of community justice efforts because of higher crime and related problems.

Even when mobilization is successful, it is important to consider who is being mobilized. Grinc's (1998) evaluation of a community policing program implies that many individuals and interests are typically underrepresented in crime prevention efforts. This may be a result of fear of retaliation from offenders or the historically poor relationship between the community and the police. It may result from perceptions of low efficacy, in part because community members do not have clearly defined roles with regard to crime prevention and in part because of experience with prior failed collective actions. Underrepresentation may also result from both intergroup tension manifest in the homogeneous and competitive organization of local groups in heterogeneous communities (Skogan 1988) and intragroup conflicts that arise between leaders and group members (Grinc 1998).

In collaborations between law enforcement agencies and private citizens or community organizations, community agendas are often sidelined because of clear power imbalances. Crawford (1995) argues that community representatives do not have the professional expertise to compete with their formal criminal justice partners. Accordingly, various interests are excluded even in ostensibly democratic participation efforts. This may occur because of informal and biased leadership or advisory position selection processes that systematically exclude problematic individuals, groups, or perspectives. The result is not simply a violation of democratic values but a failure to meet the needs of disadvantaged and marginalized groups whose views and concerns are excluded from the table. Such power processes may partly explain the persistence of crime in low-resource communities. Not only is it harder to compete for scarce development and public safety resources, but those that are delivered have so many strings attached to them that community empowerment is undermined.

With each newly established source of informal social controls, community capacity will grow. As we have argued, these forms of control tend to be self-regenerating: One strong community group can plant a seed that grows into greater levels of mobilization. As these stronger community controls grow, they will tend to supplant the official agencies and develop their own agendas for improving community quality of life. The downward spiral of devastation can be changed into an upward cycle of empowerment.

### **Funding new practices**

We have argued that communities struggling with crime problems are typically beset by crumbling institutional infrastructure. These are the same communities that are bereft of the resources that might be needed to undertake innovative community justice efforts. In the face of limited institutional strength, community justice strategies require a kind of bootstrapping of resources. Where can we look to find these resources?

There is, of course, sufficient money spent on traditional justice to fund the work of a community justice operation. A great deal of money is now spent on punishment—\$31 billion in 1992 (U.S. Department of Justice 1997). Moreover, a community justice initiative need not be costly compared with contemporary expenditures. A few professional community workers can galvanize community efforts toward safer communities by building on residents' strengths and focusing official agency efforts toward strategies that strengthen the communities in which their clients live. A community justice initiative can be paid for by diverting dollars from less effective, contemporary expenditures to more effective, community-oriented initiatives.

This can be stated in stark dollar terms. The average prison commitment (about 2 years) in the United States is also a \$40,000 commitment of public funds. Each year, roughly 650,000 convicted offenders are incarcerated (Maguire and Pastore 1998). Redirection of just a handful of these decisions can alter the calculus of public protection.

The mathematics are particularly compelling at the community level. In Washington, D.C., for example—an area much larger than a community—5,700 residents are sentenced to prison in a given year (District of Columbia Department of Corrections 1997). At an average cost of \$40,000 per sentence, a community that is willing to retain a mere five offenders in a given year has \$200,000 to use to improve its community safety. This is enough money to fully fund a small community development office. It is not radical to think there are five offenders who could safely remain in the community instead of spending the 2 years in prison they would ordinarily serve.



The question is: How can those moneys be redirected from current justice efforts toward community justice efforts? The current system has many vested interests, not the least of which is a prison-industrial complex that has grown increasingly dependent on high incarceration rates to make profits and to economically sustain rural communities in which the State prison provides the only jobs in town (Irwin and Austin 1997). It is unlikely to think that these vested interests will easily or readily change their priorities to a community justice agenda.

#### ***A community justice thought experiment***

There is much to be done in communities that suffer heavily from crime: buildings to be refurbished, roads to be repaved, elderly to be transported to day-living facilities, and so forth. These communities cannot afford to purchase these services because they are filled with people who are destitute and cannot afford to pay the manpower costs. By the same token, offenders—especially those wasting away in prisons—are an untapped labor resource. Community organization initiatives could put offenders to work repairing the neighborhoods victimized by their crimes. This work is valuable for these communities in two ways. First, dollars that would be devoted only to the objective of removing offenders from their neighborhoods would be allowed to remain in those localities. Second, entrenched problems in those communities would be attacked through the labor of residents who are also offenders.

Our ideal envisages a professional group that identifies local problems requiring manpower—such as renovation of buildings or assistance to children and elderly residents—and mobilizes those resources to address those problems. A new local agency devoted to the problems would develop work and service projects that the area needs and that can be provided by offenders. It would assess applicant offenders to see what part, if any, they could have in community development. It would then develop and manage the projects necessary to implement the vision of community justice.

The community justice group would also work closely with criminal justice agencies as they provide supervision and services to offenders living in the community. Community mentors would work with juvenile offenders, and adult community sponsors would provide similar supports for convicted adults and their families. Residents would also be partners in crime prevention efforts that emphasize the renewal of public space and voluntary public service. The local community justice activity would have the oversight of a residential board of advisers with whom criminal justice and social service officials would work closely on quality-of-life problems arising from crime and justice activities.



Slowly and deliberately, informal social control capacity would grow, and the local area's reliance on external controls from State efforts would wane.

There are many ways such an approach could be funded. Community corrections acts have attempted, with some success, to achieve these aims. Many attempts have been made to divert offenders from prison, some of them successful. What makes this description different?

In most models of sentencing reform, offenders are treated at best as irrelevant, at worst as antithetical to community safety. A community justice model recognizes reality: Offenders are community residents, and their capacity not only to live crime free in communities but also to contribute to community life is central to the quality of life in a community. If offenders are filtered through incarceration experiences only to return antagonistically to the communities from which they came, little progress is possible on the agenda of community safety and, ultimately, quality of life. But if offenders can be redirected to contribute to community life—especially in the most deeply disadvantaged communities in America—then the calculus of community safety and quality of life is recomputed to include them as potential positive forces.

But this will require a fiscal realization of their contribution, and this fiscal reality relates to both the community and the victim—their fiscal interests—not just that of the offender. Imagine, for example, that:

- For each crime, the offender, the victim, and a community board each receive a “voucher” that can be used to purchase a community justice process in place of the criminal justice process.
- The alternative process can be used *only* if both the offender and the victim purchase it (this will make them have coincidence of interests instead of adversarial interests).
- A percentage of all moneys that would be spent on the incarceration of the offender will remain in the community to be used as the community sees fit, on any community enhancement project.

This would create an incentive for all members to participate in a process that recovers community. It would also redirect investment in crime control toward community development. In the case of Washington, D.C., for example, a diversion of 50 percent of offenders from incarceration each year (roughly equivalent to the percentage of nonviolent offenders sentenced to prison) would net \$114 million for community justice activities.

## Summary

It has been our purpose to describe the elements of the emerging community justice movement not as a series of programs or projects but as a point of view about what justice means and how it is produced. We first described how community justice initiatives are “bubbling up” in the traditional criminal justice functions of policing, adjudicating, and correcting. We then described a strategic vision of justice that has as its primary aim the enrichment of community life through a focus on the way crime interferes with community life. Our argument has identified seven key values of a community justice philosophy. They are:

- Norm affirmation.
- Restoration.
- Public safety.
- Equality.
- Inclusion.
- Mutuality.
- Stewardship.

In support of these values, we propose an integrity model of community justice. This model identifies core processes and critical outcomes that separate the community justice approach from the criminal justice approach. Our view is that an integrity model can inform the design and implementation phases of community justice initiatives, broadening and deepening their contribution to the aim of widely sharing the experience of justice.

Finally, we turn our attention to several important problems of the community justice movement: legal rights, accountability, voluntary participation, and funding. We note that the challenges to community justice are daunting. However, as we envision the possibilities, we are encouraged by the successful efforts already under way in the emerging vision of the justice ideal.

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## 7. Relevant Documents, Studies and Practices – International

### 7.1. Restorative Justice Online, Making Restorative Justice Routine <sup>72</sup>

Restorative justice programs are used in every region of the world. They are applied in virtually every phase of the criminal justice system. With appropriate adaptations, they have been used in every category of offense from minor crimes to the most serious. They have worked with juveniles and adults, with first time offenders and repeat offenders. UN and Council of Europe resolutions encourage governments to make use of restorative justice programs.

Nevertheless, restorative processes and outcomes are hardly routine in any government's response to crime. In many cases restorative initiatives work at the margins of criminal justice, and restorative programs struggle for funding and support.

In spite of impressive gains over the last decade, one could hardly say that there has been a paradigm shift in thinking and acting when it comes to crime.

