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1. Key Themes (to be explored)

This is a summary of views presented in this Chapter.

The roles and responsibilities of judges have changed rapidly and significantly in the past decade. The evolution of the principle of judicial independence, and the impetus given to it by the recent decisions of the Supreme Court of Canada, make it imperative for Provincial/Territorial Court judges to consider very seriously what the practical implications are for practice and policy-making in the court. See 5.2

New Courts New courts are being established for mentally ill offenders and users of illicit drugs. In May 1998, a mental health court was established in Toronto to hear in a single courtroom all cases where accused are mentally disturbed. In January 1999 a new drug treatment court opened, with federal funding of about $1.6 million over four years. A similar court was established in Vancouver in December 2001. See 5.3, 5.4, 5.5

There are also new courts that address the needs of Aboriginal peoples. In October 2001, the Gladue (Aboriginal Persons) Court was established in Toronto; similar courts have been established in Saskatchewan and Alberta.

Problem-solving courts are seen as a way to address issues such as the increasing costs and decreasing space in our jails. These courts turn to options other than incarceration when punishing individuals for their behavior, focusing on community service or work crews and the notion of restorative justice. These courts attempt to target the roots of criminal behavior and are designed to assist individuals whose behavior is the result of problems such as substance abuse and mental illness and, by doing so, reduce recidivism rates. For some judges the courts provide a welcome opportunity to remove themselves from they refer to as the "McJustice" assembly line theory of processing cases where success is largely based on disposing of a high number of cases. See 6.3

On the other hand, it is not too hard to sympathize with those who are less-inclined to offer their full support. Some are uncomfortable tinkering with the court system, an institution based on tradition and precedent, certainty, reliability, and impartiality. They will question whether it is a place for overt judicial activism and collaboration amongst traditionally adversarial courtroom participants. Additionally, there are the issues like the potential for misguided coercion, equal protection problems, and paternalism, all of which, obviously, make legal-profession sorts slightly uncomfortable. Indeed, they are all valid concerns.

There are three touchstones by which we can measure Alaska's justice system as it enters the new millennium. They are Innovation, Collaboration, and Improved Access to the Justice System. The face of justice is changing in response to new challenges and needs. In the criminal law arena, traditional justice approaches have produced some disappointing results, with repeat offenders who cycle through the criminal justice system. Cost: This is expensive for the justice system: Judges see the same defendants repeatedly, and the jails are housing these offenders in expensive beds with no realistic hope that once released they won't be back. Therapeutic Court: Courts nationwide have been trying new approaches. One example is the therapeutic court model. These therapeutic court projects also referred to as problem-solving courts encourage prosecutors, defense attorneys, and judges to work together to reach beyond the immediate dispute that brings a defendant to court. National results show a distinct reduction in repeat offenses for the defendants who are involved with these programs. Projects such as the therapeutic courts not only incorporate innovative thinking but work best when there is a cooperative working relationship between the court and the legislature, as well executive branch justice agencies The delicate balance that exists among the three branches of government is the genius of our American system of government and of the Alaska Constitution. Yet, the checks and balances that are designed to protect individual rights and ensure individual freedom can quite naturally cause tension between our branches. One way of easing that tension is by increasing communication and by working on projects of common interest and concern. The court also needs to reach out to develop partnerships within our communities, both to promote public understanding of the courts, and to ensure that the needs of its citizens are heard and recognized. Yet judicial independence and judicial neutrality do not depend on court processes being shrouded by mystery or judges being detached from their communities. Maintaining a wall between the court and the community prevents the community from understanding the role of the court and keeps the court from fully enlisting the resources of the community. See 6.4

Judges in the four focus groups discussed both risks and opportunities associated with increasing victim involvement in the court and shifting priorities to better accommodate crime victim needs. Although restorative justice reform is not limited to changing the formal justice process, and not only to courts, change in court practices, judicial leadership and risk-taking will be necessary if restorative justice is to move from the margins to the mainstream of the juvenile justice process. See 6.7

Unfortunately, juvenile court decision makers may perceive that they have much to lose by moving their courts in this direction. As comments from a number of these judges suggest, restorative efforts to serve and involve victims raise many unanswered questions about the court's responsibility for meeting victim needs, ensuring fairness and uniformity, and protecting the rights of the accused as well as victims. More troubling was a resistance of some judges to reform that seemed based more on concerns about a loss of power or about perceived challenges in dealing with crime victims. However, as the positive response of some judges to restorative justice reforms suggest, courts and juvenile justice professionals may also have much to *gain* by transforming the focus of the court response to take account of the needs of victims and communities, as well as the needs and risks presented by offenders.

Over the last two centuries of American Jurisprudence have witnessed ongoing controversy regarding the boundaries and appropriateness of **'judicial activism',** as the use of judicial power to second-guess the policy determinations of the non-judicial branches of government. The utilization of Restorative Justice (RJ) principles has been cited as example of judicial activism by proponents and detractors alike. Given the vociferousness and practical, structural consequences of the American debate on Judicial Activism, RJ principles will only flourish in the federal system subsequent to comprehensive and focused intervention of the executive and legislative branches of a tripartite governance system. RJ proponents are thus more likely to effect change through lobbying efforts than attempts to persuade the federal judiciary to embrace more creative approaches within a determinative sentencing paradigm. See 7.1

Gone are the days when we judges limited our leadership to courtroom judgments and service club pontifications. Today's communities don't want to be told. They need involvement and they want to understand. In response, we have transformed ourselves into stewards of involvement and understanding. See 6.2

One might say we are uniquely qualified to call people "to the table". Our ability to balance competing interests, facilitate discussion and encourage collaborative problem solving are indispensable to our communities. As judges, we are charged with working with our constituents to provide the best possible services and outcomes for people.

Yet there is need for **restraint in our activism.** It is difficult to discern a bright line between Canons which proscribe the appearance of impropriety and those which exhort us to improve the law and the administration of justice. Above all we are judges. We represent the third branch of government, whose independence and impartiality cannot be sacrificed. We are stewards of the court as well as of our communities.

Restraint is required also to temper judges' penchant to control. From my personal experience, I know how hard it can be for a judge to share decision-making power outside the courtroom. In meetings we may act as battering rams, while feeling we are just one of the group. We may interpret deference accorded us to be consensus, then proceed to announce conclusions, which are taken as edicts. Our lack of awareness of how this behavior can chill the participation of others can sabotage our goal of promoting community involvement.

Our challenge is to balance others' needs to be involved with our own.

2. Research Questions

2.1. Mission/Vision/Objectives/Goals

- see also chapter on "Definitions/Principles" – "Results/Performance Measurement/Accountability"
What are the stated mission/vision/objectives/goals of the Court in community justice? Short term? Medium term? Long term?
Does the Court have any suggestions as to what the mission/vision/objectives/goals/values of the other stakeholders should be with respect to community justice?

2.2. History

- see also chapter on "History"
What is the history of the Court's role and participation in community justice?

2.3. Sponsor/ Organization/Structure/Governance

How does the Court support the work and decisions of the community justice projects?
Does the Court have any suggestions as to how should community justice projects be structured?
Does the Court have any suggestions as to how governmental/non-governmental organizations (that sponsor/support the project) could be organized/structured to support community justice?

2.4. Roles and Responsibilities

What are the roles and responsibilities of the Court in community justice?
Does the Court have any suggestions as to what the roles/responsibilities/activities of government/related organizations, councils or working groups should be in community justice?

2.5. Accountability

– see also chapter on "Results/Performance Measurement/Accountability"
What are the overall accountability mechanisms of the Court with the community justice projects?
Does Court have any suggestions as to what other accountability mechanisms should be in place for community justice?

2.6. Complaints

- see also chapter on "Results/Performance Measurement/Accountability"
Does the Court have any suggestions as to what kind of mechanism should be in place to respond to complaints about community justice projects?

2.7. Conflict Of Interest – Power Dynamics

Does the Court have any suggestions as to how community projects should handle conflict of interest situations and power dynamics?

2.8. Decision-Making

Does the Court have any suggestions as to how community justice projects should make decisions?
Does the Court have any suggestions as to how community justice projects enhance its team-building exercises, workshops, training, advice or outside assistance to resolve the differences/disputes?

2.9. Interventions/Referrals/Diversions

– see also chapter on "Interventions/Referrals/Diversions"
Does the Court have any suggestions about interventions/referrals/diversions that should be handled by the community justice project?

2.10. Activities/Services/Approaches

– see also chapter on "Activities/Services/Approaches"
What activities/services/approaches does the Court engage in community justice? How much time is spent on them?
Does the Court have any suggestions as to what activities/services/approaches should be undertaken by the other stakeholders in community justice?

2.11. Offences

- see also chapter on "Offences"
Does the Court have any suggestions as to what kinds of offences should be handled in community justice?

2.12. Clients

- see also chapters on "Offenders" and "Victims"
Does the Court have any suggestions as to whom the community justice services should be targeted? Accused? Offenders? Victims? Other?

2.13. Human Resource Management

Does the Court have any suggestions as to who should be members of the community justice projects? How they should be selected? Based on what criteria? Community Process, Elders' recommendation, Healthy/respected members of the community, Recovered from abuse, Ex-Offenders Ex- Victim, Experience/Skills, Interest in justice, other
Does the Court have any suggestions as to what kind or roles/responsibilities these members should have?
Does the Court have any suggestions as to what kind of experience/skills these members should have? Does the community have any suggestions as to what kind of education/qualifications these members should have?
Does the Court have any suggestions as to what kind of informal and formal training these members should have?
Does the Court have any suggestions as to what whether members should be paid or be volunteers?
Does the Court have any suggestions as to how volunteers could be recruited?
Does the Court have any other suggestions regarding human resource management in community justice projects?
What experience and skills do you as a member of the Court have with community justice?
What training/support do you have/received to work with the community justice project?
How many hours per week do work with the community justice project?
Do you take a break from these duties?
Are you formally or informally recognized and rewarded for your work with community justice? By whom? How often?
How has community justice impacted the Court's workload?

2.14. Financial Resource Management

- see also chapters on Funding/Budgeting; Costs
Does the Court have any suggestions as to how funding should be determined for community justice projects?
Does the Court have suggestions as to how much core funding should be available to the community justice projects?
Does the Court have any suggestions as to what financial accountability mechanisms should be in place for community justice projects?

2.15. Material Resource Management

Does the Court have any suggestions as to what material resources community justice projects should have?

2.16. Project Administration

Does the Court have any other suggestions as to whether policies/procedures/standards should exist for community justice? **see also chapter on "Standards"**
Does the Court have any suggestions as to whether community justice processes should be open to members of the public?
Does the Court have any suggestions as to community justice project administration?

2.17. Community Services/Resources

– see also chapter on "Social Development Factors"
Does the Court have any suggestions as to how other stakeholders could facilitate collaboration with programs and agencies providing different supports to participants of the community justice project?

2.18. Audits/Evaluations/Reviews

- see also chapter on "Results/Performance Measurement/Accountability" and chapter on "Review Methodology"

Does the Court have any suggestions regarding the conduct of audits/reviews/evaluations with respect to community justice projects? How often? By whom?
2.19. Working Supportive Collaborative Relationships **– see also chapter on "Relationships/Partnerships"** - Does the Court meet with the following stakeholders in the area of community justice? - If so, how often? For what purpose? - Does the Court have the support of the following stakeholders in the area of community justice? - What is working well, in terms of the Court's relationship with the following stakeholders in the area of community justice? - What are the challenges in terms of the Court's relationship with the following stakeholders in the area of community justice? - How are disagreements or disputes between parties resolved? - Does the Court have any suggestions on how to improve working collaborative relationships with the following stakeholders?
Victims – **see also chapter on "Victims"**
Victims' support/advocacy groups - **see also chapter on "Victims"**
Offenders – **see also chapter on "Offenders"**
Offenders' support/advocacy groups– **see also chapter on "Offenders"**
Community justice project – **see chapter on Community Justice Projects**
Volunteers - **see also chapter on "Volunteers"**
Community – **see also chapter on "Community"**
First Nations- **see chapter on "First Nations/Aboriginal Justice"**
Native Courtworkers – **see also chapter on "Native Courtworkers"**
Elders – **see also chapter on "Elders"**
Other community resources (e.g. Schools, faith-based organizations, local businesses, non-governmental organizations)
YTG – Community Justice
YTG –Crime Prevention
YTG –Victim Services/Family Violence Prevention Unit– **see also chapter on "Victims"**
YTG –Probation Services **– see also chapter on "Probation"**
YTG –Corrections – **see chapter on "Corrections"**
YTG – Health and Social Services (including Alcohol and Drug Secretariat)
YTG Women's Directorate – **see also chapter on "Gender"**
YTG Education
YTG Housing
YTG Sports & Rec
Justice Canada
Crown Prosecutors – **see also chapter on "Crown Prosecutors"**
RCMP – **see also chapter on "RCMP"**
Judiciary – see also chapter on "Courts"
Defense/Legal Aid **– see also chapter on "Defense Counsel"**

2.20. Other Issues

Does the Court have specific concerns and/or issues about community justice?

2.21. Best Practices

– see also chapter "Successes"
According to the Court, what are the top (5) five best practices in community justice projects?

2.22. Challenges

– see also chapter "Challenges for Change"
According to the Court, what are the (5) five greatest challenges facing community justice?

3. Relevant Documents, Studies and Practices - Yukon

3.1. Court of Appeal [1]

- The Court of Appeal of the Yukon Territory hears appeals of decisions made by the Territorial Court and the Yukon Supreme Court in civil and criminal matters. Appeals from the Court of Appeal go to the Supreme Court of Canada.
- The Court of Appeal is made up of justices of the British Columbia Court of Appeal and justices from the Yukon Territory and Northwest Territories.
- A panel of three judges of the Court of Appeal usually hears appeals.
- The Court of Appeal sits in Whitehorse once a year for one week, but many of the cases are heard when the Court sits in Vancouver. There are registries in both Whitehorse and Vancouver.

3.2. Supreme Court [2]

- The Supreme Court is a superior court that hears civil and criminal matters in the Yukon Territory and appeals from decisions of the Territorial Court, Small Claims Court and various quasi-judicial boards.
- The Court is currently made up of two resident judges, five judges from the Northwest Territories and Nunavut, and 42 deputy judges appointed from across Canada.
- The Supreme Court follows the Rules of the Supreme Court of British Columbia and other rules that its judges may set out. The Court also issues Practice Directives from time to time, which may be obtained by contacting the court registry.
- The Supreme Court sits on a regular basis in Whitehorse and sits in some smaller communities as required. There is one court registry located in Whitehorse, which performs such functions as:
  - opening and maintaining files on actions in Supreme Court;
  - signing documents, including orders, decrees and judgments;
  - registering bankruptcies;
  - assessing bills of costs;
  - executing conveyances, transfers or mortgages ordered by the Supreme Court;
  - issuing subpoenas to debtors;
  - administering oaths; taking affidavits and statutory declarations; and
  - receiving affirmations.

3.3. Territorial Court of Yukon [3]

- The Territorial Court deals with most adult criminal prosecutions under the Criminal Code and other federal statutes.
  - The Territorial Court also hears all young offender matters and prosecutions under territorial laws. It deals with first appearances, bail hearings, receiving pleas of guilty and not guilty, trials and sentencing, in both summary conviction and indictable matters, and conducts preliminary inquiries.
  - The Territorial Court also has exclusive jurisdiction over child protection matters under the Children's Act. It has limited jurisdiction over family matters.
  - The Court does not deal with divorce, custody or adoption.
  - The civil jurisdiction of the Territorial Court is limited to $5,000 in Small Claims Court.
- The Territorial Court consists of three full-time judges and approximately 15 deputy judges who are full-time or retired judges from other jurisdictions.
  - While the Court sits permanently in Whitehorse, it also provides services to 14 other communities on a regular basis.
  - Court information can be obtained from three permanent court registries located in Whitehorse, Dawson City and Watson Lake.
- The Justice of the Peace Court is part of the Territorial Court and consists of one full-time judicial officer based in Whitehorse and 32 part-time Justices, most of whom are located in the communities. Justices of

[1] Government of the Yukon, Department of Justice, Court Services, http://www.justice.gov.yk.ca/prog/cs/terr/index.html
[2] Government of the Yukon, Department of Justice, Court Services, http://www.justice.gov.yk.ca/prog/cs/terr/index.html
[3] Government of the Yukon, Department of Justice, Court Services, http://www.justice.gov.yk.ca/prog/cs/terr/index.html

the Peace are not lawyers, but they provide a range of valuable legal services depending on their training and authorization.

- Justices of the Peace may receive and swear informations, issue search warrants, deal with adjournment applications in court, receive pleas, and conduct sentencing hearings under territorial legislation and in summary conviction matters under federal legislation.
- They also hear matters in Youth Court and in child protection cases.

3.4. Domestic Violence Treatment Option Court[4]

The Domestic Violence Treatment Option (DVTO) Court recognises that family violence is a serious criminal act, and that a more innovative response is required.

THE DVTO OPERATES ON THE FOLLOWING PRINCIPLES:

- Family violence is a learned behaviour that can be changed.
- Offenders need to take responsibility for their actions, while also being supported with counselling.
- Early intervention by a multi-disciplinary team is essential.
- Initial and ongoing support must be offered victims and their families.
- An offender must be held accountable, and any deterioration in the offender's behaviour will be reported to the Court immediately

HOW DOES THE COURT OPERATE?