What will it take to change this? What kind of campaign would be needed to make restorative responses to crime the rule, rather than the exception? What strategies and resources would be needed for such a campaign? What coalitions will be required?

It is time to answer these questions; to prepare for a campaign to completely change societal responses to crime. To help start the discussion, RJOnline presents three initial suggestions about how to begin developing such a campaign.

Sir Charles Pollard is the Chief Constable of the Thames Valley Police Department in the UK, and has championed the use of restorative conferencing in entire categories of cases rather than traditional police cautioning.

Mark Carey is Deputy Commissioner of the Minnesota Department of Corrections, and an innovator in instilling restorative values in community corrections and probation.

Dan Van Ness works for Prison Fellowship International, an association of national NGOs helping Christian volunteers implement community-based responses to crime.

#### **The Need for a Restorative Justice Campaign by Sir Charles Pollard<sup>73</sup>**

Sir Charles addresses the need for a problem statement that speaks not only to restorative justice advocates, but to policymakers and the general public as well. He does this by drawing from his experience in policing and law enforcement and by the success his police force has had in incorporating restorative conferencing into the day-to-day conduct of police business.

It is most important to start the process of working out what will be needed, in the future, to make restorative justice the dominant ideology within criminal justice.

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<sup>72</sup> [http://www.restorativejustice.org/rj3/campaign\\_default.htm](http://www.restorativejustice.org/rj3/campaign_default.htm)

<sup>73</sup> [1] Sir Charles Pollard is the Chief Constable of Thames Valley Police, the largest non-metropolitan police service in England and Wales, covering a population of 2.1 million people. The force faces all the major challenges associated with policing modern society, exaggerated by its close proximity to London. Since 1995 Sir Charles has been a leading advocate of Restorative Justice, pioneering the holding of restorative conferences between victims, offenders and community representatives in place of the traditional police caution when dealing with young offenders. These developments in Thames Valley have strongly influenced government policy, with Restorative Justice principles being adopted as a key element of the reformed national Youth Justice system now being rolled out across the UK. In fact, he was appointed as one of ten Board Members of the Youth Justice Board for England & Wales in 1998, which oversees the youth justice system of England & Wales. Sir Charles will be leaving Thames Valley Police on 1 February 2002. He will continue with his work on Youth Restorative Justice from outside the police service, and undertake consultancy work on leadership and management in the public sector, and continue and expand his work with the Youth Justice Board. He will also continue his work on Restorative Justice with a number of organizations, in the UK.

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Whilst I'm happy to leave to others the job of working up in detail how a criminal justice system based on restorative justice might look, what I do know is this: I've been a police officer for 36 years, including 11 years as Chief Constable of one of Britain's largest police forces, and in that time I've become increasingly ill at ease with the way our traditional Anglo-Saxon criminal justice systems adopt an ever more adversarial approach, emphasizing legal technicalities over substance, and retribution over sentences that reduce re-offending. This approach is also totally failing to address the needs of those most affected by crime, namely crime victims, their families and local communities.

In recent years a new approach to the crime problem has started to emerge, based on methods of conflict resolution that pre-date our so-called 'traditional' criminal justice systems. This new approach has come to be known as restorative justice, and all the evidence is that it can, when done properly and backed-up by other relevant intervention programmes, reduce re-offending significantly, provide satisfaction for victims of crime to a very high level, and motivate communities to take ownership of the problems that generate crime in their localities.

In addition to these huge gains, moreover, restorative justice encourages all those involved in criminal justice to work together to a common goal. As John Braithwaite noted during the international conference on restorative justice held in England earlier this year, research evidence suggests that whilst court orders - whether to compensate victims, do community service, join rehabilitation programmes, or otherwise - are legally enforceable, it is the voluntary agreements entered into via restorative justice that are more likely to be complied with. Restorative justice builds, as John puts it, 'superior motivation to actually do what is decided in criminal justice processes'. In short, restorative justice could serve as the professional 'glue' which brings cohesion and a much more responsible sense of purpose to all who work or are involved in criminal justice, including the judiciary, police, prosecutors, defense lawyers, court staff, corrections agencies and social services.

Nurturing this unique quality of restorative justice should enable it to start moving from a position on the sidelines of mainstream criminal justice, to one where it serves as a fundamental underlying philosophy. Central to this there will need to be the development of a strategy in which criminal justice is transformed from being an adversarial, process-based 'conveyor belt', focusing simplistically on closely defined offences, into a far more inclusive and fair method of conflict resolution that meets the needs of all those involved.

I fully support the need for a forum enabling those committed to change to work together and discuss how the new approach is to be promoted and implemented. Restorative justice has the potential to reform criminal justice in Western democratic societies as never before. I hope that the discussion and debate facilitated by the 'Campaign' site will make a significant contribution towards this goal.

**Vision Weaving: Proposed Mission & Strategies for a Restorative Justice Campaign by Mark Carey<sup>74</sup>**

Mark Cary proposes a draft strategic plan for a national or international campaign to firmly establish restorative justice in a justice system still dominated by adversarial, due process, and system-goals thinking. To do that he imagines an international coalition of many groups and individuals, and suggests what that coalition's mission and key strategic goals might be.

The International Restorative Justice Coalition is committed to fulfilling the following mission, goals, and strategies indicated below. The Coalition is made up of .... This "action plan" was conceived through numerous discussions with individuals involved in advancing the principles and values of restorative justice. It is not a static plan, rather one that will need to bend and reshape as more and different voices are brought in.

The restorative justice "movement" is moving to a new stage of development, one with different challenges and required strategies than when it first began in earnest just a few years ago. The first forays into the justice system during the movement's infancy were hesitant ones, filled with a strong commitment toward the need for

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<sup>74</sup> [1] Mark Carey is Deputy Commissioner of the Minnesota Department of Corrections. He has served as Director of Dakota County Community Corrections, and as Director of Dodge, Fillmore, and Olmsted Counties Community Corrections, both in Minnesota. He has over 20 years of experience in the correctional field, serving as a counselor, probation officer, planner and consultant. He taught juvenile justice at Rochester Community College and has written numerous articles. He is currently on the American Probation and Parole Association (APPA) Board of Directors, and in 1996 he received APPA's Sam Houston University Award. In 1993, Mark was selected as Corrections Person of the Year by the Minnesota Corrections Association.

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change and an underlying fire in the belly, but with some trepidation and uncertainty that the philosophy embedded in the ideas would succeed.

After a few years of courageous efforts and risk taking, the early pioneers have emerged emboldened and confident that the restorative concepts were not pollyannaish and impractical but rather quite insightful and respectful of humanity's past traditions and values. One wonders how the justice system wandered so far off this path of restoring harm and trusting in communities' willingness to get involved.

Despite advancements in adopting restorative philosophies and programs in justice systems, schools, communities, and other areas, an ominous concern still lingers. Most restorative inroads exist as fringe elements to systems and processes that remain largely non-restorative. That is, they are unreformed and the core drivers and activities proceed under a due process, adversarial, systems-goal focus.

While the core methods used by the legal system to handle disputes that cannot be resolved elsewhere are critical to retain, an over-reliance on its methods has unnecessarily usurped and dominated the approach or passiveness of other systems. Too often, neighbors don't know each other, and therefore cannot support or confront one another. Calling 911 is usually the preferred option to conflict. Justice system personnel have been pre-occupied with moving cases through the system and surveillance instead of true, long-term conflict resolution and repair of harm. Victims and community members affected by crime are too often forgotten or given perfunctory attention. And, offenders talk of feeling like a side player watching a system duke it out as if they were an impassionate observer.

As the modern day restorative justice movement enters its second decade, new strategies are called for. New approaches must be taken if the principles are going to be driven deeper in individual and community psyche and if they are ever to become second nature.

Mission: To improve the experience of criminal justice so that victims, offenders, and communities are informed, involved, empowered, restored, and satisfied, to the degree possible.

Note: each of these words (informed, involved, empowered, and satisfied) needs defining.

Goals:

- Increase awareness of restorative justice so it becomes a widely acknowledged and understood term no matter the age.
- Ensure that new recruits entering the criminal/juvenile justice system are fully educated and trained on restorative principles.
- Increase the likelihood that restorative ideals are practiced and put forth by policy and legislation.

Strategies for Goal One:

Increase awareness of restorative justice so it becomes a widely acknowledged and understood term no matter the age.