- Specially assigned judiciary, crown and the defence lawyers will hear cases on scheduled Monday afternoons.
- Other resource people such as Probation Officers, counsellors from the Spousal Assault Program and Victim Services will regularly attend Court to provide assistance.
- Cases are fast tracked and the Court is provided monthly progress summaries by the counsellors.
- Support is provided to victims, who would like assistance with safety planning, referrals for counselling for themselves and their children, updates on the offenders progress and assistance with varying release conditions and preparation of victim impact statements for the court.

HOW DOES THE ACCUSED ENTER THE DVTO COURT?

- After the RCMP have laid a charge that involves allegations of domestic violence, a Court date will be issued for the Accused to attend DVTO Court on a Monday afternoon
- The assigned Defence Counsel will review the case with the Accused and explain the DVTO Court Process to them. If the Accused chooses to proceed with the case through DVTO Court the matter will be adjourned for approximately two weeks so that the Spousal Assault Program (SAP) counsellors can complete an assessment and determine if the Accused is eligible for treatment through the SAP.
- If the Accused is eligible for the SAP and chooses to proceed through the DVTO Court process, they will appear in court and indicate that they are accepting responsibility for the charge(s). The sentencing hearing will then be postponed for several months to allow the Accused to complete the Spousal Assault Program and address any other treatment needs.
- The Accused will be required to

[4] http://www.justice.gov.yk.ca/pdf/pubs/dvtocourt.pdf

3.5. Restorative Justice in the Yukon - 1999[5]

- Eleven (11) communities advocated changes in sentencing, i.e. more alternatives to incarceration, more emphasis on addressing the 'root cause' of the offender's behaviour.
- Eight (8) communities specifically suggested more diversion projects should be offered, especially for first-time, young offenders, and for those repeat offenders who commit 'less serious' offences.
- Three (3) communities suggested stiffer penalties for those who commit 'serious' crimes.
  - They generally believed that Judges and Justices of the Peace are too lenient, especially with youth.
- Other sentencing issues included: community service hours are not often related to the crime and there are few places in small communities that offenders, especially youth, can go to perform their community service hours.
- Three (3) communities raised the issue of the long periods between circuit court visits.
  - They felt the mainstream system is too slow and that the court's punishment is 'too little, too late'.
  - Once community stated the court circuit is normally held once every three months.
    - If the circuit is cancelled the offender(s), victim(s) etc. must wait another three months for the court to return.
    - It was not unusual to have a matter on the books for over a year before a sentence was handed down.
    - 'Justice delayed is justice denied.', was the most common quote from Yukoners who raised this concern.
    - These communities suggested that Justices of the Peace should receive more training so they could be utilized more often, thus the community would not have to wait for Judge to come to town.

3.6. Aboriginal People and the Canadian Justice System-1998[6]

The northern fly-in court party usually comprises the judge, court clerk, Crown prosecutor, and legal aid counsel. Don Avison, [107] a former Crown counsel in the Yukon, described the often-tenuous relationship between the circuit court party and the community:

"I have strong memories of how difficult it was to get people to come to court there, even those who were actual parties to the disputes. I remember days in Carmacks, and other Yukon communities, when I was there in court trying to sort out what the appropriate response or sentence should be, knowing that I was part of a group of three the judge, the prosecutor and the defence lawyer who probably knew less about what had happened than anyone else in the community, and we were the ones there to decide what the consequence should be. I also remember many times when I heard a dull rumble of voices behind me and I would know that, somehow, I had just fouled up the facts and there was no way to fix it."[11]

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[5] In December 1998, the Minister of Justice tabled a draft discussion paper on Restorative Justice in the Yukon as part of the government's goal of fostering safe and healthy communities. To focus the consultation process, the draft Restorative Justice in Yukon paper and information pamphlets highlighted a number of issues and questions dealing with correctional reform, crime prevention, policing policy, victim services and community and aboriginal justice projects. In May-June 1999, the Minister of Justice, the Commanding Officer of the RCMP and members of their staff visited most of the Yukon communities to hear what Yukon people had to say about the future direction for Justice in the Territory. During the months of July-August 1999, the comments heard at the public consultation meetings were included in "Restorative Justice in the Yukon, Community Consultation Report." Copies of the report were made public.

[6] Ross Green, B. Comm., LL.B., LL.M. Mr. Green has practised law in several of the communities described in this book, Justice in Aboriginal Communities: Sentencing Alternatives, and has advocated for the kind of sentencing alternatives he describes therein. Mr. Green currently lives and practices law in Melfort, Saskatchewan.

Editor's Note: The following is Chapter 3 of Ross Green's book entitled, Justice in Aboriginal Communities : Sentencing Alternatives, originally printed in 1998 by Purich Publishing in Saskatoon, Saskatchewan. The editor would like to thank both the author and the publisher for granting permission to reprint an excerpt from Mr. Green's book. http://www3.sk.sympatico.ca/greer/index.htm

Justice as Healing Vo1. 3, No. 4 (Winter 1998) Native Law Centre

[7] Former director general of the Aboriginal Justice Initiative, Justice Canada, and subsequently deputy minister of Justice in the Northwest Territories, Don Avison previously practised as a defence lawyer and Crown counsel in the Yukon.

3.7. A Review of the Justice System in the Yukon - 1986[8]

- Communities consistently expressed support for the manner in which JP's administered their courts.
  - It was felt the sentences imposed by JPs were appropriate and reflected community attitudes.
  - It was also felt that JPs could carry out much of the work of the Circuit Courts
- Native people are reluctant to sit alone as JPs for fear of reprisal from those they sentence or by being ostracized by the community.
- The Justices of the Peace in the communities expressed concerns about the disorganization of the JP program.
  - There does not appear to be
    - criteria for the selection of JPs,
    - a training program,
    - a benefits package,
    - timely payment and
    - basic office equipment needs are not met.

Recommendations:

- Attempts be made to recruit JPs in those communities where there are none.
- JP program be expanded to provide a panel of three (3) JPs in each outlying community.
- Job description be developed to define the JPs function.
- Training and compensating benefits for JPs be established and salaries reviewed.

Appropriate human and financial resources be allocated to administer the JP program.

[8] John Wright and Joanne Bill – A Review of the Justice System in the Yukon, 19 December 1986 – The Government of the Yukon, in response to concerns expressed about the justice system, appointed a panel to review the Justice System in the Yukon.

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

4.1. Inuit Women and the Nunavut Justice System – 2000 [9]

UNIFIED COURT STRUCTURE
The Courts
Court of Justice

- The *Bill C-57* amendments did away with the two-tier trial court system, modified the appellate court operations and, implicitly, encouraged an expanded role for justices of the peace.
- The Nunavut Court of Justice, as a superior court, is responsible for all criminal, civil and family law matters.
    - It is also the youth court for Nunavut and it is responsible for applications for prerogative writs against decisions of justices of the peace and other subordinate decision-makers.
- It is composed of three superior court judges resident in Iqaluit.
    - Two of three judges have been appointed.11
    - In addition, twenty-one deputy judges have been appointed to the Nunavut Court for a transitional period.
        - The deputy judges are intended to[10] " help ensure a smooth transition for the justice system of the new territory. "[11] 12
        - They have all of the powers of a superior court judge in the Nunavut Court of Justice.

Appeal Courts

- The Nunavut Court of Appeal assumes the responsibilities for Nunavut which were previously held by the NWT Court of Appeal. Unlike its predecessor, the Nunavut Court of Appeal hears summary conviction appeals.
    - A judge of this court will hear the first appeal of a summary conviction, and a panel of three members of the Court of Appeal will hear any further appeal.
    - As in the previous system, the Nunavut Court of Appeal is responsible for all appeals of indictable offences.
- With the demise of a lower court, *Bill C-57* also did away with prerogative writs for judges.
    - As is noted in a federal government document discussing this change, historically, prerogative writs were available to review the decisions of lower-court personne**l.**[12]
    - In their place, *Bill C-57* set out a statutory review process to review the decisions by the judges in matters such as warrants, subpoenas, preliminary inquiries and orders relating to public access to court proceedings.
    - A single judge of the Court of Appeal will hear the review, and the second level of appeal will be a three-judge panel of the same court.
- The Nunavut Court of Appeal is composed of superior court justices from the three territories and a number of judges from other courts across Canada.
    - At present there are no Inuit on this court and none of the judges reside in Nunavut.

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[9]Department of Justice, Community Justice Division, Your Community Justice Committee: A Guide to Starting and Operating a Community Justice Committee (Yellowknife: GNWT, 1997) p. 1 cited in Department of Justice Canada, Research Report, Research and Statistics, Mary Crnkovich and Lisa Addario with Linda Archibald Division, Inuit Women and the Nunavut Justice System, 2000-8e, March 2000, http://canada.justice.gc.ca/en/ps/rs/rep/rr00-8a-e.pdf.

[10] Madam Justice Beverley A. Browne of Iqaluit has been appointed Senior Judge of the Nunavut Court of Justice. Prior to this appointment, Madame Justice Browne was a Territorial Court judge in the NWT. Also appointed to the court was Robert Kilpatrick. Prior to his appointment, Mr. Justice Kilpatrick was a Crown Counsel in Inuvik, NWT. The third judge is to be appointed within one year of the establishment of the court.

[11] Department of Justice (Canada), News Release: Appointment of Deputy Judges to the Nunavut Court of Justice Announced, March 25, 1999.

[12] Department of Justice, Canada, Options for Court Structures in Nunavut - A Discussion Paper (Ottawa: Department of Justice), November 1997. In this paper, it states that "At common law, such writs could be issued only by superior court judges and only against the so-called "inferior" courts. The use of prerogative writs has declined as a result of the rights of appeal in the *Criminal Code* and the remedies available under the *Charte*r. As well, the modern requirement that lower-court judges be legally trained, in addition to their accumulated expertise in criminal law, may reduce the practical need for prerogative-writ review. Prerogative writs remain valuable, however, as an expeditious method of correcting certain errors in criminal matters. This is particularly true in matters where time is of the essence (for example, an application to recover the fruits of an illegal search) or where matters will become moot if allowed to proceed to trial (for example, a decision to commit an accused for trial after a preliminary inquiry)."

Bill C-57 Amendments: The Strengths

- The Nunavut Court of Justice, as a single-level trial court, is expected to improve accessibility and reduce delays and to reduce judges' travel and the number of court circuits.[13]
- Bill C-57 amendments supported the recommendations proposed in the Nunavut Implementation Commission (NIC) report called *Footprints II*.
    - The unified court structure is expected to achieve the intentions noted above because, unlike the previous two-tier system, this circuit court will be able to hear all judicial matters to be addressed. "In a single visit to a community, the judges will be able to deal with both minor and major criminal offences, as well as divorce matters and disputes over money and property."[14]

The Remaining Challenges

- While the unified court may address the issues associated with the delays caused by the two-tier trial system,[15] there are other outstanding challenges of the court structure.
- These include a number of accessibility issues resulting from linguistic, cultural, gender, racial, economic, and social barriers and a lack of adequate services to support the delivery of justice.
    - These challenges disadvantage all Inuit but, in particular, they have a detrimental impact on Inuit women.

Cultural Sensitivity of the Court Structure

- Perhaps the most persistent issue regarding the Nunavut court structure is that it remains rooted in the Euro-Canadian justice system.
- The results of an analysis of the justice system that takes account of the perspective of all of its diverse constituents can be complex and the solutions far from straightforward.
- For example, the 1986 reforms to the *Jury Act* of the NWT allow Inuit who speak only Inuktitut and reside close to the community (i.e. in out-post camps) to participate in jury trials.
- These changes have been commended for their cultural appropriateness.[16]
- In fact in the Report of the Aboriginal Justice Inquiry of Manitoba, Justices A.C. Hamilton and C.M. Sinclair noted that they were "impressed by the Northwest Territories' method of limiting the area from which a jury is drawn."[17]
- The Justices noted a number of advantages to this approach with the most important being that it involves the community in the trial of one of its members:
- This solution is attractive to us, since it seeks to return to the community involved in a direct sense of involvement in, and control and understanding of, the justice system....In aboriginal areas, those people would be able to understand the nuances that might apply to the relationship between victim and accused, or local factors that might escape the attention of non-Aboriginal people.
- This reform speaks directly to recent legal arguments made elsewhere in Canada that an Aboriginal offender's rights are denied where Aboriginal people are not available or selected for jury duty.[18]
- At the same time, this reform and the legal arguments obscure the fact that within Inuit culture it is not acceptable to "judge" one another or to "pass judgment".[19]
- This cultural value is in direct opposition to the role of the jury.
- Furthermore, not only does the jury process require Inuit to "judge" another individual, as a result of the judgment the jurors are indirectly responsible for the sentence meted out for the accused.
- This conflict between Inuit values and the judicial process, when coupled with the reality that Inuit communities are small, remote and closely knit, have particularly negative consequences in crimes involving violence against women.

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[13] Department of Justice (Canada), News Release: Creation of Nunavut One Step Closer as Nunavut Court of Justice Bill Receives Royal Assent, March 12, 1999.
[14] Communications and Executive Services Branch, Department of Justice, Backgrounder: The Nunavut Court of Justice, p. 1.
[15] For a more detailed discussion of the impact of delays of the two-tiered circuit court on women refer to Department of Justice (Canada), Record of Proceedings of the Aboriginal Women and Justice Consultations, April 1994. This is included in Appendix #2 of this report.
[16] In 1986 the Jury Act of the NWT was amended to allow for unilingual Inuit who reside no more than 20 miles from the place fixed for the sitting of the court to be included in the jury list.
[17] A.C. Hamilton and C.M. Sinclair, Commissioners, Report of the Aboriginal Justice Inquiry of Manitoba, Volume 1, Government of Manitoba, 1991, p. 386.
[18] See Margo Nightingale's, "Just Us" and Aboriginal Women(Ottawa: Department of Justice, 1994), p. 18. This is included in Appendix #2. In this article, Nightingale notes that these failures to have Aboriginal people available or selected for jury duty denies an Aboriginal offender's rights.
[19] NSDC, Report of the NSDC Justice Retreat and Conference, November 1998,, p. 16; Curt Taylor Griffiths et al. (1995). Crime, Law and Justice Among Inuit in the Baffin Region, NWT, Canada. pp. 116, 141. Both of these reports are included in Appendix #2.

- In a number of communities, where accused have elected to be tried by jury for sexual assault crimes, the jury appears unwilling to convict.
- This has become a particular problem in the community of Pond Inlet. Between 1983 and 1995, not one sexual assault conviction occurred in the many jury trials that took place in Pond Inlet.[20]
- Many have speculated about the reasons for the lack of convictions.
- The two most common reasons noted by Inuit are the unwillingness of Inuit to "judge" one another, and the unwillingness of jurors to be responsible for having an individual removed from the community to serve a prison term.[21]
- While no formal inquiries or studies into the jury trial process have been undertaken, the reasons cited above are worth noting and considering.
- This failure of juries to convict has been the focus of serious discussions at many of the annual meetings of Pauktuutit.
- For example, at its 1994 annual meeting, delegates passed a resolution calling upon the justice system not to locate jury trials in the same community as the alleged sexual assault took place.[22]24
- This resolution was a response to the failure of juries to convict in Pond Inlet and other communities, such as Rankin Inlet and Pangnirtung.
- The use of juries in sexual assault trials has contributed to a shared view among many Inuit women that the justice system is not effective in dealing with and preventing violations to their personal security.
- At the national consultation on justice and Aboriginal women, Inuit women participants noted that "[j]uries do not work in Northern communities," and reinforced the Pauktuutit resolution, in their statement that there be no "[n]o jury trials in communities where the crime is committed (it should be noted that this recommendation was made to sexual assault cases involving women and children)."[23]
- Those committed to reforming the Nunavut justice system appear committed to recognizing incarceration has a role as the appropriate disposition for some "serious" crimes.[24]
- However, what constitutes a "serious" crime and who defines it is cause for concern.
- There is a palpable tension between the commitment to having offenders dealt with in their communities and the need to condemn violence against women.
- As such, it is unlikely the Nunavut administration of justice, in the foreseeable future, will be able to dispel the impression Inuit women have that a judicial response to violence against them is weighted in favour of an accused.

Cultural Sensitivity of the Judiciary

- All of the judges serving on the two courts in Nunavut are non-Inuit and most live outside of Nunavut.
- The life experiences of the majority of deputy judges of the Court of Justice and the appellate court judges are far removed from those of the people living in the communities of Nunavut.[25]

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[20] See Margo Nightingale, *"Just Us" and Aboriginal Wome*n, p. 18

[21] See Department of Justice (Canada), Record of Proceedings of the Aboriginal Women and Justice Consultations, November 1993; and Pauktuutit, Inuit Women and the Administration of Justice, Phase II: Project Reports -Progress Report #2 (January 1, 1995 –March 31, 1995) -Appendix #6 - Minutes of Proceedings and Evidence from the Standing Committee on Justice and Legal Affairs Respecting: Bill C - 41, Tuesday February 28, 1995, Witnesses: Inuit Women's Association of Canada. This latter document is also included in Appendix #2.

[22] This resolution initiated Pauktuutit's justice project to begin the work necessary to undertake an in-depth review of the use of the jury trial in sexual assault and child sexual abuse cases in Inuit communities in NT[Nunavut]. This work is in direct response both the AGM Resolution and the growing concern around the judiciary's unwillingness to order change of venues when requested by the Crown in these specific cases. The project funding ended before this study could be pursued. Following the end of the project, Archibald & Crnkovich did prepare and donate a research design for a jury trial study in consultation with both Pauktuutit and the Crown's office of the NWT. The proposal was submitted to SAGE in 1996 but due to administrative difficulties Pauktuutit did not undertake the study.

[23] Department of Justice (Canada), Record of Proceedings of the Aboriginal Women and Justice Consultations, November 1993, pp. 2 and 14.

[24] NSDC, Report of the NSDC Justice Retreat and Conference, November 1998, p.9

[25] Superior court judges from Alberta, Manitoba, Ontario, and Saskatchewan have been appointed as deputy judges of the Court of Justice. Also, Mark de Weerdt, now retired and formerly the Senior Judge of the Supreme Court of the NWT since 1981, was also appointed. Of the twenty-one deputy judges, four are women. In the brief biographies presented by the Department of Justice, it is not possible to determine if any of the justices are of Aboriginal ancestry. Two of the appointed justices are specifically identified as having practiced Aboriginal law. The Nunavut Court of Appeal is composed of superior court justices from the three territories and a number of judges from other courts across Canada. The core of the Nunavut Court of Appeal, like its predecessor the NWT Court of Appeal, remains the Alberta Court of Appeal. The Chief Justice of the Court is Chief Justice Catherine Fraser of the Alberta Court of Appeal and the NWT Court of Appeal. In addition to Chief Justice Fraser, 15 other superior court judges have been appointed to the Court. Of the fifteen, one third of the appointments are women and of the five women, one has been a judge of the Supreme Court of the NWT for the past four years. Among the male appointments, two are from the Yukon and two are from the Northwest Territories. The remaining female and male appointments are from Alberta and Saskatchewan.

- Accordingly, their familiarity with Inuit and with Inuit culture and values is based primarily on what is learned through reading, cultural orientation workshops, and their interactions through court work and visits to the communities.
- Those reforming the Nunavut court structure were not oblivious to these problems.
- The expanded role of the JPs and use of justice committees in the communities are attempts to bridge these linguistic and cultural gaps.[26]
- In the meantime, Inuit women remain the unfortunate victims of a judiciary that struggles with the biases that plague an Euro-Canadian justice system that is male dominated.
- Similar to all other courts in Canada, the courts in Nunavut will no doubt continue to have their share of gender bias[27] As the next few paragraphs attest, previous courts serving Inuit living in Nunavut have demonstrated their capacity for:
    - (1) sexual stereotyping about the proper roles and true nature of women and men;
    - (2) cultural misinterpretation and misunderstanding about the roles between the sexes and the relative worth of women and men;
    - (3) acceptance of myths and misconceptions about social and economic realities encountered by both sexes; and
    - (4) behaviours that impose greater burdens on Inuit women than men.
- Inuit women who have come into contact with the justice system because they have suffered violence have spoken about their feeling of having no control.
- They have also noted that they have felt afraid, humiliated and blamed for the violence and that they were not taken seriously.[28]
- In proceedings before the court, the treatment of Inuit women is, in part, attributable to an inadequate understanding on the part of justice personnel of the dynamics of abuse as well as misconceptions about Inuit culture.
- This attitude has been displayed most flagrantly in judgments from the bench which have created a separate category where Inuit women are unconscious due to sleep or intoxication.[29]
- In these cases, judges have held that women who were intoxicated when assaulted did not suffer as serious an assault as they would have had they been sober.[30]
- There have been instances where the court has displayed an incorrect understanding that sexual assault against women and sexual abuse of children are acceptable in Inuit society.[31]
- For example, a case in which the sentence was mitigated because, as the judge pronounced, there is no prima facie age restriction on sexual intercourse in Inuit culture, that menstruation signals the age at which sexual relations can commence.
- This case is often cited by Inuit women as an example of the court accepting a myth about Inuit culture and using it to mitigate sentence.[32]
- In other cases, incorrect cultural assumptions on the part of judges have resulted in reluctance to sentence an Inuk offender convicted of a sexual assault to a federal penitentiary. The reasoning turns on the judges' perceptions of culture. These include cases in which short sentences were given to avoid sending offenders to federal institutions and cases in which lenient sentences were given to someone convicted of a sexual assault who was seen by the judge to come from a good family, who is an accomplished hunter, and not a violent person. Other factors that have been used by the court to mitigate sentences include having

[26] See comments made by Elijah Erkloo, Chair of the NSDC Justice committee in the NSDC Report.
[27] These four behaviours /attitudes are widely accepted across the United States as components of the working definition of "gender bias" in the courts. See Norma Wikler, "Researching Gender Bias in the Courts: Problems and Prospects," in Joan Brockman and Dorothy Chunn (ed.s) Investigating Gender Bias – Law, Courts and the Legal Profession (Toronto, Thompson Educational Publishing, 1993), p. 50.
[28] Katherine Peterson (1992). The Justice House Report of the Special Advisor on Gender Equality. p. 57.
[29] See Pauktuutit, Inuit Women and the Administration of Justice, Phase II: Project Reports -Progress Report #2 (January 1, 1995 –March 31, 1995) -Appendix #6 - Minutes of Proceedings and Evidence from the Standing Committee on Justice and Legal Affairs Respecting: Bill C -41, Tuesday February 28, 1985.
[30] Margo Nightingale, Judicial Attitudes and Differential Treatment: Native Women and Sexual Assault Cases , (Ottawa: University of Ottawa, 1991). This is included in Appendix #2.
[31] See Pauktuutit Phase II, Progress Report #2, Appendix # 6 and Nightingale's Judicial Attitudes and Differential Treatment for further details.
[32] See Pauktuutit Bill C-41 presentation and Margo Nightingale's Judicial Attitudes and Differential Treatment: Native Women and Sexual Assault Cases, for further details.

traditional skills; being a family man with no record; not being well educated; being under the influence of alcohol; and being a 'respected' community member.[33]

- More fundamentally, the cultural insensitivity displayed by the judiciary in past cases demonstrated the fallibility of the judicial selection process.
- In her report, Katherine Peterson reported that there was an inadequate screening of judicial candidates of cultural attitudes and stereotypes with respect to women.[34]36 The same selection process remains for Nunavut, therefore so do the problems identified by Peterson. Other problems she noted were the lack of lay representation on the committee that makes judicial appointments to the court; the inability to have extra-judicial conduct reviewable as a ground of discipline; and the slow and inflexible judicial discipline process.
- Inuit women have spoken out against the judiciary and their sentences. Primarily, they have criticized judges for their lenient sentencing of sexual assault and domestic assault cases. In particular, the women have decried these sentences because, in their view, they demonstrate that violence against Inuit women is not taken seriously. In the existing justice system, the longer the period of incarceration the more serious the crime. In commenting on the appropriateness of sentences in these cases, however, Inuit women face the risk of being isolated within their own families and communities when they advocate for longer sentences.[35] 37
- Critiques of sentencing are made within the context of the existing punitive system of justice if meaningful rehabilitation is not seriously considered or provided simply because of the significant absence of resources and support services for both perpetrators and survivors. Accordingly, Inuit women have felt they have no other option than to call for longer sentences to ensure violence against women is taken seriously. This position places them on a "side" whereby they are seen by other community members as advocating or promoting the existing system (including corrections)—a system that systematically discriminates on the basis of race and culture and does little to address the underlying factors of criminal activity experienced by the accused.

Nunavut Justice of the Peace (JP) Program

- When considering the NSDC recommendations regarding community justice committees collectively with those regarding JPs, it is clear the NSDC is promoting a new system whereby the justice committees and JPs will be the "nucleus" of the justice system for the community.
  - For example, as noted in the JP discussion, the NSDC proposes that the committees and JPs together screen all cases and determine which route each case should take—determining whether it should be a matter dealt with by the court, a JP or the committee.
  - This is a departure insofar as the RCMP have tended to be the community representative on justice matters with JPs working under the guise of RCMP officers.
- The nature of the justice committees' work, as proposed by the NSDC, is rooted in traditional approaches and responses to problems in the community.
  - The committee is promoted as a body that can counsel, discipline and provide activities for wrongdoers in a way that allows a "traditional approach" to be used in "modern times."

- **Jurisdiction:** In the absence of legislative changes, the Nunavut JP program is operating under the same terms as the previous GNWT program in the initial stages. Accordingly, the JPs jurisdiction is set out in the *Criminal Cod*e, however the extent to which JPs exercise their full jurisdiction depends on other factors.
  - Although Bill C-57 did not expressly deal with JPs when she introduced Bill C-57, Justice Minister Ann McLellan described the Nunavut JPs as "the key to the ability to deliver a high quality justice system." (This quote of McLellan's was recited in Annette Bourgeois's article, "JPs to play larger role in single court system," *Nunatsiaq New*s, March 19, 1999.)

[33] See Pauktuutit Bill C-41 presentation and Margo Nightingale's Judicial Attitudes and Differential Treatment: Native Women and Sexual Assault Cases, for further details.
[34] Katherine Peterson, The Justice House Report of the Special Advisor on Gender Equality, 1992. This is included in Appendix #2 of this report.
[35] The issue of appropriateness of sentencing and the dilemma confronted by women who speak out being considered as promoters or advocates of the current correctional system is discussed in detail in Manitoba Association of Women in the Law, Gender Equality in the Courts Criminal Law, (Manitoba: MAWL, 1991).

- **Structure:** Following their appointments, the Chief Justice of the Court of Justice is responsible for directing JPs and assigning duties.
  - Each JP is appointed to one of five levels of JPs. Of the five levels, two are administrative and the remaining three are presiding justices of the peace.
  - With the creation of a unified court system, it is anticipated that JPs will be in a position to take on more of the minor cases leaving the superior court to deal with the more serious cases.

- **JP Coordinator:** The Nunavut Justice of the Peace program has a coordinator whose primary responsibility, as identified by the Deputy Minister, is recruiting and training JPs. Deputy Minister Nora Saunders briefly described this position as follows,
  - We see that this JP administrator will have a role in talking ahead of time to people who are considering [becoming a JP], perhaps by traveling to different communities and different regions and by talking with local officials about the kind of person needed, so that they have a sense of what that person's expected to do. (Annette Bourgeois, March 19,1999, p. 2. Under the GNWT program, an individual becomes a JP by first being appointed by the hamlet council and then being appointed by the territorial government. It is not clear whether the community justice committees have played a role in identifying individuals to the hamlet councils as potential JPs. There do not appear to be any guidelines on the selection of individuals for position of JP.)

- **Number of Individuals:**
- Prior to April 1, 1999, there were 82 individuals (26 women and 56 men) working as justices of the peace in 27 Nunavut communities. 44 Annette Bourgeois, *Nunatsiaq New*s, March 19,1999, p. 1.
  - The number of Inuit participating as JPs in the communities today was not available at the time this report was prepared.

- **Authorized Duties:** Depending on the level and the assigned duties, JPs are authorized to conduct trials of any by-law offence, territorial offence, or federal summary offence (but not trials involving a young offender).
  - They can impose jail sentences of up to 18 months. They are also authorized to conduct judicial interim release hearings for both adults and young offenders, issue or cancel search warrants under all federal and territorial statutes, conduct remand courts for criminal matters and bail applications, peace bond hearings and perform other judicial functions.

  - JPs are empowered to conduct some preliminary inquiries and hear guilty pleas, however, prior to April 1, 1999, no JP had conducted a preliminary inquiry in Nunavut (or elsewhere in the NWT).

  - Historically, JPs in Nunavut have not exercised all the powers available to them under the Criminal Code.
    - In a Nunatsiaq News article about the JP program, the duties performed by Nunavut JPs are summarized into three areas of experience—" signing documents, hearing guilty pleas and conducting trials"—which is considered by the Nunavut Government's Deputy Minister of Justice to be the "lower end of the scale" compared to powers exercised by JPs in other parts of Canada. (Annette Bourgeois, "JPs to play larger role in single court justice system", *Nunatsiaq New*s, March 19,1999, p.1. In comparison, there are two categories of Native Justices of the Peace in Ontario—presiding and non-presiding justices. The presiding justices can receive and swear information and complaints; issue summons and warrants; preside over first appearances and set trial dates; conduct bail hearings; conduct trials and sentencing offenders for provincial offenses and violation of certain statutes such as the *Indian Ac*t; and conduct weddings. The non-presiding justices cannot conduct trials or sentence offenders. See the Inuit Justice Task Force, Appendix #2, for further details of this comparative analysis)

- **Salary/Wages:**
  - While most of the JPs have full time-employment other than as a JP, having JPs paid a salary remains an outstanding issue. (Prior to April 1, 1999, under the GNWT program JPs received an honorarium of $200.00 per year for their services.)

- The Nunavut government is committed to ensuring JPs are paid for their services.
- The NSDC presented an alternative to paying JPs a salary directly. It proposed establishing a protocol that would compensate employers of the JPs for the employee's absence from work while performing jury duty.
  - The NSDC recommendations regarding JPs are as follows:
    - Establish a protocol to deal with the employer of the JPs to allow time to be free for sittings and training. The idea of the protocol is to establish an arrangement whereby employers are compensated for the employee's absence from work.

- **Education/Training/Preparedness:** The absence of continuing education left many JPs uncomfortable with exercising duties that extended beyond swearing information, and arrest warrants. (See Margo Nightingale, *Nunavut Single-Level Trial Court* (Yellowknife: GNWT Department of Justice, December 1998), p.2. This is included in Appendix #2 of this report.)
  - In terms of cases, it is estimated that prior to April 1, 1999, JPs heard from 30% to 60% of all cases that came to court with the circuit courts hearing the indictable offence cases. (Inuit Justice Task Force, *Inuit Justice Task Force Final Report: Blazing the Trail to a Better Future* (Lachine, Quebec, Makivik, 1993), p. 164.)
- The NSDC notes that the lack of extensive training, in both English and Inuktitut for all JPs, leaves them ill-equipped to fulfill their responsibilities and more dependent upon the RCMP and others to tell them what to do.
  - The expanded role envisioned by the federal Minister of Justice is one shared by the Nunavu Department of Justice and reflective of the recommendations from the NSDC Justice Conference. None the less, both the Nunavut Deputy Minister and Assistant Deputy Minister of Justice have given assurances that an expanded role for JPs depends entirely upon the training made available and the willingness of JPs to take on these added responsibilities. (See article by Annette Bourgeois, Nunatsiaq News, March 19,1999, p.1..15)
  - The NSDC recommendations regarding JPs are as follows:
    - Increase the Justice of the Peace Training Program in order to meet the responsibilities JPs are provided with under the *Criminal Cod*e. (NSDC, *Report of the NSDC Justice Retreat and Conference,* November 1998. p.17) This should include providing more legal training programs to train JPs in laws and regulations that they must deal with, including the criminal law, family law, procedures of the court, young offenders law, and some civil law; and developing a justice of the peace support network.

- **Role in Justice System:** At the NSDC justice conference, recommendations regarding JPs and their role in the Nunavut justice system were based on the following principles:
  - Wherever possible, conflict should be resolved through consultation with those involved.
  - If the conflict only involved a few people, these people should be the ones involved in the resolution of the conflict. It is not necessary to bring out the big guns every time.
  - If the "lesser group" cannot resolve the problem, then access to larger or more influential individuals or groups is important.
  - Every opportunity should be made to encourage a person to accept responsibility for what he or she did.
    - This is somewhat contrary to the present system whereby people only accept responsibility if they are proven to be guilty, although there is some opportunity for people to plead "guilty". NSDC, *Report of the NSDC Justice Retreat and Conference,* November 1998. , p. 15.
    - The NSDC report notes that traditionally it is believed that hiding one's guilt creates sickness in the individual and if hidden for a longer period of time, this sickness spreads to others around the individual, and those individuals also become sick or dysfunctional.
    - Eventually the whole community could be infected with this sickness. It is not until the story is told and the person discloses his or her wrongdoing that those who are unhealthy can become healthy again.
    - It is therefore important to deal with issues as soon as possible. Furthermore, where there was a breach of rules a consultation process would have to take place.
    - Where it was a minor offence, the consultation would be within a family.

- If the breach resulted in a major offence, the consultation would be within the community. ". NSDC, *Report of the NSDC Justice Retreat and Conference,* November 1998. , p. 14.
- It remains to be determined what factors are considering in making the distinction between major and minor offences (e.g. scale of impact of the offence on community members).
- From these principles the NSDC recommends an expanded role for JPs and encourages JPs to "involve others in helping to make decisions as to sentencing."
  - Wherever possible, families of both the accused and the victim should be involved.
  - The victims should be involved as often as possible, recognizing that at times the victim might not feel comfortable in being involved and that it is important to protect and respect his or her rights.
  - However, the traditional approach to dealing with problems generally involved everyone, including the victim. (NSDC, *Report of the NSDC Justice Retreat and Conference,* November 1998, p. 14)

The NSDC recommendations regarding JPs are as follows:

1. Increase community support for justices of the peace so that people are encouraged to take on the duties and responsibilities and so that people will feel more confident having matters dealt with in JP Court. (NSDC, *Report of the NSDC Justice Retreat and Conference,* November 1998, p. 17)

The NSDC recommendations regarding JPs are as follows:
4. The Court's physical set up should be much less formal to facilitate consultation and lessen the adversarial approach.