- a. Approach the Ad Council to gain assistance in developing a marketing strategy that includes billboards, TV spots, newspaper articles and other methods.
- b. Devise a media packet that will be sent to each jurisdiction that seeks to improve local news coverage of restorative justice, especially editorial boards.
- c. Find a "poster child" case(s) to use for national exposure.
- d. Develop and promote a curriculum to be used in schools (elementary, junior high, and high schools).
- e. Approach major markets for possible movie or series such as Disney. (This needs more fine tuning.)
- f. Bring together a group of creative, artistic individuals to craft ways to get restorative ideas into mass market (eg, novels, comic books, paintings, Nintendo, TV, radio, etc.).
- g. etc.

Strategies for Goal Two:

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Ensure that new recruits entering the criminal/juvenile justice system are fully educated and trained on restorative principles.

- a. Develop a “blueprint” manual on how to engage local universities and colleges in discussing the needs of the field and to hold on-going discussions of professional trends and publications that should be used by higher learning institutions. Provide the manual to restorative agencies seeking to address this issue with state and private educators.
- b. (Need a strategy to work with law schools here....)
- c. Ensure that state training academies are including restorative training in new staff orientation. Provide sample curriculum to training coordinators.
- d. Work with ACA, APPA, NADA, SJI, and other national associations to find out where information and training gaps exist and provide technical assistance.
- e. Sponsor a national gathering of federal/state government and university educators to discuss topic.
- f. Create list of textbooks that contain restorative material and work through major distributors to encourage their use.
- g. Sponsor politician “ride-alongs.”
- h. Devise a set of restorative questions to provide to League of Women Voters and other organizations that sponsor candidate debates.
- i. etc.

Strategies for Goal Three:

Increase the likelihood that restorative ideals are practiced and put forth by policy and legislation.

- a. Organize a state-by-state campaign to find existing elected officials that are restorative in policy positions and acknowledge their contributions.
- b. Recruit and support restorative minded candidates to run for office.
- c. When new governors or mayors are elected, seek ways to place restorative volunteer on search committees for judges, commissioners, police chiefs, and directors.
- d. Appoint and support an agency in each state that serves as a “policy watchdog” to support or alert officials when policy is passed that could hold restorative features.
- e. Approach APPA to establish national outcome measures for restorative goals (Dennis Maloney has already put this forth. Needs follow through.)
- f. etc.

Other things to consider:

Changing names and titles to reflect restoration. (eg, change names of judge, probation officer, prosecutor, victim advocate, etc.)

**Doing One Thing Well: Applying Restorative Justice to A Specific Crime by Daniel Van Ness**

Dan Van Ness proposes that a broad-based international coalition select a particular crime that would become the subject of a global campaign to reduce its incidence and the harm resulting from it. He suggests burglary might be a likely candidate and outlines a process for laying the groundwork for such a campaign. The basic premise underlying his proposal is that most countries have not made significant commitments to restorative justice. Firmly establishing restorative justice in a part of the criminal justice system that cannot be marginalized (as might juvenile cases, for example) will make wholesale adoption of restorative justice more likely

Momentum is growing for the United Nations to adopt a Declaration of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. An Expert Group will shortly be proposing specific language for such an instrument to the UN's Commission on Crime Prevention and Criminal Justice. If the Commission approves the Expert Group's recommendation, action by the Economic and Social Council could take place by mid-2002.

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This is an important moment for the restorative justice movement. UN action does two things: it signals how far restorative justice has come, and it provides an impetus and guidance for further expansion.

The need for further expansion is evident. While restorative justice interventions and thinking have made surprising and impressive inroads, they are still in many respects marginal to "justice as usual". Restorative justice is used for minor offenses or offenders in many jurisdictions, or are available as an adjunct to traditional criminal justice methods rather than as a replacement.

This is the right time, then, to be discussing a restorative justice campaign. It is important to build on what has happened, with the ultimate objective of firmly establishing restorative justice as society's primary response to crime.

That is the long-term objective. To reach that, a campaign must set tangible, intermediate goals. It must gain broad, lasting public support. It should draw together a diverse coalition of organizations, agencies and public officials, with each lending their particular insights and expertise to a common application of restorative justice. It should be capable of showing clear, beneficial results. It should be applicable in every nation of the world, regardless of legal system, economy or culture. It must demonstrate the effectiveness of restorative justice so effectively that policymakers will naturally begin to expand it into all parts of the justice system

Mark Carey and Sir Charles Pollard come from jurisdictions in which restorative justice programs have taken hold in important ways, thanks in large part to their personal efforts. Their proposals address the need to expand restorative thinking throughout entire systems. Other jurisdictions have made similar commitments, but the countries in which restorative justice is well established even in juvenile or first-time nonviolent offenses are few in number compared to the overwhelming number of countries for which restorative justice is an occasional alternative or supplement to conventional criminal processes.

Perhaps what is needed is a global campaign targeting the same specific crime in every country. The goal would be to reduce both the incidence of, and harm resulting from, that crime by applying restorative principles. In the process we would seek to firmly establish restorative practices as the principal approach used by governmental agencies as well as civil society.

**Example: A Campaign Against Burglary**

Consider, for example, a global restorative justice campaign against burglary:<sup>14</sup>

1. Burglary is a serious crime but not a violent crime. (Of course, violence may take place in the course of a burglary, but let us exclude those situations). The emotional, spiritual and economic impact on victims can be profound, particularly when the burglary is of a residence or small business. International victimization surveys have found that crime victims, when given a list of 17 crimes, ranked burglary as the seventh most serious, higher than assault and robbery without a weapon.
2. On average, one out of five urban residents was a burglary victim over a five year period around the world. The percentages ranged from 35% in Africa to 11 % in Asia. It is a crime that affects many people.
3. People report burglaries to the police. Two out of three burglary victims worldwide notify law enforcement. The reasons they give for reporting fall into two general categories: (1) to recover the property or get insurance, and (2) catch the offender or stop further burglaries. This high rate of reporting is not equal throughout the world, however. It ranges from 42% in Asia to 86% in North America. Nevertheless, knowing the reporting rates for each region of the world should make it easier to assess the significance of rises or falls in reported burglary. This in turn will help assess whether new restorative interventions contribute to reduced numbers of burglaries.
4. Because of public concern about burglaries and high reporting rates, this crime is one in which police are actively involved. Roughly half of victims worldwide report being satisfied with the police response, with victims in North America and Western Europe most satisfied (nearly 3 out of 4) and those in Latin America, Africa and Central and Eastern Europe least satisfied ( 25%, 29% and 35%, respectively). Reasons for

dissatisfaction overwhelming relate to the perceived indifference of the police and their failure to apprehend the suspect or recover missing property. This suggests that police innovations such as community policing may have appeal and usefulness to law enforcement not only because they improve their performance, but because this improvement would lead to increased public respect.

5. Few burglary victims (only 4% around the world) receive any assistance from victim support and assistance organizations. This number would be even lower were it not for the 10% of Western European victims that receive such assistance. This means that there is a dramatic need for victim assistance, raising the potential for productive coalitions among victim advocates and restorative justice supporters.

6. According to a survey covering 60 countries, just over 40% of all respondents said that imprisonment was the appropriate sanction for a 21 year old man found guilty of burglary for the second time. People from industrialized countries made that choice 41% of the time, those from countries in transition made it 39% of the time, and those from developing countries chose prison 65% of the time. This means that a restorative approach emphasizing accountability in the form of restitution, community service and other measures will have significant public support (since 6 out of 10 people believed that non-prison sanctions were most appropriate). However, a campaign to apply restorative processes will also need to engage in education of the significant minority of the public who may question using new approaches.

### **Preparing for the Campaign**

How would we develop such a campaign? Preparation will require expertise in research, public policy, and marketing/promotion:

First, clarify what is known about restorative interventions in the case of burglary. It would be useful, for example, for researchers to review their data sets to see what we can learn about victims and perpetrators of burglary. Here are some of the questions worth answering:

- What are the factors that make restorative encounters effective? Do those appear to be consistent in different regions of the world, or are there informative differences?
- What about court ordered restitution or community service in cases of burglary? Are they effective?
- What do we know about recidivism rates of burglars who become involved in restorative programs? How does that compare with those of burglars who are treated conventionally?
- What are the needs of victims of burglaries? What kind of median economic costs are associated with that crime, and what compensation funds or social services are available through public or private means?
- What is the satisfaction rate of burglary victims who participate in restorative programs? Are there factors that seem to contribute to increased or decreased satisfaction?
- What policing strategies seem to be effective or ineffective in reducing the incidence of burglary? Does restorative justice thinking or analysis help us understand why those interventions are useful?
- What community-based strategies are effective (for example, Neighborhood Watch programs). Does restorative justice thinking help us understand this better.

Second, develop a portfolio of interventions that can responsibly be presented as reducing either the amount of burglary or the harmful effects of that crime. Accumulate research on each of these, and also on the projected costs and benefits of using them. Consider how these might be used in combination to produce a package of proposals addressing the problem of burglary at multiple levels. (For example, certain strategies that should be taken by neighborhoods, others by the police, and still others by courts and probation.)