The NSDC recommendations regarding JPs are as follows:
5. Screen all cases by the Justice of the Peace and the Community Justice Committee for referrals to the Community Justice Committee, Justice of the Peace court or higher court.

The NSDC recommendations regarding JPs are as follows:
7. Expand the sentencing options available to the Justices of the Peace, including Community Correctional Centres and Outpost Camps.

- ***Inuit Culture and Traditions:***
  - *What is positive about the NSDC approach is the attempt to have Inuit culture and traditions form an integral part of the JP court structure and program, including JP selection, training and mandate.*
  - *The NSDC recommendations regarding JPs are as follows:*
    - *Change the way JP court operates to reflect the Inuit traditional practices of having groups not individuals make decisions. (NSDC,* Report of the NSDC Justice Retreat and Conference, *November 1998, p.18)*
  - *The NSDC recommendations reflect the work being done to ensure that while Inuit traditions and culture are respected and incorporated, the concerns of Inuit women regarding this inclusion are not overlooked.*
    - *For example, in making the recommendation for all charges to go through an initial screening involving local JPs with the justice committees, the NSDC notes that concern was expressed about preserving the privacy of complainants in domestic assaults and sexual assault cases and ensuring that no pressure is brought to bear on these complainants.*

In response, the report states that "it was felt that these types of cases should only be screened by the JPs and the justice committee if the complainant agrees to the process." (. NSDC, *Report of the NSDC Justice Retreat and Conference,* November 1998. , p. 20)

Likewise, the NSDC acknowledges that there was some discussion about actually having the JPs sit with "hand-picked" panels in certain instances such as sentencing hearings. These hand-picked panels would provide for the benefit of persons involved or involve those individuals who are considered most suited to deal with the particular matters. As the NSDC report states, "[t]raditionally, women would deal with matters which were considered "women's issues" and (. NSDC, *Report of the NSDC Justice Retreat and Conference,* November 1998 ,

p.17) men with the "men's issues" and it may be that there are instances when it is appropriate to select a panel based on gender." (NSDC, *Report of the NSDC Justice Retreat and Conference,* November 1998, p.18)

- **Community Perceptions of JPs:** The NSDC recognizing the current status of JPs in the eyes of the community is not sufficient to absorb an expanded role, has suggested measures that would increase community support for JPs.
  - It recommended, for example, a change in title for JPs to "Community Judge" in order to reflect the importance of the JP in the community.
    - Such a change is more than cosmetic. If JPs are to take on such expanded roles as presiding over domestic violence and sexual assault matters, which was a key NSDC recommendation, then it is critical that JPs first have credibility and the respect of the community.
  - It is worth noting that while the NSDC proposes JPs begin to hear cases involving violence against women; it also calls for JPs to have more freedom to expand their sentencing options.
  - Such recommendations when viewed collectively, as the NSDC intended, suggest that the NSDC is attempting to use methods other than incarceration as appropriate dispositions for serious crimes. The court structure, legally, does not recognize JPs as having an authority greater than a lower court. (JPs are limited to giving a sentence of imprisonment that does not exceed 18 months.)

- **Community Services/Resources:**
  - The challenge of this approach for the NSDC and Inuit generally, is the reliance upon adequate services and resources being available in the communities from which JPs can rely upon when creating alternative dispositions.
  - At present, there is an extreme shortage of services for victims of violence.
  - At the same time, the services to assist those who are convicted of sexual assault or other forms of violence against women are not available in the communities.
  - This specific challenge will only be overcome if JPs and their communities are adequately equipped to provide alternatives to incarceration that Inuit women and other members of the community identify as: accountable, effective in dealing with the underlying factors leading to the crime, and do not jeopardize women's safety.

JPs Preparedness:

- The NSDC assessed that before JPs take on greater responsibilities such as preliminary inquiries, child welfare matters and small claims actions, they would benefit from the development of a justice of the peace support network and from regular legal training on the substantive components of criminal law.
- The Nunavut government's commitment to and (Ibid., p.18.) recognition of the need for ongoing training of JPs is essential to the success of this program. In light of the JPs expanding role, their lack of training impacts on the quality of the justice system in Nunavut. For example, the majority of preliminary inquiries conducted in the North are for sex offences. Margo Nightingale notes, in inquiries for these types of offences there are significant risks of both jeopardy of an accused and of psychological harm to a complainant and the potential for violations of his or her rights to privacy. She explains this point by way of the following example,
  - …it is not uncommon for defence counsel to seek information about prior sexual conduct between the complainant and the accused (or others) which is subject to restrictions under s. 276 of the *Criminal Cod*e, or to elicit personal records in the hands of third parties which is subject to restrictions under s. 278.1-278.8. Given that there are still many debates among counsel about the application of these provisions there is real concern that a J.P. may not adequately understand the *Criminal Code* in these areas to act as arbiter. 56 Margo Nightingale, *Nunavut Single-Level Trial Court (SLTC*), p.3.

To conduct a preliminary inquiry of this sort requires a skillful application of the sections of the *Criminal Code* that address disclosure of personal records, for example, as well as the ability to properly respond to objections from the Crown which seek to protect a complainant from inappropriate questions. 57 Ibid., p.3.

In the past, concerns were raised that JPs did not possess sufficient knowledge about the *Criminal Code* and of evidentiary issues to be able to competently fulfill their duties. This lack of knowledge and understanding greatly affected the JPs' credibility within the communities and the understanding of the role of the JPs among community members. 58 In its Phase II Justice project report, Pauktuutit noted that in order to be more credible, JPs needed to be selected from the
community they serve. However, the current criteria create a barrier for unilingual Inuit, since training is not available in Inuktitut. (Pauk. Phase II, July –Dec. 1994). In its report, the NSDC noted that the community has a limited understanding of the work that JPs do, and the process by which they are appointed. It noted, for example, that there is a perception that JPs do not do important work.

Uniform training in respect of substantive law matters is even more important in view of recent case law. A recent Court of Appeal decision involving a charge under the GNWT *Liquor Act* suggests that trials conducted by JPs may be held to a lower standard of legal and evidentiary requirements. (*Camsell v. Her Majesty the Quee*n, unreported, July 9, 1998.)

The implications of this decision for training are significant since the decision suggests that trials conducted by JPs may result in lower standards of legal protection for the accused than trials conducted by judges. (It is unclear at this point whether a future *Charter* challenge to this case or the principle for which this case stands, would be successful particularly if the trial were in respect of a *Criminal Code* offence (see Nightingale, *Nunavut Single-Level Trial Court (SLTC*), p. 2, 3 for further dicussion).)

As noted above, this type of decision reinforces the attitudes and perceptions that the subject matter dealt with by JPs is of lesser significance and therefore the consequences of such criminal activity is also not as serious.

- **Sexism/Gender Bias:** One remaining challenge in relation to JP preparedness is the matter of training with respect to awareness of issues of sexism and gender bias.
  - As noted below, there is an attempt to ensure that a more representative group of JPs serves a community.
  - Nonetheless, there remains a challenge on how to reconcile gender bias issues and the conflicts arising in relation to attitudes and behaviours rooted in religious, cultural, or traditional values that devalue and discriminate against Inuit women.
  - Inuit delegates to a national Aboriginal women and justice consultation raised the following concerns on this point:
  - Traditions and culture are often confused. They are not the same thing. …
  - There is a need for a balance between the past and present to be achieved.
  - Aboriginal peoples must stop romanticizing the past and address the realities of the present. 61 Department of Justice, *Record of Proceedings of the Aboriginal Women and Justice Consultatio*n, November 1993, p. 7.

- It was noted that the Christian influence can be responsible for many "bad habits", especially for the non-acceptance of certain community members, such as gay community members. 62 Department of Justice, *Record of Proceedings of the Aboriginal Women and Justice Consultatio*n, November 1993, p. 7.

With regards to abuse, one must explode the myths and promote understanding about the dynamics of why men abuse. Common myths include:
1. Myths about culture and Christianity - Elders are holy and leaders are above the law;
2. Elders, leaders and Christians who abuse are under stress;
3. Women ask for abuse;
4. Inuit culture allows assault against women and children;
5. Inuit culture allows men to control women;
6. Children can be sexually assaulted when they reach puberty ; and
7. All Inuit people are drunks. Department of Justice, *Record of Proceedings of the Aboriginal Women and Justice Consultatio*n, November 1993, pp. 7-8

Excuses used to support myths and absolve the offender from responsibility for the crime are as follows:
1. if you learned to abuse in your upbringing;
2. if you are "nagged" by the woman you assault;

3. if you have a stressful job;
4. if you are an Elder, leader or "good" Christian;
5. if you are or planning to undergo treatment
6. if you plead guilty;
7. if the woman you assault was under the influence of alcohol or alcohol involved in some way;
8. if you support your family (for government employees, it is assumed the wife will become homeless); and
9. if you are " born again." (Department of Justice, *Record of Proceedings of the Aboriginal Women and Justice Consultatio*n, November 1993, p. 8.)

The message must be conveyed that violence is not part of Inuit culture. A positive approach must be taken in the development of role models for the community. Children must be taught their rights to protection and personal safety. (Department of Justice, *Record of Proceedings of the Aboriginal Women and Justice Consultatio*n, November 1993, p. 9.)

A justice system must be defined as one which is culturally relevant yet does not romanticize the past. It must deal with the realities of today (Department of Justice, *Record of Proceedings of the Aboriginal Women and Justice Consultatio*n, November 1993, p. 9.)

- With the recent court decisions and lack of guidance in *Bill C-57* the door has been left wide open for JPs to operate with more autonomy and less understanding of the law.
- At the same time, the serious concerns raised by Inuit women regarding attitudes, values and beliefs in the communities about violence against women and children relate directly to those in the community who act as JPs. These concerns regarding JPs preparedness need to given the attention and response they deserve.

- **A Inuit-based JP program:** Other challenges remaining for the JP program are those related to making the JP court system more reflective of Inuit traditional practices.
- The inclusion of more Inuit, especially unilingual Inuit, is seen as a positive step.

- **Independence:**
- **RCMP:** Recognizing the importance of maintaining the impartiality of the decision-maker in the eyes of the community, the NSDC warned, "if JPs are not well trained, they may be open to influence by the RCMP.
    - JPs who lack the necessary legal training tend to rely only on the RCMP for advice, and in fact sometimes just do what the police ask them to do, rather than be independent as they should be." (NSDC, *Report of the NSDC Justice Retreat and Conference,* November 1998, p. 18.)
- **Small Inter-related Communities:** Another challenge the program confronts is achieving a JP program that is also independent of the pressures brought to bear on individual JPs living in their small, inter-related community by other community members (e.g. relatives, powerful families, etc).
    - The NSDC recommends that the JP court consider using a group of JPs and possibly others to decide a matter in order to overcome the cultural conflict faced by Inuit "judging" another Inuk.
    - This approach of sharing responsibility also may serve to alleviate the other challenges facing community members.
    - As discussed earlier in relation to jury trials, there are conflicts arising when community members are left to judge or participate in matters dealing with sexual assault and other crimes of violence against women.
    - The NSDC recommends JP selection focus on identifying longer term residents, with a mix of ages and gender, and a minimum of four for each community to ensure JPs are more representative of community values and therefore encourage more respect for their decisions, to avoid conflict of interest issues that presently arise, and allow JPs to team up and sit as a larger group for support.

4.2. Options for Court Structures in Nunavut - 1997[36]

- This document highlights the relationship with the mainstream justice system as well as the Northern environment. This is a discussion paper. It does not propose particular answers.
- Instead, it is intended to encourage dialogue about the issues involved.
- It gives an overview of the different court structures that can be established in Nunavut after the division of the Northwest Territories and the creation of the Nunavut Territory.
- The two main options available are the
- establishment of a Territorial court structure (representing the status quo with a Territorial Court, Supreme Court, Court of Appeal and Justices of the Peace) or
- a single-level trial court (a court with a single class of judges responsible for hearing all the cases at the trial level, replacing Territorial and Supreme Courts).
- The author discusses the merits of each as they address the specific Nunavut context and needs.
- Through the discussion a number of important issues facing justice in the North, especially justice issues for Nunavut policy-makers to consider, are highlighted.

Underlying Themes and Assumptions

- The geographic and demographic realities of Nunavut bear directly on all structure designs.
- An interface between the Nunavut court structure and the larger Canadian criminal justice system and Constitution will exist and that relationship must be examined and incorporated into the discussion.
- There are conflicting views regarding the role of the larger, formal criminal justice system in relation to the more local systems that may develop.
- While the current system is seen as foreign to Inuit culture and traditions, aggravating divisions in the community, others are of the opinion that the disempowered groups in the community need the larger system to protect their interests.

Findings

Limitations of the Territorial Court:

- As a result of the vast geography and dispersed population in the North, the Territorial Court operates as a Circuit Court.
- Inherent in that system is a number of limitations.
- Specifically, there are huge delays in addressing crime and Courts are not based in the communities they serve.
- Territorial Court or Single Level Trial Court? The author holds that there exists no hard data on which system is better and this discussion paper does not conclude strongly in favour of one or another. Rather, it sets up the issues for determining the structure.

Expanded role of the Justices of the Peace:

- The expansion of the roles and responsibilities of the Justices of the Peace (in criminal, civil, family and youth courts) is discussed as a way of addressing the limitations of a one-tier system and lessening the problems associated with circuit courts.
- Expanding the roles of JPs would address the delay in having the matter addressed.
- Delays are damaging to both the victim and the accused.
- The victims in small Northern communities may be in a dangerous situation when faced with a delay, while the accused is put in a unjust position by having the charge 'hanging over' him or her until the circuit court comes.
- The time lapse creates a feeling of being subjected to an irrelevant justice process.
- Expanding the role of the JP also results in greater community involvement because the JPs are residents of the community they will serve.
- However, the author points out that there exists a danger in enlarging the role of the JP: the existing inequalities in the community may be reinforced through the justice system.
- The author concludes that a possible way to address this is to have JP panels, instead of individuals.
- Geographic and demographic realities of Nunavut and their implications:
- The demographics of Nunavut pose a unique challenge to a justice system.

[36] Department of Justice. Options for Court Structures in Nunavutt. Ottawa: Department of Justice, 1997 cited in Department of Justice Canada, Research and Statistics Division, by Naomi Giff, Nunavut Justice Issues: An Annotated Bibliography, March 31, 2000, http://canada.justice.gc.ca/en/ps/rs/rep/rr00-7a-e.pdf

- It must address the fact that 84% of the population is Inuit, more than half are under the age of eighteen, 20% (in 1991) spoke only Inuktitut, and it is made up of small, dispersed communities spread over a quarter of Canada˜s land mass.
- In such an environment, access to justice can be a problem as information is difficult to obtain and there are few lawyers.

Criminal activity in Nunavut:

- In 1996 the Northwest Territories had seven times the national average rate of reported sexual assault and over five times the national average rate of reported assaults.
- An understanding of and a plan of action to address the level and type of criminal activity in the region of Nunavut must be incorporated into any justice system.
- Interface between Nunavut justice system and Canadian justice system:
- A relationship will continue to exist in a number of ways.
- The Nunavut justice system must be consistent with protections guaranteed to accused persons in the Charter of Rights and Freedoms.
- As well, there are constitutional limits on the degree to which a court system in Nunavut can be modified to reflect traditional Inuit responses to crime.

Conclusions

- The discussion paper holds that given the demographic and physical reality of Nunavut, there are specific goals and considerations that must be incorporated into any discussion of justice delivery and administration:
- The system of justice or court structure must be able to provide accessible, timely and streamlined service to the people living in the remote, small communities that will make up Nunavut.
- The system must be accessible and understandable to all Inuit people.
- The system must ensure equal benefit and protection of the law to all persons.
- The system must provide adequate accountability for decisions made.
- The system must address the needs of the victim, offender, and all parties involved (community).
- The system must respond to the geographic remoteness of many of the communities, offenders and victims from courts and court services.
- The system must recognize and respond effectively to the problems of domestic violence.
- The system must develop links with other agencies to coordinate responses and make best use of limited resources.
- The system must only remove offenders (especially young offenders) from the community where truly necessary.
- The system must enhance community involvement and confidence in the justice system.
- The system must be flexible to meet the needs of particular communities; encouraging innovation in resolving disputes and in sanctioning actions.

4.3. The Changing Role of Native Courtworkers in Northern Justice Society -1992[37]

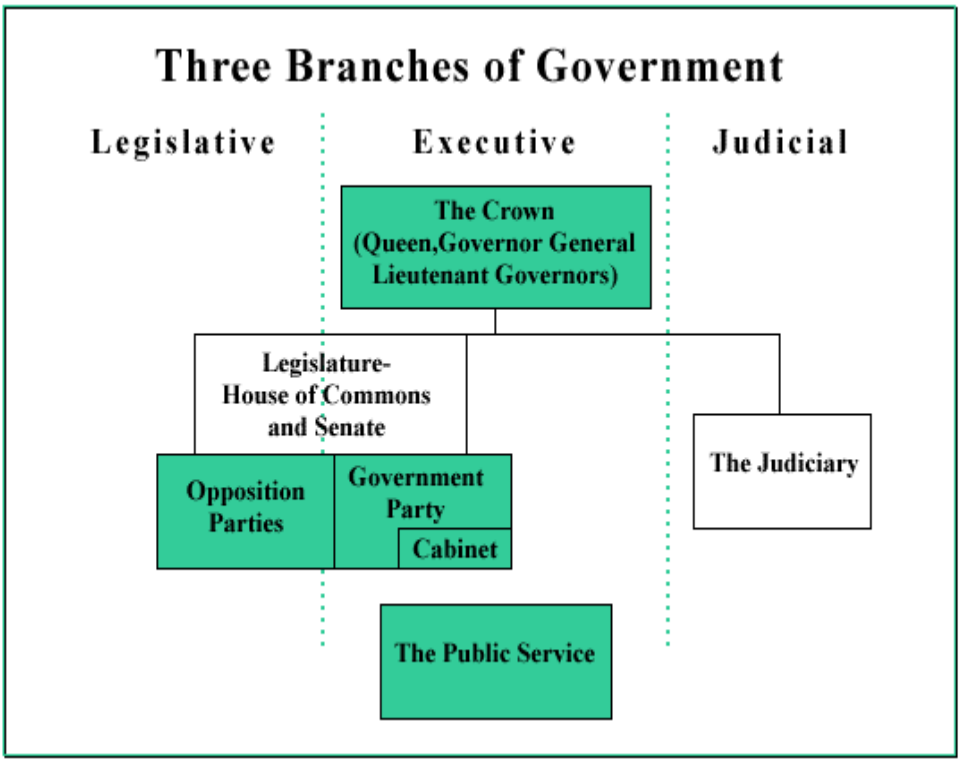
- ***Future directions for Native Courtworker*s within Justice of the Peace Courts:**
  - In this workshop, the participants discussed the idea of enlarging the role of the Courtworkers (officially) within the Justice of the Peace courts. There was mixed support for the initiative.
  - They spoke of how such an approach would better serve the legal needs of the communities, how it may address some of the limitations of the adversarial process and how such an approach may better meet the needs of the victim.
  - The move was also seen by some of the participants as a limited direction for reform.
  - Such an expansion, which focuses on better delivery of the formal justice system, does not represent a community-based path.

[37] Avison, Don, Alice Mackenzie and Helen Nuvalik Tolonganak. "The Changing Role of Native Courtworkers in Northern Justice Society", Self-Sufficiency in Northern Justice Issues Burnaby: Northern Justice Society, Simon Fraser University, 1992 *cited in* Department of Justice Canada, Research and Statistics Division, by Naomi Giff, Nunavut Justice Issues: An Annotated Bibliography, March 31, 2000, http://canada.justice.gc.ca/en/ps/rs/rep/rr00-7a-e.pdf

- Justices of the Peace courts are still working within the framework of the larger criminal justice system, its form and content, and serves the interests of the larger system, not necessarily the community.

5. Relevant Documents, Studies and Practices – Other Canadian

5.1. Three Branches of Government[38]



5.2. Responsible Governance: The Implications of Judicial Independence for Policy and Practice in the Provincial Courts of Canada[39]

1. Introduction:

An independent judiciary is one that engages in impartial decision-making, unfettered by external influences, whether they be from the political arena, from members of the public, or from any other source, and is especially above interference by the government of the day. For Provincial Court judges(1) it has come to mean something more than this of late, because of the increasing number of statutory powers and the broader discretions that have been put into the hands of these judges.

The emergence of the Provincial Court as the primary criminal trial and sentencing court in Canada is the starting point for my discussion. A combination of circumstances, of a jurisprudential, statutory, political and sociological bent, have suddenly propelled the Provincial courts into this position of unprecedented power and responsibility.

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[38] http://192.197.77.131/eng/lrncentr/online/hgw/how-gov2.htm#BM2_5

[39] Judge Timothy White of the Provincial Court in Saskatchewan Responsible Governance: The Implications of Judicial Independence for Policy and Practice in the Provincial Courts of Canada,? http://www.acjnet.org/capcj/en/law/publications/white.html

These courts must quickly recognize this reality and begin to address the question of how they will discharge their greater responsibilities in an age of accountability and intense public scrutiny. The, so-called, "inferior" courts must consider the practical implications of this change for the policies and practices they employ.

I believe that Provincial Court judges must be more pro-active, innovative and sophisticated in the performance of their duties if public confidence in the administration of justice is to be enhanced and strengthened.

2. The Recent Emergence of the Provincial Court

The Provincial Court in Canada has emerged as a powerful institution in the very recent past. One need only consider that in many places only a short twenty or thirty years ago the Provincial Court as we know it today did not even exist. It used to be the Magistrate's Court! That nomenclature is rarely, if ever, invoked today, but when it is used, it often attracts glances askance and undisguised wincing. That is not to say that the term "magistrate" is of pejorative quality. *Au contraire,* there are many who believe that the opposite attribute applies.

However, in this country the term evinces images of a bench that, not long ago, was occupied by individuals who were poorly trained and who were given only a modicum of the supports that were taken for granted by the superior courts. The provincial courts are now presided over by people who have distinguished themselves in their legal careers, who have much professional experience, who have shown academic prowess, and who display widespread dedication to public and community service.

The legislators in the country have demonstrated increased confidence in the ability of the provincial courts to discharge the greater responsibilities that have been thrust upon them. No better proof of this can be had but the consistent and unceasing bestowal of additional areas of competence on them in the last several years. This is particularly so in the sphere of criminal law, where the Federal government has increased the courts' jurisdiction: the growth in absolute jurisdiction offences and increased discretion over the possible lengths of sentence for summary conviction offences are but two recent examples. In addition, Provincial governments have increased civil jurisdiction in family law matters and have already done so or are planning to raise the monetary limits for small claims.

Just as legislative intervention has affected the expansion of the jurisdiction of the Provincial courts, so too the socio-economic conditions of the 1980's and 1990's have meant that an increasing number of civil and criminal litigants have chosen the Provincial Court as the tribunal to decide their matters in dispute. The net effect of this movement has been to increase, over the past decade in particular, the volume of trial cases in the Provincial Court. But it is not only the volume of cases that has increased-it is also the seriousness and the complexity of the cases that have also increased.(2) It is estimated that about 90% of Canadians who end up in court, rely on the Provincial courts for settlement of their legal disputes. It is not even widely recognized or understood that the courts have succeeded in dealing with the downloading of jurisdiction or just how well the courts have met the challenge in an expeditious, judicious and fair manner of deciding the large volume of cases that come before them.

At the same time as governments have increased the powers of the court and litigants have chosen the Provincial Court as their forum *conveniens*, the Supreme Court of Canada has directed that the Provincial Court be accorded greater deference in matters involving an exercise of judicial discretion. The remarks of Chief Justice Lamer in R. v M (C.A.),(1996) 46 C.R. (4th) 269 at pp 314-15 are apt:

"In *Shropshire, supra*, this Court recently articulated the appropriate standard of review that a court of appeal should adopt in reviewing the fitness of sentence under s. 687(1). In the context of reviewing the fitness of an order of parole ineligibility, Iacobucci J. described the standard of review as follows, at para. 46:

An appellant court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all the witnesses whereas the appellant court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. *That is to say, that it has found the sentence to be clearly unreasonable.* [Emphasis added.]

As my learned colleague noted, this standard of review traces part of its lineage to the jurisprudence of the B.C. Court of Appeal. As Bull J .A. described the nature of a trial judge's sentencing discretion in R. v *Gourgon* (No. 2) (1981), 58 C. C. C. (2d) 193 (B.C. C.A.) at p. 197:

... the matter is clearly one of discretion and unless patently wrong, or wrong principles applied, or correct principles applied erroneously, or proper factors ignored or over stressed, an appellate Court should be careful not to interfere with the exercise of that discretion of a trial Judge.

Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a *discretion* to determine the appropriate degree and kind of punishment under the *Criminal Code.* As s. 717(1) reads:

717. (1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the *discretion* of the court that convicts a person who commits the offence. [Emphasis added.]

This deferential standard of review has profound functional justifications. As Iacobucci J. explained in Shropshire, at para. 46, where the sentencing judge has the benefit of presiding over the trial of the offender, he or she will have had the comparative advantage of having seen and heard the witnesses to the crime. But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions (as was the case in both Shropshire and this instance), the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of the criminal justice system. Perhaps most importantly, the sentencing will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly."

This represents a profound sea change in the way the provincial court is viewed. This is especially so because three key areas of criminal law have always involved a significant exercise of judicial discretion -- fact finding/credibility, sentencing and Charter of Rights issues.[3] The recent Federal amendments to the Criminal Code Sections 718, 718.1, 718.2 and 742 underscore this point. The exercise of judicial discretion lies at the heart of these statutory regimes. There has arisen a concomitant need for the development of principled approaches and methodologies to guide judges through these uncharted waters. More about this later.

3. Judicial Independence

The struggles of the provincial courts to reach a constitutional accommodation with elected officials, in practically all the provinces, but especially in Saskatchewan, Alberta, Manitoba, Newfoundland and Prince Edward Island are only some of the growing pains that have been felt by the court as it has emerged as a decisive player in the judicial process and evolved in the latter part of the 20th century from an obscure court into an important and powerful institution.

The accord reached between the government of Saskatchewan and the Provincial judges should serve as a model for other jurisdictions to follow in the new millennium. The settlement is a unique constitutional compromise that embraces the twin pillars of judicial independence and political accountability.

It is to be expected that as time moves on the Provincial courts of the country will build on this principled constitutional resolution by establishing new fiscal arrangements that will enable courts to arrange their own budgets subject to the rules of accountability understood by both the judiciary and the legislators. This was clearly within the purview of the Supreme Court of Canada in its recent pronouncements with respect to the independence of the provincial court as an institution and the judges in their individual capacities.

It is understood that Ontario judges have begun a process similar to that which obtains in Saskatchewan. These initiatives, of course, are simply a logical and practical result of the constitutional division of powers amongst the legislative, the executive and the judicial branches of government. The demands and challenges presented by this process will compel the members of the courts to be strong, innovative and accountable.

4. The Political Context

The sheer physical size of this country, when coupled with the disparate multi-cultural composition of it, makes consensus-building, at best, a constant and very difficult business indeed. This, of course, has important implications for the judiciary.

The Federal government often finds it expedient to avoid difficult legal and moral questions by ceding the authority to the courts to deal with these matters and placing the responsibility squarely on the shoulders of judges. The Constitutional Act, 1982 provides the locomotive for these constitutional changes and the government keeps adding new box cars. The process of devolution of power to the judiciary has continued unabated. What is surprising is just how far-reaching the process has been.

The amendments to sections 742 and 718, 718.1 and 718.2 of the Criminal Code represent a devolution of executive power to the judiciary. Formerly only the Parole Board or provincial correctional authorities could determine the manner of serving a sentence of imprisonment, but some of the discretion exercisable in respect of such matters has now been diverted to the judiciary. It is being called upon to decide release dates, minimum periods of imprisonment and related issues in appropriate cases.

More dramatic still are the amendments to the section of the Criminal Code dealing with dangerous offenders, especially the parts dealing with "long-term offenders". I refer to section 753.1 in particular.

5. The Implications for Provincial Court Practice and Policy

a) *Accountability*

In a democracy those who are entrusted with power are expected to bear the full weight of the responsibilities that go with it. The corollary of this is that all who do so will be held accountable for their actions.

This is as true of appointed judges as it is of elected politicians. Whatever the constitutional niceties of the concept of judicial independence, the media and the public interest demand accountability. This a fact of life in Canada today and it is germane to talk about how an independent provincial court can preserve its independence while also meeting the expectation that it will be accountable.

To "account" is to "give an explanation" and to be "accountable" is to be "answerable", to be "responsible", to be "explicable". In the present context being "accountable" means being answerable to the public. Judges are paid out of the public purse. While they are certainly not "civil servants" nor, strictly speaking, are they "public servants", they certainly do provide a public service, and one of increasingly greater civic importance. It is obligatory, at the very least, for judges to explain to the public how, why and to what ends taxpayers' money is expended for the administration of justice by the judiciary.

b) *Implications for Judicial Practice*

Aside from administrative "accountability", the demand for explanation and answerability also has practical ramifications for the way in which judges carry out their day-to-day work. At a minimum, judges are expected to explain how they arrive at the conclusions that they reach on the cases before them. This means reasons for judgment. [4] Simply put, in the current climate, justice may not be done and certainly will clearly not be seen to be done unless reasons are given. This is so in spite of what the law may say about the legal requirement of reasons for judgment. The public demands and has a right to know why a judge decides a matter in a particular way. This obligation is ever the more onerous when judicial discretion is involved in reaching a result. In these cases a heightened public interest and an increased level of anxiety may be anticipated and is often present.

The reality is that the Provincial Court is being called upon to decide just such cases on a daily basis. The Criminal Code and Charter of Rights have made this so.[5] Madame Justice McLachlin in "Rules and Discretion in Governance of Canada", (1992), 56 Sask. L. Rev.167 at pp. 170-71 said as much, in this passage:

"An examination of what actually happens in legal decision-making belies the notion that such decision - making is inherently certain, predictable and rule-driven. In fact, a strong case can be made that the notion that "law" and "discretion" are discrete concepts occupying water-tight compartments never possessed great validity. As important as rules, certainty and predictability are in the law, discretion has always been an integral part of judicial decision-making.

The most fundamental way judges exercise discretion is in finding the facts. Evidence is presented, often incomplete and sometimes conflicting. Judges resolve these conflicts and fill these lacunae by making inferences and choices. In so doing, they exercise discretion, defined as the exercise of choice between alternatives.

A second way judges exercise discretion is in applying the law. A new fact situation presents itself. In most ways it conforms to the fact situation in the precedent cases, but with a slight difference. One party says it is significant; the other says it is not. The judge decides the significance of the difference, and in doing so, exercises a discretion. Moreover, some judges are known to be predisposed to extending the law to cover entirely new fact situations. In this way, they exercise their discretion more liberally than do others.

Although only two examples have been cited, the instances are numerous in which judges exercise discretion. It is argued, however, that this is not true discretion in the administrative sense, because there are precedents and guidelines. Assuming for the moment that administrative decisions are made without such guidelines, there is no scarcity of examples of judicial discretion writ large. Costs have long been highly discretionary. Sentencing is also to a large extent discretionary. Statutes, too, may confer wide discretionary power on judges. For example, section 40 of the *Supreme Court Act* provides the judges of the Supreme Court with a wide discretion to grant or deny leave to appeal.

The *Charter* has introduced vast and important new areas of judicial discretion. The language in which the rights and freedom are cast is broad and open-textured. What does free speech mean? Liberty? Equality? The right to vote? Judges faced with is sort of language must shape and carve and sometimes limit it, like a sculptor shapes a stone, finding the ultimate shape with the undefined block. Section 24(2), which permits the court to admit evidence obtained in violation of Charter provisions, is another example of the express conferral of judicial discretion. And what of section 1, with its blatant requirement that the courts are to determine whether a particular limitation of a right or freedom is demonstrably justified in a free and democratic society? This forces the court to make a fundamental value decision, one that is indeed inherently discretionary.

We thus see that the law as administered by our courts is far from the certain, predictable code of rules assumed by the Diceyan model. Many matters, small and large, are ultimately left to the discretion of the judge. Undoubtedly, the structure of rules within the legal system is more tightly meshed than that of many administrative agencies, and the areas of discretion in the legal system may be smaller overall. But the fact remains that it is either impossible or undesirable to commit absolutely to written rules the many detailed considerations that bear on particular decisions. The law must be certain and predictable, but that certainty and predictability can never be absolute. It must yield at the periphery and sometimes at the core (as in the case of the *Charter)* to the demands of practicality, flexibility and individual justice."

The deference shown by the Supreme Court of Canada to the judgments of trial/sentencing courts illustrates why it is important to give full reasons for judgment.[6] The sentencing judge is in the best position to formulate an individualized sentence which takes into account the background of the offender and the needs and current conditions of the community. Generally the Provincial Court judge will have presided at a trial of the offender and has had the advantage of seeing and hearing the witnesses. The sentencing judge is by circumstance and experience in a position to articulate society's values and apply them in a principled way to the facts, and is duty bound to do so.

The question which emerges from this discussion, but which is seldom asked is this: how does the judge ascertain what the needs and current conditions of the community are? Each judge will have to decide how this is achieved without feeling compromised or being inappropriately influenced. It is the judges who will have to decide whether or not to talk with community groups, police officers, probation officers, prison officials, advocacy groups and other volunteers and professionals who are a part of, associated with or just interested in the justice system.

Let us assume that the judge does understand the needs and requirements of the citizens within the community that the court serves. What, if any, obligations arise from this knowledge in light of the judge's statutory and common law powers and duties? The short answer is to apply the law in a just manner, but little guidance can be gained from such a terse and broad stroke since it invariably leads to many other questions. When, for example, is the law being applied in a just manner? How is the judge to decide what justice is?