Third, clarify the public policy implications of these approaches. Is there a need for change of laws or can these interventions be applied under current law? Will this require an increase or decrease in governmental budget, or will there be no change? How can the various agencies of law enforcement be made to work together under a common philosophy toward common goals?

Fourth, identify the best arguments for shifting to restorative practices in dealing with burglary. It is important not to over promise, but also not to undersell. What research evidence is currently available to bolster the



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claims made, and how can those be communicated to the key audiences? Who are the likely allies and opponents?

Finally, how should success be defined? Can one predict a reduction in crime will follow implementation? How will the reduction in harm caused by burglaries that do occur be quantified, captured and reported?

### **Other Issues**

What kind of international coalition might be drawn together to give leadership to the campaign? In addition to the expertise required to do the research mentioned above, it would be very important to find representatives from every aspect of law enforcement, the judiciary, and executive and legislative officials. Resistance to new ideas or approaches often comes from those who have a vested interest in the status quo, and even those who are open to change may be suspicious of proposals made by a group that does not include representatives of their professions.

Initially it would be wise to target specific countries that hold promise of being willing to implement wholesale reform in addressing burglary. There are a number of factors to consider in making that assessment, but a key one would be the presence of a person or group of people willing to provide strong leadership to the effort. A reasonable objective might be to select one or two countries per region of the world in which the initial efforts would be made.

A coalition will be needed within each country in addition to the international coalition. This should be made up of representatives of the parties who have a stake in making this change, but there should also be strong representation of people with a strong background with restorative justice as well.

Mark Carey's paper has outlined some of the implementation and evaluation issues that will need to be addressed. It will be important to remember that success is not winning agreement by governments and members of civil society to make the change. Success lies in those changes being effectively accomplished and in a reduction in the incidence of, and harm caused by, crime.

<sup>[1]</sup> Dan Van Ness is Vice President at Prison Fellowship International, an association of 93 national affiliates making up the largest volunteer-based prison outreach in the world. Dan has written books and articles on restorative justice, including Restoring Justice (2nd Edition) with Karen Strong. His is general editor of RJ Online ([www.restorativejustice.org](http://www.restorativejustice.org)).

<sup>[2]</sup> The definition used here is one employed by the Fifth UN Survey of Crime Trends and Operation of Criminal Justice Systems: "Burglary refers to unlawful entry into someone else's property with an intention to commit a crime." The statistics cited are from Global Report on Crime and Justice, edited by Graeme Newman, and published by Oxford University Press, 1999.

## **7.2. Restorative Justice: Justice Of The Future -2001<sup>75</sup>**

- For 50 years citizens of Western societies have been pessimistic about crime.
  - They have seen crime as one of those things that is always getting worse.
  - There are actually a lot of reasons for optimism that we have the capacity to reduce crime over the next 50 years by more than it has risen over the last 50.
  - Accomplishing this would require a greater commitment to social justice than we have shown in recent decades, to guaranteeing economic security to all.

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<sup>75</sup> John Braithwaite, Research School of Social Sciences, Australia National University, Restorative Justice: Justice Of The Future, Restorative and Community Justice: Inspiring the Future, An International Conference Winchester, England March 28 – 31, 2001 <http://www.law.soton.ac.uk/bsln/rj/rjsumbr.htm>

- However it would also require a shift away from punitive justice so that the resources freed up by reducing our prison population could be devoted to restorative justice and crime prevention.

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### 7.3. Restorative Justice Programs in Australia - 2001<sup>76</sup>

#### Effective Extension of Restorative Justice Programs

Before considering the means by which programs could be extended a prior question concerns the desirability of doing so. It is early days for restorative justice: it may be the oldest way of conflict and dispute resolution, 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.

Even in relation to programs in the justice setting, where most of the evaluative research has taken place, we do not know yet very much about how effective the restorative approach may prove to be in reducing reoffending; this is especially difficult to estimate when programs are mostly directed at a population of offenders whose offences are minor and criminal careers brief. Large claims of 'success' among those who may never have reoffended anyway confuse and distract policymakers. RISE, the randomised controlled trial being conducted in the ACT, has recently shed important light on this subject: as we mentioned above, it found that while the Canberra conferencing program did no better than court for juvenile property offenders, and actually resulted in a slightly worse rate for drink driving offenders, it worked most effectively for young violent offenders who had been assigned to a conference, whose rate of reoffending was 38 percent lower than those assigned to court (Sherman et al 2000).

We already know that concerns exist about the potential for netwidening, for inadequate protection of offender rights in the context of non-judicial processing, and for conferences to be potentially coercive settings especially for young people (Warner 1994). They may be unduly intrusive and have the potential to impose harsher outcomes than would be meted out in court (Wundersitz 1996). They also may lack consistency and proportionality because of the focus on harm to the victim (Mason 2000). Concerns have also been expressed about the coercion of victims (see for example Reeves & Mulley 2000). However, results from RISE (Sherman et al 1998, Strang et al 1999) indicate that for the victims and offenders themselves, these considerations do not weigh heavily: both parties consistently report that they view conferencing as fairer than court and victims consistently indicate that they are more satisfied with conferencing than with court.

In the event that restorative justice programs prove worthy of extension beyond their present scope, experience to date indicate a number of issues that need to be addressed:

It is necessary to identify what needs, benefits and outcomes are expected to be achieved by the program and to make decisions about the point of intervention, eligibility, voluntariness and admissions, referral arrangements and oversight and appeal processes.

Because the police, and to a lesser extent the courts, are likely to remain the gatekeepers for entry into any restorative program (absent statutory obligation to divert to conferencing, as exists in New Zealand), there must be high levels of consultation between the program administrators and the police at every level. Support only from above will not suffice: top-down direction by senior officers may not affect the rate of referral on the ground. Support only from below will not suffice either: a few enthusiastic junior officers are not likely to be able to influence referral beyond their immediate environs.

Police and magistrates need information and training on a continuing basis about restorative alternatives so that they can make informed decisions about which offenders should be referred.

A high degree of consultation is required with Aboriginal and ethnic communities and organisations in implementing restorative programs. This is already being done effectively in some locations in South Australia,

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<sup>76</sup> Heather Strang, Director, Centre for Restorative Justice, Research School of Social Sciences, Australian National University, Restorative Justice Programs in Australia A Report to the Criminology Research Council, March 2001, <http://www.aic.gov.au/crc/reports/strang/problems.html>

Queensland and NSW, where conference convenors are local people who have already learned a great deal about the most effective ways of engendering positive attitudes towards the process and maximising the likelihood of compliance with agreed outcomes.

State and Territory governments may be understandably cautious about committing resources to new justice initiatives when cost savings cannot be guaranteed, or even necessarily expected. Although there are in fact likely to be savings at the court and corrections end of the criminal justice system, it is unlikely that a successful program would provide net savings to government: families and communities need properly funded assistance to support effectively offenders who would otherwise be a direct charge on the public purse.

All these considerations would apply equally to the extension of restorative alternatives in welfare, school and other settings. We need assurance about their effectiveness through the conduct of rigorous evaluation studies, ongoing consultation with all the agencies whose cooperation is essential for the programs' viability and genuine consultation with Aboriginal and ethnic groups who feel especially marginalised in their dealings with government and whose input is essential to the success of the program.

### **Problems and Some Solutions in Devising and Implementing Programs**

**Upscaling problems:** There is considerable variability between Australian jurisdictions in the uptake of restorative justice programs, though all States and Territories now have them to a greater or lesser extent. But independent of the level of uptake, there is remarkable consistency across Australia in the pattern of administrative and implementation problems, some of which may derive from the need for carefully and sensitively managed change across the justice system and in the community at large. Usually the program begins with a pilot undertaken by a small group of enthusiasts who perform well: the program is usually evaluated positively with a recommendation for wider use. The reasons for not upscaling the program usually relate to cost (though both formal evaluations and government departments making the decisions are often vague on this subject). Sometimes they relate to concerns about responsibility or 'turf'. Often they concern a generalised sense of uncertainty about the value of the program and a kind of cultural resistance to the restorative approach: this last is as evident in schools and other settings as it is in 'justice'.