In earlier (and some say simpler!) times a judge merely had to place sentences within the tariff established by the decisions of the provincial Court of Appeal and adjust the resultant sentence to fit the circumstances of the offender, the facts of the case and the seriousness of the offence. In these times the process is far more complex and exponentially more difficult.

In recent amendments to the Criminal Code the Federal legislators have effectively directed judges to consider every alternative sanction that is available and may be appropriate in the circumstances before resorting to incarceration. Judges are cautioned to use imprisonment as the ultimate sanction and with great restraint (S. 718.2(d)). Of a like effect is the directive in S. 718.2(e) of the Criminal Code to pay particular attention to the circumstances of aboriginal offenders.

Sentencing courts are also directed to consider ordering offenders to serve the sentence of imprisonment in the community rather than in a correctional center where, to do so, will not endanger the safety of the community (S. 742.1). It is also noteworthy that alternative measures are available in appropriate cases to divert offenders away from the traditional court system.

The upshot is that many Canadian legislators, academics, jurists and law reform commissions, and perhaps even many of the public, have concluded that too many Canadians have been and are being sent to jail and that every available alternative is to be considered in order to rectify this situation. The task of addressing this concern has been left to judges. Judges have been entrusted with great power and discretion to carry out the objectives and purposes of sentencing that have been codified in Ss. 718.1, S. 718.2 and S. 718.3 of the Criminal Code.

What are the practical implications for provincial court judges in this new sentencing Jerusalem? First, the judge must ensure that all cases that can be directed away from the formal criminal justice system are diverted and mediated and otherwise settled in and by the community. This requires that the police, prosecutors and defense counsel be reminded of the appropriateness of this manner of dealing with certain cases. Vigilance will be required to make sure that this happens in a consistent and principled manner.

Secondly, judges must show leadership in developing new sentencing processes and alternate sanctions to imprisonment. Innovation in the approach to sentencing will be the order of the day. It follows that new protocols and methodologies will have to be developed and employed by judges of the provincial court who are on the front lines of the criminal justice system. They are being given these new responsibilities because it is they who are in the best position to direct the initiatives and assess the efficacy of new methods.

The groundwork undertaken by Judge C. Fafard of the Saskatchewan Provincial Court in implementing and fine-tuning sentencing circles as an alternative to the traditional approaches to sentencing offenders is a timely and useful demonstration of how effective, persuasive, innovative and caring a judge can be.

In R. v Morin (1995), 42 C.R. (4th) 339 the Saskatchewan Court of Appeal approved and applied his methodology. At p. 345 Mr. Justice Sherstobitoff commented as follows;

"A recent judgment of the Provincial Court R. v. *Joseyounen*, [1995] 6 W. W. R. 438, sets out the criteria developed by the judges of the Provincial Court sitting in the northern part of the Province to determine whether use of a sentencing circle is appropriate in a given case. By way of preface, Fafard Prov. J. said this at p. 439:

The first sentencing circle to be held in Saskatchewan took place in Sandy Bay in July of 1992. I was the presiding judge. Since then many sentencing circles have been held in Northern Saskatchewan (I estimate that I have dealt with over 60 cases in that manner myself), and out of this experience by me and my colleagues on the Provincial Court in the north, there have emerged seven criteria that we apply in deciding if a case for sentencing should go to a circle. These criteria are not carved in stone, but they provide guidelines sufficiently

simply for the lay public to understand, and also capable of application so that our decisions are not being made arbitrarily.

It is imperative that the public, aboriginal and others, be able to know and understand what is happening in the development of sentencing circles: the credibility of the administration of justice depends on it.

The criteria are as follows:

(1) The accused must agree to be referred to the sentencing circle.

(2) The accused must have deep roots in the community in which the circle is held and from which the participants are drawn.

(3) That there are elders or respected non-political community leaders willing to participate.

(4) The victim is willing participate and has been subjected to no coercion or pressure in so agreeing.

(5) The court should try to determine beforehand, as best it can, if the victim is subject to battered spouse syndrome. If she is, then she should have counseling made available to her and be accompanied by a support team in the circle.

(6) Disputed facts have been resolved in advance.

(7) The case is one in which a court would be willing to take a calculated risk and depart from the usual range of sentencing."

Mr. Justice Sherstobitoff also commented on the desirability of trial courts making rules to govern matters coming before them. At p. 348 he said:

"In the light of these foundations, and given the wide latitude accorded judges as to the sources and types of evidence and information upon which to base their sentencing decisions, it is doubtful that this court should attempt to lay down guidelines in respect of a decision whether or not a sentencing circle should be used in a given case. We might comment on some of the principles at work in making such a decision, principles by which we are all bound, but we should be reluctant to lay down guidelines.

Moreover, the judges of the trial courts are empowered, as this court is not, to make rules governing these matters, something they may wish to consider. In this respect, we agree with the suggestion made by McEachern C. J. Y. T. in *R. v. Johnson* (1994) 91 C. C. C. (3d) 21 [31 C.R. (4th) 262] at p. 24 [C. C. C., p. 296 C. R.]:

I wish also to observe that the sentencing circles employed in this case, although possibly useful in cases of this kind, went through several phases, and took far longer than the sentencing process prescribed by the *Criminal Code*. It is apparent that is procedure cannot be employed in every case.

Sentencing circles are not prescribed by the *Criminal Code* of Canada. If the judges of a court propose to use sentencing circles to assist them in some kind of sentencing (and I do not suggest they should not), they should establish and publish rules under *Code,* s. 482(2) and *Interpretation Act*, R. S. C. 1985, c. I-21, s.35 (which defines "province" to include the Yukon Territory), so that both the Crown and the accused, and their counsel, will know the kinds of cases to be tried in this way, and precisely what they and their client may expect. It would be wrong, in my view, if the judges of a court should follow different procedures on such a common question as sentencing which is an important component of every case where a conviction is entered.

Also, if rules are established, any aggrieved party will have a certain basis for attacking such procedure either before or after the commencement of the sentencing process."

The emerging jurisprudence concerning conditional sentencing orders suggests that provincial court judges will have much to contribute in the debate over when it is appropriate and just for the sentencing court to impose a conditional sentence as an alternative to imprisoning the offender. The consensus of appellate opinion is that the process under S. 742.1 is a tripartite procedure that concludes with a discretionary (as apposed to an

automatic or mandatory) decision either to make the conditional sentence order or not. How that discretion is exercised is to be determined by weighing and balancing the purposes and principles of sentencing. (See S.742.1(b) and S. 718 to S. &718.2).

This process will be complex and, is, as yet, controversial. It is to be expected that judicial opinion will vary on the amount of weight to be given to various factors. Some questions that come to mind as germane are these: how important is general deterrence in sexual assault , drug and breach of trust or fraud cases? What is denunciation and where does it fit into the mix of factors? Can denunciation be achieved without incarceration? How important is individual deterrence? How does the concept of individual deterrence fit into the framework drawn by the statutory goals of restorative justice? What does parity in sentencing imply? What does it mean to say that a sentence should be similar to sentences imposed on similar offenders for similar offences in similar circumstances? (7)

These are just some of the perplexing questions that Provincial Court Judges will have to face on a regular basis. If appropriate and acceptable answers are to be found they must be consistent with the prevailing needs, circumstances and values of communities affected and peopled by offenders and victims alike. This will dictate that judges shall engage in social context education. In a multi-racial and multi-cultural country like Canada the sensitivity that comes from this kind of exposure is not optional, it is a necessity. (8) There is no doubt that the judge at first instance will have to develop a principled approach to decision making in a complex sentencing arena and to fact finding in an equally complex and sometimes bewildering domain. (9) Arriving at such decisions and articulating the reasons for them will be both the challenge and the burden of the provincial court as it heads into the new millennium.

c. *Implication for Judicial Policy*

The acceptance of the reality that the provincial court and its judges have individual and institutional independence from the legislative and the executive branches of government has profound administrative and budgetary significance. If the judicial branch is to be separated from the legislative and executive arms of government then judges will be required to administer a budget and be generally accountable for procurements and expenditures. Internal mechanisms will have to be put in place to formalize relationships between the judges and government and *puisne* judges and their chief judges. (10) It will be an enormous undertaking. At the heart of the process will be the overriding need to strike a balance between the maintenance of independence and the need to be accountable for the expenditure of public funds. It will not be easy!

I have been primarily concerned here with the establishment of internal rules pertaining to fiscal responsibility. Another policy issue, and arguably the more important one, concerns public policy: how, for example, as a matter of external policy, should judges, communicate with the community? This is of critical importance in the era of instantaneous communications and the thirty-second video clip or sound bite!

If the public is to have confidence in the job that the judiciary is doing it must be better informed. The mass media is not doing this at present. But the judiciary does not have the choice of simply throwing up its collective hands and doing nothing but complain about the situation. Something more is required to inform the public of what the courts do and on which principles the courts rely in deciding cases. It is incumbent upon the judiciary to build a relationship with the media.(11) Lines of communication must be developed between the two camps so that judges get a better sense of what the media does and why they do it and conversely so that the media gets an informed understanding of the roles and responsibilities of the judiciary.

This will undoubtedly require a change of thinking. It will also require some risk-taking since openness and accessibility are essential to the media's ability to function. Can the integrity of the judicial process be protected in this new world? Only time will tell. However, it is submitted that a key task for the judiciary in the 21st century will be to actively work to build public confidence in the way courts administer justice in Canada. This will not happen by default or through the inertia of benign neglect. It will require a courageous and careful effort on the part of judges to achieve. It will involve education and training in media relations. The judiciary must become pro-active and persuasive. A passive, reactive posture unfortunately only attracts criticism, complaint and misunderstanding in the collective community that is this country.

Conclusion:

The roles and responsibilities of Provincial Court judges have changed rapidly and significantly in the past decade. The evolution of the principle of judicial independence, and the impetus given to it by the recent decisions of the Supreme Court of Canada, make it imperative for Provincial Court judges to consider very seriously what the practical implications are for practice and policy-making in the court. The Provincial Court is being called upon to provide leadership in meeting the challenges facing the administration of justice in the 21st century. We live in interesting times!

Endnotes

1. I shall use the phrases "Provincial Court", "Provincial Courts", "Provincial Court Judges" and "Provincial governments" throughout this piece generically to refer to the Provincial and Territorial Courts and the judges of these courts, and to Provincial and Territorial governments, as the context dictates.

2. For example see: R. v. W.(D), [1991] 3 C. R. (4th) 302 (S. C. C.); R. v. B.(G), [1990] 77 C. R. (3d) 347 (S. C. C.); R. v. S.(T), [1995] 40 C. R. 1 (Sask. C. A.); R. v. W(S), [1996] 47 C. R. (4th) 354 (Ont. Gen. Div.); R. J. Delisle, "Silence at Trial: Inferences and Comments", [1996]1 C. R. (5th) 313 and R. v. Rockey, [1996]2 C. R. (5th) 301 (S. C. C.); and also, R. v. Noble [1997] 6 W. W. W. R. 1 (S. C. C.).

3. See Dale Gibson, "The Deferential Trojan Horse: A Decade of Charter Decisions", [1993] 72 Can. Bar Rev. 417; also see Deborah Coyne's "Constitutional Reform and the Charter of Rights", [1991] Sask. L. Rev. 203

4. See MacDonald v R., [1977] 2 S. C. R. 665 at pp 672-73; Also see R. v B.(R.H.) 1994, 29 C. R. (4th) 113 and "After B. (R.H.): Continuing Need to Give Adequate Reasons for Findings of Credibility" by E. N. Sangmuah 29 C.R. (4th) 135.

5. See R. v Pierce (1997) 5 C. R. (5th) 171 (Ont. C.A.). ; also see R. v Simpson (1995) 95 C. C. C. (3rd) 96 (S. C. C.)

6. See for example, R. v. Simpson supra n. 4 and R. v. Wolfe (1995) 42 C. R. (4th.) 313 (Sask. C. A.) and the recent decision in R. v. McDonnell (1997) 6 C. R. (5th.) 228. There is a particularly insightful article entitled "McDonnell and the Methodology of Sentencing" which is to be found in (1997) 6 C. R. (5th.) 277. Also of interest is R. v. C.(R.), [1993] 2 S. C. R. 226.

7. See: R. v Pierce supra n. 4, R. v Horvath, unreported decision of Sask. C.A. judgement delivered 16 June 1997. Also see: Jack Grumell's article "The New Conditional Sentence Regime" (1997), 39 Crim. L. Q. 334 particularly at pp. 336-39. R. v McDonald (1997),5 C. R. (5th.) 189, R. v. W.(J) (1997) 5 C. R. (5th) 248 and A. Manson, "The Appeal of Conditional Sentences of Imprisonment" (1997), 5 C. R. (5th) 279 and A. Manson, "Finding a Place for Conditional Sentences" (1997), 3 C. R. (5th) 283. Also see Laurie Lacelle's "Curing Disparity: The Placebo Approach of Starting - Point Sentencing", [1996] 47 C.R. (4th) 204.

8. See Rosemary Cairns - Way's "What is Social Context Education?" National Justicial Institute Bulletin Vol. 10, Number 3, August, 1997, p.5.

9. On fact-finding and credibility see Judge Gerald T.G. Seniuk's brilliant article, "Judicial Fact-finding and A Theory of Credit", [1992] Vol. 56(1) Sask. L. Rev. 79.

10. See Gilles Cadieux's article "New Directions for the Conference des juges du Quebec, Provincial Judges Journal Spring 1996, Vol. 20, No. 1, Page 21

11. See Jack Watson's, "Badmouthing the Bench: Is There a Clear and Present Danger? To What?" [1992] Vol. 56(1) Sask. L. Rev. 113. See also, the Provincial Judges' Journal, Vol. 19, No. 3, Fall 1995 for a general review of this area by numerous authors, including judges and media alike.

5.3. Toronto Drug Treatment Court Update[40]

[40] National Crime Prevention Centre, http://www.crime-prevention.org/english/publications/index.html

National Crime Prevention Centre
Centre national de prévention du crime

Toronto Drug Treatment Court Update

Background

While a causal connection between drugs and crime may be difficult to make, the disproportionate use of drugs by offenders is now well documented. It is also clear that the relationship between drugs and crime is of increasing social concern. Other countries appear to have found that court-monitored treatment of addicted offenders is a useful alternative to traditional jail sanctions in some circumstances. As a result, the Toronto Drug Treatment Court, established with funding from the National Crime Prevention Centre (and the first of its kind in Canada), has adopted the therapeutic jurisprudence approach of courts in the United States and elsewhere to address the problem of the drug addicted offender. The Toronto program also incorporates a harm reduction approach. At the present time, the program is targeted primarily at addicted offenders who commit federal drug statute offences but it is expected that, over time and with positive evaluation results, this might be expanded to include a broad range of Criminal Code offences as well. While it is important to reduce drug-specific offences and related levels of incarceration, it is clear that in order to have a significant impact on the criminal justice and correctional systems, it will be necessary, in future, to include a much wider range of offences.

The harm reduction approach has been adopted in the Toronto model because drug addiction is so frequently associated with unemployment, homelessness, violence, family discord, and a range of mental and physical health problems. Because incarceration typically does not address the root causes of drug addiction, an approach which combines structured treatment with court reporting and urinalysis is considered to be potentially more effective in reducing recidivism and the use of incarceration, while offering positive outcomes for addict offenders.

Crime Prevention Investment Fund

The National Crime Prevention Centre's Crime Prevention Investment Fund (CPIF) has been established to identify and support innovative crime prevention projects with Canada-wide significance. It also supports research and evaluation of the costs, benefits, and overall effectiveness of comprehensive efforts to prevent crime and victimization. Under the CPIF, the Government of Canada has agreed to provide $1,958,420 of funding to the Toronto Drug Treatment Court program over a four-year period, from December 1998 to December 2002.

The Drug Treatment Court reflects the objectives of the National Strategy on Community Safety and Crime Prevention, which include promoting partnerships to help reduce crime and victimization, and supporting community-based solutions to problems that contribute to crime. After 18 months of negotiations involving a committee of representatives from the Department of Justice Canada, the defence bar, duty counsel, probation and court services, the Centre for Addiction and Mental Health, the judiciary, and public health, the Toronto Drug Treatment Court officially opened its doors in December 1998. While targeted at prostitutes, youth, and visible minorities, other offenders who are addicts and drug offenders are eligible to enter the program.

Evaluation

The Toronto Drug Treatment Court program is being evaluated to assess the cost-effectiveness, efficiency, and overall success of the program.

The evaluation of the program adopts a quasi-experimental design involving an experimental group and a comparison group. The latter is comprised of offenders who undergo the initial legal and addiction screening and are deemed eligible for the program but who do not actually participate beyond the assessment stage. The two groups will be compared along a number of dimensions including demographics, risk level, recidivism, and quality of life and well-being. The experimental group will be tracked in terms of additional measures including program retention, completion and termination, and the use of sanctions and rewards while participating in the program.

The evaluation is conducted jointly by researchers from the Centre for Addiction and Mental Health and the Department of Justice and consists of a process evaluation, an outcome evaluation, and a cost-benefit analysis.

First Progress Report Findings

The first evaluation progress report was submitted March 1, 2000. While it is premature to expect any outcome results when only 11 months of data have been collected, the first report provides descriptive information about the operational characteristics of the program (including the treatment regime) and its governing structures. It also provides preliminary information about the experimental and comparison groups, referrals to community resources, and the perspectives and reactions of key players. Two of the issues of importance to the NCPC in the first progress report were (a) if the program was being targeted on the right groups, and (b) the capacity of community resources to support the program.

(a) Target Group

Track 1 clients consist of low risk, first-time offenders while Track 2 is comprised of those clients with longer criminal histories and periods of addictions. The vast majority of offenders presently in the program are Track 2. Nearly 90% have a prior criminal record and 57% were in custody at the time they entered into the program. As well, over one third had outstanding charges, and slightly less than one quarter (21%) were already under probation supervision. This reflects the shift in the program — admitting more serious offenders and those who present the greatest challenges and problems to the criminal justice and correctional systems.

Crack cocaine is the primary drug of addiction, and only 3% were admitted on a non-drug charge. Slightly over one third of offenders are male; 44% are black, 37% are caucasian, 16% belong to other visible minority groups, and 3% are Aboriginal. Nearly half of those admitted to the program are between the ages of 25 and 40, with the greatest bulge in the 35-40 group.

(b) Experimental/Comparison Group Similarities and Differences

The Toronto Drug Treatment Court program began formal operations on December 1, 1998, and 129 people have been admitted since its inception. However, because the data collection for the evaluation did not begin until April 1, 1999, there are 75 clients in the experimental group and 29 people in the comparison group. The comparison group is comprised of clients who are eligible for the program but who decided not to enter the program or who, upon admission to the program, did not attend assessment, treatment, or court.

There are more males and twice as many black clients in the experimental group than in the comparison group, and more of the experimental group was on crack cocaine. By contrast, more of the comparison group was in custody at the time of admission to the program, more of the group was Aboriginal, and more had only drug-related charges. There are similar proportions in the two groups with a prior record and outstanding charges. The age span of the two groups is also similar, even though the experimental group has more of the older clients.

Because the numbers are small it is still too early to infer the reasons for the differences between the two groups.

(c) Retention Levels

As of December 31, 1999, 42 of the 75 clients (56%) in the experimental group were still participating in the program. Of the clients no longer in the program, 20 (27%) were expelled; 4 (5%) withdrew; and 8 clients (11%) were terminated from the program as they had failed to return to court or to treatment. One client (1%) from the experimental group has successfully completed the program. In total, nine people have graduated since the program officially began.

(d) Court Performance

While still preliminary, the court performance sample data reveal that more rewards than sanctions are imposed and, even when sanctions are imposed, they are the less punitive ones. The other important court performance finding is that nearly three quarters of the clients have not re-offended while in the program. For the small group that did re-offend, drug offences, followed by administration of justice offences, were most common.

(e) Community Referrals

The community referral data shows that slightly over one half (55%) of the sample required a referral to a community service. Females required referrals more often than males. Client referral needs are also fairly extensive because on average, five referrals were made per client. Housing, followed by job training and education, were the most common referrals. In understanding the capacity of the community to support the DTC, it is important to note that in nearly one third of referrals, clients were not accepted because of lack of availability of the service or because of waiting lists.

(f) Key Player Perceptions and Reactions

The first round of client and non-client interviews revealed significant agreement about the strengths and weaknesses of the court but, on average, the majority of respondents expressed optimistic views about the court and agreed about what needs improvement. Generally, respondents felt the program differed from the traditional court in positive ways including the lack of formality and the fact that the judge gets to know clients. Respondents also agreed that consistent with a harm reduction philosophy, measures of "success" should not be narrowly defined, and that the majority of clients were well selected for the program and were committed to it and to their own personal growth and change.

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Conclusion

The Toronto Drug Treatment Court is an experimental program with the potential to provide a model for other jurisdictions and be replicated throughout the country. While it is difficult to make definitive statements based on the preliminary results to date, the program appears to have promise and more detailed process information will be provided shortly.

The National Crime Prevention Centre will release periodic updates that reflect the interim and final reports of the evaluation.

5.4. The Criminal Justice System: Significant Challenges – 2002 [41]

Efforts to maintain fairness: New courts.

- New courts are being established for mentally ill offenders and users of illicit drugs.
  - In May 1998, a mental health court was established in Toronto to hear in a single courtroom all cases where accused are mentally disturbed. In January 1999 a new drug treatment court opened, with federal funding of about $1.6 million over four years. A similar court was established in Vancouver in December 2001.
- There are also new courts that address the needs of Aboriginal peoples.
  - In October 2001, the Gladue (Aboriginal Persons) Court was established in Toronto; similar courts have been established in Saskatchewan and Alberta.

5.5. Drug Treatment Court Of Vancouver -2001 [42]

VANCOUVER, DECEMBER 4, 2001 - Canada's newest Drug Treatment Court is set to open December 4th in Vancouver, British Columbia. The announcement was made today by the Minister of Justice and Attorney General of Canada, Anne McLellan, and the Solicitor General of Canada, Lawrence MacAulay, in collaboration with the Attorney General of British Columbia, Geoff Plant, and the Solicitor General of British Columbia, Rich Coleman.

"The Government of Canada is pleased to be working with the Government of British Columbia, and the City of Vancouver, in this important undertaking," said Minister McLellan. "This project is an example of how the criminal justice system--the police, the judiciary, and the Bar--and the broader community can come together to deal with the underlying causes of criminal behaviour, and help break the cycle of drug addiction, crime and victimization."

The Drug Treatment Court of Vancouver (DTCV) is a pilot project that aims to reduce the number of crimes committed to support a drug dependence by reducing drug addiction through treatment services. In addition, the project will connect people receiving treatment with community services that are best able to deal with their related social, health, and economic needs.

"Drug addiction and related crimes are serious problems that affect everyone but it's been clear for some time that we needed to find new ways to address these issues," said Minister Plant. "The drug treatment court is an innovative and effective way to protect the public and reduce the burden on the justice system caused by repeat drug offenders."

"The objective is to enhance public safety. People who commit crimes as a result of their addiction will be getting much needed treatment," said Minister Coleman.

By 1998, there were an estimated 11,700 injection drug users in Greater Vancouver, with a large percentage living on the streets or in temporary housing in a few square blocks in the Downtown Eastside. According to a 2000 report by the City of Vancouver, the total number of overdose deaths in British Columbia had risen from 39 in 1988, to 331 in 1993. Since then, an average of 147 illicit overdose deaths have occurred per year in the city of Vancouver alone.

Drug abuse and addiction are chronic problems often associated with persistent criminal behaviour, violence, family discord and health problems. Without proper addiction treatment, the rate of criminal recidivism is typically very high.

"This project is testament to the capacity of a community to work together in the development of an innovative solution to crime and victimization," said Minister MacAulay. "All the partners, and every level of government, recognize the importance of coordinating efforts to reduce the social, health and economic costs of substance abuse."

The members of the DTCV team, consisting of a judge, crown prosecutor, defence counsel, case managers, and treatment providers, will monitor each participant's progress carefully. A comprehensive team of therapists and case managers will provide treatment services for court participants, as well as referrals to other services. By providing a treatment option for those caught up in the criminal justice system, it will help those individuals

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[41] 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

[42] http://www.sgc.gc.ca/Releases/e20011204.htm

end their addiction, as well as reduce the burden and long-term cost of processing high numbers of drug-related cases and repeat offenders.
"The establishment of a drug court in Vancouver is welcome news," said Vancouver Mayor Philip Owen. "This is an important step forward for the city's drug policy, *A Framework for Action*, which includes a drug court as an urgent action along with prevention, treatment and harm reduction. Drug courts are an effective tool that recognize the need to treat drug addiction in order to reduce property and other crimes. The federal, provincial and city governments have worked hard to make this drug court happen and we look forward to co-operating on further actions to improve Vancouver's drug problems."
The Government of Canada's funding is being provided through the National Strategy on Community Safety and Crime Prevention's Investment Fund, administered jointly by the Department of Justice and the Solicitor General of Canada. The National Strategy is providing $1.7 million over four years to support the project. Through the course of the project, the National Strategy will conduct rigorous process and outcome evaluations through a third party.
British Columbia is providing $1.7 million for treatment, as well as funding court operations, case managers and legal aid.
The Drug Treatment Court of Vancouver pilot project is the second of its kind in Canada. The first Drug Treatment Court was established in Toronto in 1998 as a pilot project of the National Strategy, along with the Government of Ontario, the Ontario provincial court and the Centre for Addiction and Mental Health. It is also being funded under the Crime Prevention Investment Fund.
The launch follows an announcement early this year that the Governments of Canada, British Columbia, and the City of Vancouver, would be working in partnership to develop the new Drug Treatment Court.

5.6. Alternative Justice, Testing the Waters-2001[43]

I have been invited here to speak to you about alternative justice and I am grateful for the opportunity to share my experiences with you and some thoughts.

I realize that you are law students and will be leaving these classrooms some day to begin your own careers as lawyers. You will no doubt, be faced with the same reality that many new lawyers are faced with at that time and that is that you don't really get taught everything that you will need to know to be a practising barrister or solicitor. There are things left for you to discover on your own to be assimilated into your already vast legal memory banks. Such things as legal aid billing forms and form letters and negotiating a claim out of court are examples of things that for many of you will be new experiences that don't get explained in the legal training of law school. Another such matter is relatively new yet old concept of Restorative Justice AKA alternative justice.

Maybe I am wrong on this but I would bet that not too many schools yet have this as a formal part of law school training. For me I can say that when I heard the term it seemed vague and uncertain and even when you near someone explaining it, it sounds some how made up or unreal. I think this is so because it is something that is not from what can be called the conventional sources of learning. Academic writing normally comes from highly educated professionals who are well known for their published legal theories about things like mens rea or evidence or constitutional matters. Restorative Justice however has had a different beginning that seems to come from the needs and concerns of ordinary citizens.

When I read through Judge Stuart's report of Aug. 1996 entitled "Building Community Justice Partnerships, Community Peacemaking Circles, A description of the Yukon Experience" it became clear to me that this was not a theoretical essay but rather a report based on his experience with people. His ideas and solutions fascinated me. I have tried to follow his advice in my town of Prince Rupert where I am a sitting Provincial Court Judge. Restorative Justice is really at its base a criticism of the current justice system. Whereas the movement towards finding alternatives to the existing system seems to have begun within First Nations

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[43] Judge Steven Point, Provincial Court of British Columbia, is program alumus 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)

communities, it seems to have grown to a search for an alternative for all Canadians. It begins with the proposition that the current system is not working well. It is too expensive, it is to complex, it is not inclusive, it takes too long to get results, it ignores the needs of victims, it is adversarial in nature, it does not promote harmony or wellness in the community or family from which the offender is from, it requires specialists to travel in and interpret the inner workings of the system. These are but a few of the complaints levied at the current justice system not only in Canada but also in the USA, Australia, Japan, and many others. The central concern is that Canadians have abdicated their responsibility for managing conflicts within their families and their respective communities. That they are now outsiders watching a slow, incomprehensible system deliver what seems to them to be injustice and not justice? That the system's high cost is not justified when one examines the results, that is the crime rate, and the recidivism rate. Proponents of restorative justice want this power or ability to manage conflict locally restored to them through what are called peacemaking circles. The circle is made up of member of the community who sits together and works out a solution that is alternative to the typical jail sentence imposed for criminal behavior. They see jail time as a short-term solution that only delays the inevitable problem, which is to heal the relationship between the offender and the victim. Jail is a costly solution, that doesn't work. It does not bring about rehabilitation, nor does it reduce the crime rate and reduce the prospect of reoffending. Restorative justice is about restoring to family and community the responsibility for sustaining healthy relationships and harmony by locally managing conflicts.

If all of this sounds too hairy fairy to you, well at first blush it does sound that way, but I can tell you that I am now a believer. Now I don't want to leave you with the impression that I am an expert on this subject because I am not, nor should you think that because I am aboriginal that I have any better knowledge of restorative justice methodology than anyone else, but I can say that I think I understand it and am willing to give it a try. So here is what I have done so far.

First of all I am aware of the sentencing principals in the Criminal Code which now have restorative justice aspects to them. I have read the Gladue decision and realize that as a Judge in the Provincial Court I can ask for certain things regarding alternatives that may exist in First Nations communities before passing sentence on Aboriginal offenders. I have attended the lectures given by her Honour Judge Turpel Lafond in which she explains the process, the dos and don'ts of sentencing post Gladue. When I raise this issue 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.

Anyway there I was in court one day and it was a family matter in which the children, four of them were now in the ends of the Director for family and child serves. The question was whether they should be returned to the mother or not and in this process the First Nation has a right to be heard. Counsel for the First Nation requested that we move to the community Hall to allow more members attend since the courtroom could only commodate twenty people. I thought, what a good idea, lets go to the community hear from the people in their own turf, perhaps we can get a dialogue going about local solutions to these kinds of problems. Well the first issue came from the director who did not wish to attend to the community hall and if was directed to attend would not speak. I said that that as fine, but that we were going. Then counsel for the mother asked who was going to speak could anyone speak and what order? I said that I did not know, but that since it was their request we would be following their protocol.

That afternoon, we moved the whole court, sheriffs, clerk, witnesses and lawyers to the local community hall where people were already gathering. It was a basketball gymnasium with one side of the room for seating. The main floor was taken up with chairs and they had set up a semi-circle of chairs for the lawyers and clerk on one side, the hereditary chiefs on the other side and me in the middle. The Chiefs wore their button blankets and cedar hats. The proceeding began with a song and prayer. The main chief, then addressed the gathering in his own language and then in English. Elders in the audience also wore their button blankets and sat, watching and listening with great interest. Every now and then someone would bring coffee to them as they sat and waited. Then I spoke briefly about why we were there and what we hoped to accomplish. We were there to hear from the people. These children were from their community. The mother was one of their own as family member and community member. They were all well aware of her situation and the history of the Ministries involvement. Individual members were now given an opportunity to address the court through a microphone placed in the center of the room.

First the other chiefs spoke about their community and the history of their village. Then mothers took the floor, to talk about how they had been taken by the ministry as children and how that effected their lives. They spoke of how the ministry had then taken their children and how that effected them. Mothers openly wept as the lawyers and court staff watched in to silence. One speaker was the local bus driver who spoke about the mother and how the kids looked every morning. Another spoke of how helpful the mother was during funeral feast and gatherings. That she always arrived with food for the family and helped clean the home for the visitors. Other tribal chiefs spoke of how they have tried to get children returned without success. The session went on to about six o'clock, when one of the chiefs remarked that the elders were getting tired and cold. We adjourned to the next day. The speakers came to court and continued for the entire morning speaking on behalf of the mother.

I really did not know what to expect from this approach. I didn't know if they were going to suggest a solution or not. What did occur however was that their feelings on the matter were heard. They held long term resentments for past treatment by the ministry for family and children. If nothing else they finally felt like they were a part of the process. What happened in the end was that they did develop a solution that was accepted by the ministry. I don't know if it was because of the community hall experience but I like to believe that that experience made a difference.

What I think is all too often overlooked is that this system of conflict resolution was brought here and imposed on the Aboriginal People who don't feel like they are part of the process. What we are beginning to hear from the main stream is that they too feel the same way but for different reasons. Alternative justice is about bringing the community back into the picture if that is what they desire. It's about allowing communities to find their own solutions to problems that are local and on going.

The justice system can not be all things to all people but it can open its doors and invite others to help offer alternative solutions to long term problems. A healing circle can bring in those parties that have seen affected by the incident face to face to air out their concerns. The offender can hear and see the pain that he or she has caused. Other family members can accept responsibility as well as the offender in some cases like young offenders so that hat person isn't standing alone. Restoring he harmony becomes much more important then punishment. Reconnecting he offender with family and friends can lo a lot more for the recivitism rate then ret another probation order to do community work service. Any justice system that aims at resolving conflicts is, only as good as the support and respect it enjoys from the people it intends to service. There really need to re-examine our current system to make it user-friendly, accessible, understandable and ultimately fair and just.