**Caseflow problems.** Those jurisdictions which have implemented restorative justice programs have difficulties in common too. The programs sometimes have very limited eligibility criteria: they are usually restricted to juveniles, sometimes to first or early offenders, and eligible offences are often at the trivial end of the spectrum. This gives rise to criticism about the net-widening and mesh-thinning potential of a third tier of justice between cautioning and court, which is exacerbated when the referring agencies are conservative in the offences and offenders that they are prepared to recommend for these programs. Unlike New Zealand, where referral of juveniles to conferencing is mandated in the Children, Young Persons and Their Families Act of 1989 for all offences up to attempted murder for all admitted offenders, there is no imperative for referral by either court or police in any Australian jurisdiction, nor external oversight as to whether they do so or not. Even in those locations where the police either run the program themselves or have done so in the past, police have not shown great enthusiasm for referral. This difficulty may be an evolutionary one: in South Australia, where conferencing in justice has run longest, an education and training regime for police, specialist police youth officers and courts willing to divert suitable cases has reduced the caseflow problem, with around 17 percent of all juvenile cases now going to a conference (Daly 1998).

**Safeguarding rights:** Given the risks inherent in any informal justice procedure, there is some anxiety about the potential for the violation of due process protections of offenders (see for example Sandor 1994). These include admitting to offences in the belief that they will receive more lenient outcomes through conferencing, the potential at least theoretically for police intimidation and the lack of appeal mechanisms regarding outcome severity. As a program administrator, Bergen (unpublished) has expressed concern about ensuring that entitlements such as right to legal advice are consistently respected. There is also a potential for victims to be 'revictimised' by taking part in conferences, leaving them more fearful or anxious than before (Strang unpublished).

**Restorative justice and Indigenous communities.** Perhaps the most controversial aspect of restorative justice programs in Australia concerns the question of their appropriateness and effectiveness in Indigenous communities. Cunneen (1997) summarised the criticisms as follows: a failure of those setting up restorative programs to negotiate and consult with Aboriginal communities and organisations; concerns about the discretionary powers of police over access to programs; inadequate attention to cultural differences; the undermining of self-determination through a tokenistic recognition of Indigenous rights.

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Bargen has addressed this subject from an operational point of view. In reviewing the first year of operation of the NSW program in 1999 she observed:

'...disappointingly, but perhaps not surprisingly, the Act is not yet working as it should in Indigenous communities. Cautioning rates and conference referral numbers for Indigenous children and young people remain low in many parts of the state. It is not always possible for an administrator to appoint an Aboriginal convenor in all appropriate cases. Many Indigenous people are still not aware of the existence of the Act nor of the part they can play in its operation nor of its potential to reduce the entry of significant numbers of Aboriginal children into the juvenile justice and ultimately adult criminal justice systems' (unpublished, p 19).

Wundersitz (1996) in her South Australian evaluation also observed that conferences did not appear to be working as well for Aboriginal cases, with around 12 percent of Aboriginal youths failing to appear for conferences. However, she noted that steps had been taken to address some of their special needs: wherever possible an Aboriginal conference convenor was assigned to the case and, rather than attempting contact by phone, these convenors preferred to visit Aboriginal youth and their families at home. Wundersitz suggested that '[T]his face to face contact is important in breaking down some of the mistrust which Aboriginal people often feel towards the criminal justice system, and it makes it easier for the coordinator to identify who, of the extended kin network, needs to be invited to the conference' (p 117-118). Similar efforts are being made in NSW and Queensland too (Strang & Braithwaite forthcoming).

**Restorative justice and ethnic communities** Similar problems exist in extending the reach of the new legislation into ethnic communities. The 'structural' criticism of conferencing concerns its inability to address the social causes of crime, while at the same time both referral practices and the conference process itself may favour middle class, articulate participants. Despite the criticisms of Cunneen (1997) and others (see for example Kelly & Oxley 1999) about strategies to involve minority groups, much effort has been made in NSW to rectify this situation: for example, administrators in the Sydney region in 1999 used an innovative recruitment and training method developed in close association with those communities, resulting in an extra fifty new convenors

**Resource problems.** Finally, on a practical front, limited financial resources may restrict the expansion of programs unless the political will exists to do so. As observed above, the costing of programs remains vague wherever it has been undertaken, especially in comparison with the alternatives of cautioning and court, though the Queensland evaluation report (Hayes et al 1998) suggested that '[A]t least several million dollars would be needed to fund the program State-wide' (p 60). It also observed that strategic issues needing to be addressed particularly in rural areas included transportation costs of conference participants, the location of conference coordinators and the status of convenors required only on an irregular basis: this is all true, but the same issues have been faced and dealt with, apparently successfully, in New South Wales, for example.

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#### 7.4. Sustaining the Edge of Restorative Justice -2001<sup>77</sup>

After my first year of university, I made the decision to throw reason to the wind and study drama. Leaving my hopes for a stable income behind, I followed my heart and my dreams to class. I envisioned a core group of drama majors, radiating creativity and laughing in the face of convention. We were going to bond together as only true "artsies" could. We were going to fear no art and make the world a happier, more luscious place to inhabit. We were cutting edge.

We were also- apparently- going to compete fiercely for roles, ooze insincerity and stab people in the back. I soon grew weary of what I came to see as a false creativity and general stagnant environment. The drama scene wasn't measuring up to its ideals. Besides, the architects were the true creative souls on campus.

Within the conflict transformation field, restorative justice has a very attractive pull. It's creative, works as an alternative for a system in dire need of alternatives, and feels very cutting edge. And when it works well, it is all of that and more.

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<sup>77</sup> Kristin Reimer, Editor, *Conciliation Quarterly* is a publication of the [Menonite Conciliation Service](http://www.restorativejustice.org/rj3/Feature/MARCH2002/Conciliation/introduction.htm). The Summer 2001 (V. 20, No. 3) issue was dedicated to restorative justice., **Sustaining the Edge of Restorative Justice**  
<http://www.restorativejustice.org/rj3/Feature/MARCH2002/Conciliation/introduction.htm>

Restorative justice, however, is subject to all the ills and pitfalls of any system--mainstream or otherwise. Regardless of how full of integrity and principled a system may be in theory, holding true to those ideals in practice is no easy task.

As restorative justice becomes more and more accepted on the predominant criminal justice scene, it runs the risk of losing its edge. And when the edge is gone, the disillusionment will not take long to set in. This issue of CQ is dedicated to those people who are working diligently to keep the restorative justice field on its toes and on the edge. The articles in this issue remind us where we come from, where we want to go and refuse to allow us to get comfortable with where we are.

I would like to thank the co-compiler of this issue, Lorraine Stutzman Amstutz, the director of the Office on Crime and Justice for Mennonite Central Committee U.S. Her dedication to the restorative justice field is continuous and ever-growing. Now that she is working in the same office building as MCS- blessing us with her humor and spirit- we intend to further foster our relationship with the restorative justice community. One way this relationship will manifest itself is with the inclusion of a restorative justice focused article in each issue of CQ. We're excited about this expansion of our vision. Readers, please share your views on this (and anything else!) with us.

Restorative justice is doing very good work. Now is not the time to cozy up and get comfortable.

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### **7.5. ADR/Non-Adversarial Regulation: Why are they still not mainstream/can they ever become mainstream? – 2001<sup>78</sup>**

#### **Change:**

- Law is a discipline that is highly resistant to change.
  - o While modern practitioners of medicine, physics, sociology and philosophy hold understandings vastly different from those held by their ancient counterparts, it is not difficult to imagine that jurists from ancient Rome, for example, would probably be able to function quite efficiently in a modern legal chambers, provided, merely, that they were able to bring themselves up to date on current legislation, cases and procedure<sup>79</sup> (Cohn 1967:64).
  - o While this is not necessarily remarkable in itself - the functions of family life, for example, would have few dissimilarities either - nevertheless what can be seen as the common link is the tenacity with which both the ancient and modern legal systems hold on to certain tenets, practices and procedures.

#### **Day in Court**

- One such tenet in the common law system is that justice is more likely to be done (indeed, to be seen to be done) when one is able to have one's day in court.
  - o Increasingly, this view has been questioned and challenged.
    - Alternatives to adversarial formality have emerged, for example, systems and practices pursuing, amongst other things, alternative dispute resolution or 'ADR', family group conferencing, interest-based mediation, court-ordered conciliation conferences, industrial arbitration, transformative justice, restorative justice, diversionary courts and therapeutic jurisprudence.
    - Each of these alternatives came about as more and more people began to recognise the limitations of any approach that brought parties into a highly formalised legal battle, one

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<sup>78</sup> Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>79</sup> Cohn, G. (1967) Existentialism and Legal Science, Dobbs Ferry, NY: Oceana Publications. *cited in* Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

- against the other, where there could be but one winner (eg. French 1991, Ingleby 1991)<sup>80</sup>.
- Legal and non-legal observers alike have been enormously productive in seeking out and spelling out ways and means to address and manage legal conflicts and to solve legal problems in ways that are enduring and acceptable to the parties concerned.
- The reasons for this search for alternatives are easy to glean.
    - In adversarial systems, criminal and civil alike, an adjudicator (a judge or jury) considers the arguments from both sides, following examination and cross-examination and re-examination (and legal argument on the admissibility of evidence) and imposes a judgment.
    - The dispute is thereby declared 'resolved'.
      - This resolution, however, comes at great cost, not only in terms of the legal expenses imposed upon the litigants (and the community, too, as measured in court time, judicial costs etc), but in the harm done to the combatants as well, financially and psychologically.
      - The conflict never really goes away.
        - In many ways, commentators allege, it is merely exacerbated (e.g. McDonald and Moore 2001).<sup>81</sup>
  - In contrast, non-adversarial procedures and informal practices are said to be more easily accessible and less daunting to those who wish to participate in the legal process but whose skills, confidence or resources are lacking.
  - Yet despite all of the evidence of the spiraling costs and enduring bitterness launched and fomented by the litigious process, there is little evidence that its appeal, generally, is shrinking.
    - That is not to say that alternatives are being frustrated by this resilience.
      - Certainly there are officially mandated ('court-annexed') conciliation conferences readily ordered in commercial cases, family law disputes and in the industrial and employment law realms.
      - It is also the fact, of course, that most legal matters, certainly commercial cases, are settled 'out of court'.
    - Yet there is an unyielding view that alternatives to litigation are still very much the 'alternative'.
      - The instituting of legal proceedings, and, indeed, the making of threats of litigation, are fundamental to the processes associated with civil justice.

### **The resilience of adversarial approaches**

- There are a number of possible reasons why litigation endures as the cornerstone of the civil legal system notwithstanding the great strides made by law reform commissioners, community legal services and governments alike in seeking alternatives.
  - These reasons are explored briefly in the discussion that follows.
- For the sake of the simplification of the arguments, three somewhat artificial notions need to be constructed.
  - Firstly, litigation and its alternatives are set out as dichotomous and mutually exclusive entities.
    - This is a little misleading, for there are a number of permutations in relation to legal outcomes that cannot be classified as one or the other, and, in many cases, the bringing of proceedings is a necessary forerunner to court-annexed mediation or conciliation process.

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<sup>80</sup> French, The Hon Justice (1991) 'Hands on Judges, User Friendly Justice', in Papers Presented at the Ninth Annual AIJA Conference, Melbourne 1990, Carlton South: Australian Institute of Judicial Administration, 75-100 AND Ingleby, R. (1991) In the Ball Park: Alternative Dispute Resolution and the Courts, Carlton South: Australian Institute of Judicial Administration. *cited in* Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>81</sup> McDonald, J. and D. Moore (2001) 'Community Conferencing as a Special Case of Conflict Transformation', in H. Strang and J. Braithwaite (eds.) *Restorative Justice and Civil Society*, Cambridge: Cambridge University Press *cited in* Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29

- Nevertheless, for the purpose of exploring the question posed (above), there is an assumption that a clear dichotomy does exist.
  - Secondly, formal adjudications and the adversarial system are linked irretrievably.
    - This is not always the case, but for the purposes of this explanation, there is an assumption that the process of examination and cross-examination is a precondition to a formal, legal adjudication.
  - Thirdly, while there is court-annexed ADR, and options outside of the formal system, no distinction between them is made for the purposes of this paper.
- The reasons for the survival and pre-eminence of litigious and adversarial practices are many and varied.

#### **The certainty of a judicial pronouncement has deep appeal<sup>82</sup>**

- There is great power in the symbolic function of a judicial pronouncement at the end of a formal hearing rather than an outcome that has been drawn from a mediated exercise, where parties have been led to reach a compromise that may be seen to be unsatisfactory to both.
- Many people prefer to live in a world of certainty even when it is said or suspected that such certainty is contrived, in much the same way as some people, in times of trouble, often adopt theological precepts they may have previously abandoned. John Locke stated it thus:

“Freedom of Men under Government, is to have a standing Rule to live by, common to every one of that Society, and made by the Legislative Power erected in it; A Liberty to follow my own Will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man” (sic). (quoted in Kennedy 1973:370)<sup>83</sup>
- There is a strongly held view that legal arguments and formal pronouncements are required in order to develop the law, and in order to give certainty to legal relationships. This is the basis of the doctrine of precedent. Consider the reasoning of the English Court of Appeal in *Rickards v Rickards* [1990] FCR 409:

“The importance of the rule of *stare decisis* in relation to the Court of Appeal’s own decisions can hardly be overstated. We now sometimes sit in eight divisions and, in the absence of such a rule, the law would quickly become wholly uncertain. ...[Certainty in relation to substantive law is usually to be preferred to correctness, since this at least enables the public to order their affairs with confidence” (per Lord Donaldson of Lynton, MR, at 416-7).
- In other words, if the law is simply what the parties care to say it is, or what a compromise says it may be, what is a legal advocate to argue? What is a judge to justify in any later decision? The pre-eminence of formal pronouncements in legal proceedings will not lightly be set adrift. This may explain the attitude of some litigants who will press on through litigation despite the advice of their counsel and regardless of the costs involved.

#### **The visibility of and consistency attached to an open court hearing is attractive<sup>84</sup>**

- Moves away from open court litigation take parties into private deliberations and outcomes that are usually shielded from public scrutiny.
  - Mediated outcomes, for example, those emanating from family group conferences for juvenile offences, and, to a lesser extent, civil settlements where confidentiality is imposed upon the disclosure of the terms of the settlement, suffer from an opaqueness that concerns some commentators (for example, Hossain and Malbon 1998).<sup>85</sup>

<sup>82</sup> Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>83</sup> Kennedy, D. (1973) ‘Legal Formality’, *The Journal of Legal Studies*, 11(2), 351-398. cited in Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>84</sup> Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>85</sup> Hossain, M. and J. Malbon (eds) (1998) *Who Benefits from Privatisation?* London: Routledge. cited in Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

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- In other words, alternative dispute resolution outcomes and decisions that are unlikely to be publicly viewed, and even less likely to be debated, may be treated with suspicion.
- The fairness or otherwise of the final outcome for the parties concerned or the public in general is not open for public scrutiny.
- Moreover, there is an expectation in a democratic society that the law will be applied consistently. The New Zealand Court of Appeal recently overruled a restorative justice family group conference outcome determining that it was too lenient in the punishment it awarded, and arguing that the state had an abiding interest in equalising punishment across offences (Mason 2000, quoted in Bayley 2001:220).<sup>86</sup> There is a perception that alternatives to the litigious process may allow parties to license an *ad hoc* intervener to determine a dispute between them according to an “arbitrary and inherently indeterminate view of the outcome” (Kennedy 1973:376)<sup>87</sup>. Commentators have noticed that unsatisfactory inconsistencies in the application of administrative law penalty options are becoming more common (Tomaino 2000:188ff; Grabosky and Braithwaite 1986:163ff).<sup>88 89</sup>

**Litigation serves the purposes of the legal profession**

Legal commentator Maureen Cain points to the ‘claustrophobic structure’ of the legal profession as one of the reasons why the ideology upon which the profession operates remains largely unexamined.

“Maintenance of the unity of legal thought is contingent upon [judges and lawyers] being impervious to the various day to day rationalities of other sections of the population.” (Cain 1976:246)<sup>90</sup>

That is, says Cain, there is power in the mystery and esoterism of the litigious process, and in its language, the dress of counsel and the formal courtroom practices (Sarre 1994:16-20).<sup>91</sup> Judges, generally, are not averse to perpetuating that power and esoterism. They are unlikely to renounce the deference the public accords to their judgments (Elson 1989:363). Lawyers may act likewise.

“The good lawyer, then, is the one who can demonstrate to himself and to others that he does, in fact, know more than other lawyers and, especially, more than the ordinary, well-educated layman about things legal. Such a view inevitably breeds a kind of exclusivity and separatism in relationships between lawyers and the public. It is no accident that prestige and authority within the legal profession increase with one’s distance from the general community.” (sic) (Fraser 1977:70)<sup>92</sup>

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<sup>86</sup> Mason, A. (2000) ‘Restorative Justice, Courts and Civil Society’ in H. Strang and J. Braithwaite (eds.) *Restorative Justice: From Theory to Practice*, Ashgate: Aldershot UK. cited in Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>87</sup> Kennedy, D. (1973) ‘Legal Formality’, *The Journal of Legal Studies*, 11(2), 351-398. cited in Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>88</sup> Tomaino, J. (2000) ‘Punishment and Corrections’, In R. Sarre and J. Tomaino, (eds.) *Considering Crime and Justice: Realities and Responses*, Adelaide: Crawford House Publishing. cited in Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>89</sup> Grabosky, P. and J. Braithwaite (1986) *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*, Melbourne: OUP. cited in Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>90</sup> Cain, M. (1976) ‘Necessarily Out Of Touch: thoughts on the social organisation of the English bar’, in P. Carlen (ed), *The Sociology of Law*, Keele, UK: University of Keele cited in Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>91</sup> Sarre, R. (1994) *Uncertainties and Possibilities: A discussion of selected criminal justice issues in contemporary Australia*, Adelaide: University of South Australia. cited in Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>92</sup> Fraser, D. (1977) ‘Knowing the Law: A Discussion Paper’ dated 19 October 1977 but reported in 1988-89 *Australian Journal of Law and Society*, 5, 66-71. cited in Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>



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This is an idea explored in a now famous essay by Danish criminologist Nils Christie and expanded in the concept of restorative justice (e.g. Bayley 2001). Although Christie was referring to victims' rights and returning criminal conflicts to their 'rightful' owners, he foreshadowed the possibilities of an evolution of lay-people's sense of power over the legal process:

“[The current system is] a loss of opportunities for a continuous discussion of what represents the law of the land...Lawyers are... trained into agreement on what is relevant in a case. But that means a trained *incapacity* in letting the parties decide what they think is relevant (emphasis in the original) (Christie 1977:8).<sup>93</sup>

To this extent, it is argued that alternatives to the adversary system threaten to remove power from those with whom it has resided for centuries.

“[The law's] guardians are a priesthood, who to greater or lesser degrees cling together in mutual self-discipline encouraging or compelling each other to understand, apply and preserve the orthodoxy. Of course, the whole is really a writhing mass of movement, change and conflict even though, from a distance, it may appear to some to hang together in a sort of seamless web. (Mason 1990:80)<sup>94</sup>

**The adversarial system is entrenched in the current style of legal education<sup>95</sup>**

There is little doubt that the way in which law is taught and the curricula that are assembled entrench the view that legal judgments (as opposed to customized outcomes arrived out through parties' discussions) are a preferred method for reaching 'correct' results.

“Wherever [a] traditional style of legal training is offered, social problems tend to be reduced to a series of disconnected disputes between anonymous and interchangeable individuals. Hypothetical cases are manufactured for students who are expected to isolate the 'facts' and then apply the relevant law. The student's task is to arrive at the legally 'correct' solution by reasoning in an intelligent and objective manner. ... For much of the time, the required task is skilfully to piece together small sections of the [jigsaw] puzzle, without ever having to appreciate the entire composite legal picture and its implications for society. Thus is maintained the impression of a fair, dispassionate and objective treatment of all parties who come before the law.” (Naffine 1990:33)<sup>96</sup>

This is not to suggest that no alternatives find their way into the classrooms or that legal educators are not aware of the difficulties attached to a litigious approach to legal problem-solving. Indeed, there is now a concerted effort for mediation training in law schools and continuing legal education curricula. There is a tendency, nevertheless, for these subjects to be peripheral to 'real' law. That is, practitioners come away from their education with the belief that the law consists of set principles and that the profession is the guardian and preferred interpreter of those principles.

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<sup>93</sup> Christie, N. (1977) 'Conflicts as Property' *British Journal of Criminology*, 17(1), 1-15. *cited in* Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>94</sup> Mason, K. (1990) *Constancy and Change*, Annandale, New South Wales: Federation Press *cited in* Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>95</sup> Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm> *cited in* Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>96</sup> Naffine, N. (1990) *Law and the Sexes*. North Sydney: Allen and Unwin *cited in* Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

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“The most obvious failing of the traditional law school curriculum is that its ... concentration on legal doctrine as an objectively rational subject of discourse results in the neglect of a multitude of competencies that mark the excellent practitioner.” (Elson 1989:345-6)<sup>97</sup>

A wholesale change in the style and content of legal education cannot occur overnight, of course. It would be, however, needed if there were to be a greater exploration of the possibilities offered by alternative approaches.

**Law reformers accept the centrality of the adversarial/litigious approach**

- It is the often case that reformers review alternatives to litigation by referring to them as ‘exceptional’ and thus the perceived immutability of the prevailing assumption remains intact.
  - For example, Ericson and Baranek use the term ‘tinkering’ to describe the manner in which reformers toy with existing structures rather than challenge the more enduring underpinning assumptions, a process which “serves not as change but as an excuse for not changing” (1982:225)<sup>98</sup>.
  - Their work examines the process by which reforms may become used as matters of administrative convenience, and point to the manner in which policy-makers and legislative draftspersons often collaborate in mystifying what the reform is really intended to do.

**The adversarial system may assist those who challenge authority and power<sup>99</sup>**

There is, furthermore, an argument that the adversarial approach can *return* power to the hands of the otherwise powerless (Handler 1978:232-3)<sup>100</sup>. It is possible that an open court judgment, with fixed procedural rules, may act against the threat of arbitrary action by the more powerful elements of society. Do not clear and authoritative legal rules and judgments, pronounced by an authority above reproach and removed from political interference, provide protection against injustice, for example, the availability of the writ of *habeas corpus*? Where matters can be dispensed with in a manner that may not require formal rules, for example, those dealt with by administrative action or on a private settlement, there may be the suspicion that powerful elements were at work in reaching a settlement based more upon convenience than justice (Kennedy 1973:393; Sarre 2001)<sup>101 102</sup>

In other words, a mediated response may be perceived as favouring the interests of the powerful. There is an argument that only through the litigious process can power imbalances be overcome, assuming equal access to resources. Only in a litigious setting will rules of evidence and procedure be in place to ensure fairness and the perception of fairness.

One of the guiding principles of mediated legal processes is that formal rules are not usually followed. The closing off of the possibility of formal legal rules, however, may lead to a perception that there is no impartial ‘umpire’. Even the participants in the most simple of neighbourhood meetings may need to refer to Roberts Rules of Order to ensure that a meeting is conducted fairly. In other words, despite a society’s best endeavours

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<sup>97</sup> Elson, J. (1989) ‘The Case Against Legal Scholarship; or, if the professor must publish, must the profession perish?’ *Journal of Legal Education*, 39 (3), 343-381. *cited in* Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>98</sup> Ericson, R. and P. Baranek (1982) *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process*. Toronto: University of Toronto Press. *cited in* Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>99</sup> Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>100</sup> Handler, J. F. (1978) *Social Movements and the Legal System: A Theory of Law Reform and Social Change*, New York: Academic Press. *cited in* Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001 <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>101</sup> Kennedy, D. (1973) ‘Legal Formality’, *The Journal of Legal Studies*, 11(2), 351-398. *cited in* Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>102</sup> Sarre, R (2001) ‘Alternatives to the Criminal Courts: Some considerations of civil and administrative options in the process of legal regulation’, *Caribbean Law Review*, 11(1), 25-38. *cited in* Rick Sarre, Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream? Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

towards adopting more localised and less formalised processes and outcomes, legal 'centralism' is hard to break when people are aspiring to fairness (Galanter 1979, cited in Bayley 2001:220).<sup>103 104</sup>

**The adversarial system is culturally determining and determined**

- There is, finally, an argument, albeit from one particular paper, that the rate at which people choose adversarial, litigious approaches can serve as an indicator of legal culture.
  - o Blankenburg (1997)<sup>105</sup> compared civil litigation rates in Austria, Belgium and West Germany (the more litigious) with Italy, Denmark, the Netherlands and Japan (less litigious).
  - o He then conducted a comparison of the otherwise seemingly culturally similar nations, the Netherlands and West Germany that allowed him to conclude that 'legal culture' is as much the product of the system as it is its generator and does not exist outside of legal institutions.
  - o David Nelken, the editor of the volume in which this view appears wrote critically of this argument, which appears to confuse culture and structure.

**Conclusion**

Despite the criticisms of the litigious process, and its not insubstantial role in exacerbating conflicts rather than managing them, it remains as one of the cornerstones of the civil justice system, if not the criminal justice system in Australia as well. The faith that we place in lawyers as suitable combatants for our battles and judges as paragons of objectivity remains largely unshaken. For the reasons outlined above, alternatives that one might have thought should have or could have become mainstream have remained *alternative*. Whether that is because of the perceived value of certainty, the need for objectivity and openness and so forth, or whether it is simply because there is, as yet, less faith in the process of dispute resolution by those who find themselves in conflict remains a moot point. At the very least, there will need to be some attention given to the above issues if there is to be a greater reliance upon, and confidence in, alternative procedures and practices, alternatives that have promised much for some time but which have failed to make the sort of impact that their proponents may have hoped for or predicted in the past.

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**7.6. Reason and Emotion in Restorative Justice - 2000** <sup>106</sup>

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**7.7. Restorative Justice - The Public Submissions-1998** <sup>107</sup>

**Opposition to Restorative Justice**

Nine submissions were strongly opposed to the introduction of any forms of restorative justice in New Zealand. Some reasons included:

Justice, the enforcement of law and order, should discourage the predators in our society by imposing a just punishment for crimes committed and act as a deterrent to others who may contemplate criminal activity and violence upon those weaker than themselves. (Mitchell, 6)

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<sup>103</sup> Galanter, M. (1979) 'Justice In Many Rooms' Working Paper No. 4, Madison WI, University of Wisconsin Law School, Dispute Resolution Program. *cited in* Rick Sarre, *Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream?* Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>104</sup> Bayley, D. (2001) 'Security and Justice for All' in H. Strang and J. Braithwaite (eds.) *Restorative Justice and Civil Society*, Cambridge: Cambridge University Press. *cited in* Rick Sarre, *Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream?* Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>105</sup> Blankenburg, E. (1997) 'Civil Litigation Rates as Indicators for Legal Cultures' in D. Nelken (ed.) *Comparing Legal Cultures*, Hants, UK: Dartmouth Publications, 41-68 *cited in* Rick Sarre, *Alternative Dispute Resolution and Non-Adversarial Regulation: Why are they still not mainstream and can they ever become mainstream?* Asia Pacific Mediation Forum, Conference at Adelaide, South Australia, University of South Australia City West Campus, 29 November - 1 December 2001, <http://www.unisa.edu.au/cmrg/apmf/papers/Rick%20Sarre.htm>

<sup>106</sup> Luna, Erik, Associate Professor, University of Utah College of Law Senior Fulbright Scholar and Lecturer, New Zealand Institute for Dispute Resolution, Victoria University of Wellington Faculty of Law, Reason and Emotion in Restorative Justice July 2000 <http://www.scoop.co.nz/archive/scoop/stories/51/19/200007051755.74daa57b.html>

<sup>107</sup> Ministry of Justice – New Zealand - Restorative Justice The Public Submissions First published in June 1998, © Crown Copyright [http://www.justice.govt.nz/pubs/reports/1998/restorative\\_justice/ex\\_summary.html](http://www.justice.govt.nz/pubs/reports/1998/restorative_justice/ex_summary.html)

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It does NOT give me any confidence as a VICTIM that it will improve the dispensing of JUSTICE especially where long suffering victims are concerned. (Source withheld to protect privacy)

Restorative Justice which appears to find favour with some judges is ridiculously lenient and quite inappropriate....Trendy liberal experiments which allow serious offenders back into the community have a huge and totally unacceptable cost to society. (Freer, 43; Stewart, 44; Baker, 47)

Restorative justice denies the inherent interest the rest of society has in the relationship between a criminal and his or her victim. Every individual is part of a society, and society, as a whole is affected by agreements between individuals. For example, if a criminal and a victim agreed to only a slight penalty for committing a particular crime, others could be less deterred from committing the same crime. The incidence of that crime may increase. The whole of society is made worse off because of the agreement made by one particular criminal and victim. For this reason, societies demand a say in the punishments meted out to particular offenders. The appropriate punishment is not a matter for criminals and victims to settle between themselves. (NZ Business Roundtable, 45)

### **Can Restorative Justice Work in Today's Society ?**

Almost all of the 26 submissions that addressed this question believed that restorative justice could work in today's society.

I favour restorative justice and believe that it can be made to work - but that it will not be easy. In many cases, it cannot, at least, be worse than putting people in prison; and it has the potential for many more positive outcomes. (Rhodes, 7)

Several added provisos. Some suggested that restorative justice would only work if:

- It was implemented gradually;
- It was part of an integrated approach to offending;
- There was knowledge and debate about the concept in the community;
- There was co-operation between agencies;
- It was focused on young offenders.

Barriers to success were identified. These included dysfunctional families or a weakening of family ties, and the belief that today's society was not ready for such a change.

The NZ Māori Council saw restorative justice as being able to work if the best of past traditional practice was married with the needs and perspectives of the present.

Some submissions listed conditions that they believed had to be met if restorative justice was to work. For instance:

Victim Support believes that Restorative Justice can only be practised where guilt is acknowledged by the offender, or has been proved to the satisfaction of the Court AND the victim agrees, and has the power of veto throughout the process. (NZ Council of Victim Support Groups, 32)

Others acknowledged that restorative justice would not work in all cases.

Like any system Restorative Justice will not work for everyone but this is no reason not to try it. (Aitken, 35)

### **Consent**

Thirty-three submissions commented on the issue of consent to participate in restorative processes.

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Twenty-four believed that the consent of both victim and offender was necessary for any programme to proceed. Some reasons included:

Consensual participation by both victims and offenders, particularly in mediation or conferences, is necessary to ensure that programmes are effective and to prevent procedural and human rights abuses. However, we recognise that, in relation to offenders, any consent given may not be truly voluntary, given the possible likelihood of more punitive interventions if they refuse to participate in restorative justice programmes. (Law Commission, 85)

Due to the nature of restorative processes, it is not appropriate for any stage of the process to be compulsory. Any party that is taking part in the process under compulsion will not have the necessary attitude to the offence/offender/victim to achieve a successful outcome. (Wellington Community Law Centre, 94)

Eight submissions commented specifically on the necessity of the victim to freely consent to participate. These were generally silent on the issue of offender consent. Some comments included:

...the prerogative of the victim to participate should be at the heart of any restorative justice scheme. (NZ Police, 24)

Victim Support believes that Restorative Justice can only be practised where...AND the victim agrees,... (NZ Council of Victim Support Groups, 32)

One submission suggested there should be no compulsion on the offender to participate.

### **The Need for Caution**

Ten submissions expressed the need for caution in implementing any restorative justice initiatives. Some specific concerns were that present gains for women under the existing system might be lost, and that introducing restorative justice initiatives to appease victims would be unwise. Introducing trials in a staggered and/or a closely monitored fashion was also discussed. A cautious approach was suggested in some submissions as a way to deal with the possibility of unrealistic expectations from any restorative justice initiatives, especially with regards to victims' expectations.

Concerns were also raised about leaving offenders in the community and about the safety of victims under restorative justice (seven submissions).

Nineteen submissions called for a pilot programme. There was particular concern to ensure that any trials were adequately resourced, monitored and evaluated.

So.....please get a RJ system into being. And.....make certain that a tracking system is established at the same time so that we get high-quality data as to whether or not RJ produces better outcomes than the present approach. (Chapple, 49)

Restorative justice is supported in principle by WDFP but we have major reservations about its practical application. Family group conferences and diversion schemes have yet to be proved an effective tool for reducing levels of offending. However, prison sentences are also proving not to be effective deterrents, so WDFP supports trials to see whether new options will be successful in our society. These will need to be carefully monitored and developed in consultation with experts in the field. (Women's Division of Federated Farmers of New Zealand, 82)

Some submissions had detailed ideas about how and where any pilot programmes might operate.

### **7.8. Putting Aboriginal Justice Devolution Into Practice - 1995<sup>108</sup>**

Initiatives, such as Hollow Water in Manitoba and the lay assessors courts in Greenland have been subjected to criticism of leniency in cases involving violence. The limited discussions over the course of the three days of the Workshop did not permit a full airing of the leniency issue, but participants pointed to its relationship to larger contexts. These include accountability of those responsible for the initiative to the community, accessibility of victims or those who represent their interests to the decision-making of the initiative, community consensus regarding the objectives of programs, and the overall state of support of mainstream society and the public for experimentation and Aboriginal aspiration.

The **perception of leniency** may be a reaction to the emphasis on healing and rehabilitation. This complaint may have merit if the emphasis is only on the healing of the offender rather than of the community. The case studies repeatedly show that part of their success is in the partnership between the official justice system which retains its punitive powers over the offender (or victimizer) and the healing processes which is community driven. Notable examples of this partnership are found in the case studies in Kwanlin Dun, Hollow Water and Canim Lake. As illustrated by the case studies, a workable partnership cannot be taken for granted and is often a result of long periods of give-and-take.

Notable also is the role of the victim in the community healing process. Concern over the interests of victims could also be caused by the emphasis on the healing of the offender/victimizer rather than the healing of the community. The New Zealand victim-centered Family Group Conference approach has provided an example of how justice devolution to the community can advance victims' interests.

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<sup>108</sup> The International Centre for Criminal Law Reform and Criminal Justice Policy and The School of Criminology, Simon Fraser University and with the support of The Department of Justice Canada and The Ministry of the Attorney General of British Columbia, Putting Aboriginal Justice Devolution Into Practice: The Canadian And International Experience Workshop Report, July 5-7, 1995 <http://137.82.153.100/Reports/Aboriginal.txt>