Before concluding I would like to hare another example of this process that have experienced. I was in court on a youth criminal matter and about to deliver my sentence on the young man when a call came in from the Chief of the youth's community. She asked me if I would consider moving the hearing to the community to allow the elders to participate. I agreed. Two weeks passed and I found myself with the court staff and one sheriff on a small plane heading to the remote village on the west coast of B.C. The boy had plead guilty to cutting in half two logs that were being prepared for a feast hall. He had also thrown into the salt water two chain saws that were the property of the First Nation. The elders wanted a public apology in a traditional feast called a shame feast to occur. When we arrived we were greeted by the Chief and her father who was their hereditary chief. He welcomed us and thanked us for coming to their community which had no roads or cars only a warf for boats and lanes. Inside the community hall where court was to be held, they had tables set up in a feast fashion with dishes and bread .ready on them. I got ready and the skier announced "all rise" and when I entered every seat was taken up by family and community members. Once again the proceeding was begun with a prayer and a speech from the hereditary chief and then court commenced. The young man (accused) came forward with his family and made his public apology. The elders listened and then they each spoke to him. They gave him advise and thanked him for following through with their old ways. I was advised that he had to gather the food for the meal and the gifts that had to be given out as part of the potlatch. He made a commitment to replace the logs from his families land and to replace the saws. At the end just before the meal his grandfather spoke. He cried for his grandson and he too apologized to the elders for the boy's actions. He commented how it had strained their relationship and was glad that this was now done. He crossed the floor and embraced the old chief and both wept. It was a very moving and solemn moment that seemed to last a long time. Everyone watched in silence. After that the meal commenced I changed to my street clothes and joined the others at one of the tables. The boys family began to bring out the meal which included clams, fish, potatoes, home made bread, fruit and much more. Just when I thought it was ended, a speaker got up to speak for the young man, and his family and friends openly pledged assistance both financial and otherwise for him

to complete his obligation to the elders. Then his family came and gave to each guest a small gift to take home to remember that this happened. I still remember with laughter the moment when the sheriff asked me if he could keep his gift. I explained that he must keep it otherwise the family would be offended.

This kind of reconciliation would not have been possible if I had merely given another period of probation and perhaps restitution. The offender was reconnected to his family and to the community at large. In the end he accepted responsibility as did his family for his actions. It was all very good.

My intention was to speak with you briefly about Restorative Justice and then to share with you two of my experiences with trying to implement that which I have learned. What I discovered is that I have a lot of learn. I hope that you have learned something today. Thank you for listening. Thank you.

5.7. Aboriginal Justice Strategy (AJS) Trends – 2000 [44]

5.7.1. Court Circuit

- Nunavut and the Northwest Territories: The most obvious problem articulated by these northern projects is the limitations inherent in the circuit court. In this area the projects speak about time lags between the event and its resolution as well as the normative problems with justice delayed.
  - While community-based justice programs are a mechanism developed to address this (as well as other conditions), circuit court is still a factor in how the projects operate and it is still an issue for these projects.

5.8. Aboriginal People and the Canadian Justice System-1998[45]

The Circuit Court as Absentee Justice System

Most non-urban Aboriginal communities across Canada are serviced by circuit courts. Based in central urban locations, circuit court parties travel to these communities by road in the south and (usually) by air in the north. The northern fly-in court party usually comprises the judge, court clerk, Crown prosecutor, and legal aid counsel. Don Avison, [10] a former Crown counsel in the Yukon, described the often-tenuous relationship between the circuit court party and the community:

"I have strong memories of how difficult it was to get people to come to court there, even those who were actual parties to the disputes. I remember days in Carmacks, and other Yukon communities, when I was there in court trying to sort out what the appropriate response or sentence should be, knowing that I was part of a group of three the judge, the prosecutor and the defence lawyer who probably knew less about what had happened than anyone else in the community, and we were the ones there to decide what the consequence should be. I also remember many times when I heard a dull rumble of voices behind me and I would know that, somehow, I had just fouled up the facts and there was no way to fix it."[11]

Many Aboriginal offenders facing sentence at circuit courts are intimidated by the process. Derek Custer and Cecile Merasty, two members of the sentencing circle committee at Pelican Narrows, Saskatchewan, explained that local offenders understand neither court procedures nor the English language. As a result, they usually stand mute before the judge, hoping their sentencing will be expedited.[12] This sense of confusion and intimidation has also been described by defence counsel Nick Sibbeston of the Northwest Territories, who commented that "[t]he general impression Dene people have of the court circuit is that a bunch of strangers, most of whom are nonnative people, have come to town." He said these people "see the court proceedings as

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

[45] Ross Green, B. Comm., LL.B., LL.M. Mr. Green has practised law in several of the communities described in this book, Justice in Aboriginal Communities: Sentencing Alternatives, and has advocated for the kind of sentencing alternatives he describes therein. Mr. Green currently lives and practices law in Melfort, Saskatchewan.

Editor's Note: The following is Chapter 3 of Ross Green's book entitled, Justice in Aboriginal Communities : Sentencing Alternatives, originally printed in 1998 by Purich Publishing in Saskatoon, Saskatchewan. The editor would like to thank both the author and the publisher for granting permission to reprint an excerpt from Mr. Green's book. http://www3.sk.sympatico.ca/greer/index.htm

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very strict and formal, and for most of them, scary."[13] Estrangement from the circuit court system was also evident in the comments of Harry Morin from Sandy Bay:

"With the probation officer or the magistrate [the judge] ... you only see him once a month. You don't care. You know, 'I'll get away with this, I'll get away with that. They're not going to know.' Well, of course, nobody knows because they're gone. Nobody sees them until the next court date. Here, he [the offender] knows the people that are involved, and he knows the people that care and they keep an eye [on him], and they tell him that right in the circle, 'If you ever need any help, if you need someone to talk to, if something's troubling you, we're available.' And if you don't have a phone, you know, and a lot of times the probation officers won't accept a collect call, what do you do? When the pressure gets so tough, do you just say, 'To hell with it?' Well, basically, that's what the system is doing. Here, [in Sandy Bay] you have your community of people. You know who is there. You know who you can talk to."[14]
I frequently encountered such feelings of estrangement in the communities I studied.

Many problems have been associated with the administration of justice by non-resident circuit courts. These include large court dockets, time constraints, lack of interpreters for Aboriginal offenders, and cultural differences between court personnel and Aboriginal offenders and communities. In northern Saskatchewan and Manitoba, circuit courts regularly face heavy caseloads. For example, despite an extremely high case count, Sandy Bay is allocated only one court date per month. Constable Brian Brennan indicated Sandy Bay had the second highest case load per member in Saskatchewan, next to La Loche. He reported that Sandy Bay had a total yearly load of nine hundred cases, shared by three officers who functioned without secretarial staff.[16]

Sentencing hearings in such communities are often conducted quickly with little participation by offenders, victime, and local community members. During my appearances in the courts of central Saskatchewan, I have often experienced days on which more than fifty Aboriginal accused have appeared. As the vast majority of these accused either entered guilty pleas or were found guilty, there was little time to consider offenders as individuals during sentencing. This case-processing approach has been described by Judge Fafard:

"I'm really not interested in making more sausage or better sausage or adding spice to the sausage. Personally, I want to see a change away from that. I want to see us do good work. I sometimes feel it doesn't really master if I do the forty or fifty cases before me on the docket in the morning, because if I do get them all done, I will not have done them very well. If I could do just a few of them and do them well, I would probably be further ahead than having case-processed them all and having done a bad job. So what we have at the moment, I believe, is an offender-processing system. It's not a criminal justice system because we're not achieving justice. We're not resolving the conflicts and the problems that are brought to us, and I think that our present system, as we operate it, just doesn't have the wherewithal to do that."[17]

Given current restraints on public funding in all sectors of government, a significant increase in court resources to allow for the additional time and personnel required to move away from a case-processing system appears unlikely. The more likely scenario is that we shall see incremental changes to conventional sentencing practice based on the requests and advocacy of lawyers or lay community members or Given current restrains on public funding in all sectors of government, a significant increase in court resources to allow for the additional time and personnel required to move away from a case-processing system appears unlikely. The more likely scenario is that we shall see incremental changes to conventional sentencing practice based on the requests and advocacy of lawyers or lay community members or on the willingness of judges to take risks and depart from the status quo.

A further explanation of the seeming detachment displayed by Aboriginal offenders at conventional sentencing is that facing a judge is viewed as simpler than facing one's own community. This view was echoed in comments made by Constable Brian Brennan of Sandy Bay, who explained differences between conventional sentencing and circle sentencing :

"And it really actually confronts the accused a lot more ... standing ... before his community, and admitting that he was wrong and explaining why he did it, than to stand before a stranger. It's easier to stand before a stranger for four to five minutes while the judge sentences you and be clone with it, than to sit for an hour or two, maybe even three, and have a number of people criticize your character and your actions, and you have to defend yourself"[18]
These comments reflect the impact of local systems of social control on offender response, and confirm the statue of circuit court judges and personnel as "strangers" and "outsiders."

: The relative isolation of rural and northern communities may be a factor in the relationship between the court and the community. Local participants and resources may be more easily identified and accessed in northern Aboriginal communities that are geographically isolated from the larger centres of the South and whose population is generally less transient. Constable Brennan associated community isolation and population stability with the availability of the local support systems he viewed as prerequisite to effective circle sentencing. He contrasted the situation in Sandy Bay with that of the Red Earth and Shoal Lake Reserves, 250 kilometres (155 miles) to the south, where he had been stationed previously:

"The main difference is that Sandy Bay is an isolated community.... I think sentencing circles can work in any community anywhere if there's the proper support structure. I don't think that in a place like Red Earth and Shoal Lake unless that support structure's there ... that it's going to work. They're [the residents of Red Earth and Shoal Lake] on the move. They move back and fortin between Nipawin and the reserves and Prince Albert ... so much that you don't have the solid core community support that you need to have a sentencing circle work."[19]

: Although time constraints and separation from local communities and local culture are problems faced by circuit courts sitting in Aboriginal communities, one advantage appears to be the broader discretion over the sentencing process exercised by circuit court judges in comparison with urban judges. A significant majority of the sentencing circles conducted in Saskatchewan by the fall of 1997 had been conducted by northern judges operating out of La Ronge and Meadow Lake. During a sentencing circle on April 19,1995, at Sandy Bay,20 Judge Fafard estimated that he had conducted between sixty and seventy sentencing circles. In addition, Judge Bria Huculak and Judge Ross Moxley, both previously of La Ronge, and Judge Jeremy Nightingale of Meadow Lake had been active in conducting sentencing circles in northern Saskatchewan. Judge Huculak stated unequivocally that circle sentencing development in northern Saskatchewan had been essentially "judge driven."[21]

: The tendency of northern circuit judges to depart from conventional practice is not new. This is reflected in the following description of a 1978 court hearing conducted by Judge Jim Slaven of the Territorial Court of the Northwest Territories:

"The court party arrived in Rankin by plane from Yellowknife at noon on the trial date. It was an autumn day in 1978 and Judge Slaven was ready to proceed. But a group of Rankin people - Inuit - asked him to delay proceedings. They were calling a community meeting to talk about the young man [the accused] and his fate. 'It was the first time that such a thing had happened in Rankin,' the judge said, 'the first time the local people had ever set clown together. You see, coming from all various backgrounds the way they had, different strains of Eskimo, they'd never merged as a real community. There was a professor up there, fellow named Williamson from the University of Saskatchewan, who'd been going to Rankin for eighteen years, and he said this was the old traditional Inuit way of doing things, meeting together and looking after their own. Well, hell, under those circumstances the court was pleased to stand aside for a few hours. That might sound ridiculous to [a] judge in the south but northern justice is different.' "[22]

This breadth of judicial discretion allowed innovation by individual judges to significantly affect the relationship between court and community. Greg Bragstad, a participant in several sentencing circles at Sandy Bay, commented on the local impact of Judge Fafard:

"Judge Fafard I find, anyway, has made a tremendous impact here and has, I think, in himself ... made a lot of changes and allowed those things to happen and allowed people in the community to be responsible and so there's a whole lot less anger in the community towards him, than there [was] in the past. Because he's allowed the community to take responsibility. "[23]

In addition to the systemic problems and advantages of circuit courts described above, mis-interpretation of information about and of behavior by Aboriginal offenders in the conventional justice system has been a concern.

5.9. Diversion Programs for Adults - 1997[46]

Dedicated Drug Treatment Courts

[46] Joan Nuffield, Ph.D, Solicitor General of Canada, Diversion Programs for Adults, 1997,http://www.sgc.gc.ca/EPub/corr/e199705/e199705.htm

An innovation in the handling of "low-level" drug offenders in the U.S. since the late 1980s has been special drug courts. Although many of these are aimed solely at speedy prosecution of drug offenders, there are two dozen or more which target treatment. Variations exist in many program aspects, including the stage at which diversion is available (deferred prosecution or sentence consideration). The program is based on a number of premises. They include, for example, that freedom from drugs is a long-term goal, treatment should begin with detoxification immediately after the "crisis" occasioned by the arraignment, the judge should be actively and frequently in contact with the offender, the program should include attention to education, employment, and family issues, and relapses are to be expected and dealt with in court immediately without resort to lengthy imprisonment.

It is too early to tell what kinds of outcomes to expect from treatment-oriented drug courts, but their advocates are enthusiastic (see, e.g., Tauber, 1994; Dickey, 1994). The oldest established such court (since 1989), in Dade County, Florida, is a deferred prosecution scheme promising dismissal upon successful completion of the one-year treatment program. It targets felony drug possession defendants with up to three prior felony non-drug convictions and any number of prior felony drug convictions. The program includes counselling, acupuncture to assist with withdrawal pains, fellowship meetings, education and vocational services, along with active monitoring through urine testing and regular court appearances in which the judge inquires into progress. The program had an active caseload of about 1200 cases in 1993.

An evaluation by Goldkamp and Weiland (1993) used a comparison sample of similar drug offenders who had been processed in the years before the introduction of the drug court. Eighteen months after program completion, 28% of successful program graduates had been rearrested, about half the rate for the comparison group. New offences were also less serious, on average, than for the control group. The average time to rearrest for the favourables was 235 days. Bench warrants for clients who failed to appear in court or suffered a relapse in treatment were frequent; fully 54% of clients had at least one bench warrant during the program. Typically, the outcome was from two to eight days in jail, the number of days escalating with subsequent violations. About half the defendants presented with the option declined it, choosing to take their chances in court. Although the program attempted to avoid "net-widening", it is not clear how much was occurring. The program's net cost per completed case was $800 for one year. Most clients, however, contributed to the cost of their treatment, thus lowering the net cost.

6. Relevant Documents, Studies and Practices – USA

6.1. Problem-Solving Courts -?[47]

Over the past decade, hundreds of experimental courts have sprung up across the country, testing new solutions to problems like addiction, domestic violence, child neglect and quality-of-life crime. These "problem-solving courts" include specialized drug courts, domestic violence courts, community courts, family treatment courts, mental health courts, gun courts and others. While each of these initiatives targets a different problem, they all use the authority of courts in new ways – to improve outcomes for victims, communities and defendants. And, in the process, they all seek to shift the focus of courts from simply processing cases to achieving tangible results like safer streets and stronger families.

This amounts to a significant departure from business as usual in the courts – an institution that is not known for embracing change lightly. What does this look like in practice? Instead of adversarial sparring, prosecutors and defenders in some problem-solving courts work together to encourage defendants to succeed in drug treatment. Instead of embracing the tradition of judicial isolation, judges in problem-solving courts become actively involved in their communities, meeting with residents and brokering relationships with local service providers. Perhaps most importantly, instead of being passive observers, citizens are welcomed into the process, participating in advisory boards, organizing community service projects and meeting face to face with offenders to explain the impact of their crimes on neighborhoods.

The concept of "problem-solving justice" has emerged gradually over the past several years, as the idea that courts can achieve better results by changing the way they do business has snowballed. (See, for example, "Neighborhood Justice at the Midtown Community Court," by John Feinblatt, Greg Berman and Michele Sviridoff, from "Crime and Place: Plenary Papers of the 1997 Conference on Criminal Justice Research and Evaluation," and "Making the Case for Hands-On Courts," by New York State Chief Judge Judith S. Kaye, Newsweek, Oct. 11, 1999.) Today, there are literally hundreds of courts that are testing new approaches to difficult cases where social, human and legal problems intersect. These include community courts that seek to improve the quality of life in neighborhoods struggling with crime and disorder, drug courts that link addicted offenders to drug treatment instead of incarceration, family treatment courts that seek to stop the cycle of drugs, child neglect and foster care, and domestic violence courts that emphasize victim safety and defendant accountability. For all of their diversity, these emerging court models do share some unifying principles, the most basic of which is their problem-solving orientation.
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Principles

There are several shared principles that distinguish problem-solving courts from the conventional approach to case processing and case outcomes in state courts.

Case Outcomes

Problem-solving courts seek to achieve tangible outcomes for victims, for offenders and for society. These include reductions in recidivism, reduced stays in foster care for children, increased sobriety for addicts and healthier communities. As New York State Chief Judge Kaye has written, "...outcomes – not just process and precedents – matter. Protecting the rights of an addicted mother is important. So is protecting her children and getting her off drugs."

Judicial Monitoring

Problem-solving courts rely upon the active use of judicial authority to solve problems and to change the behavior of litigants. Instead of passing off cases – to other judges, to probation departments, to community-based treatment programs – judges at problem-solving courts stay involved with each case throughout the

[47] Community Justice Exchange, Problem-Solving Courts http://www.communityjustice.org/frameset.asp?pt=y&pg=CC_index.html

post-adjudication process. Drug court judges, for example, closely supervise the performance of offenders in drug treatment, requiring them to return to court frequently for urine testing and courtroom progress reports.

Informed Decision-Making

Problem-solving courts seek to improve the quality and quantity of information available in the courtroom through, among other things, innovative computer technology, frequent court appearances and on-site professional staff. With better information, judges can respond more swiftly and effectively to problems and hold defendants, as well as partner agencies, to a higher level of accountability. In community courts, for instance, caseworkers conduct comprehensive evaluations of defendants to determine their exact social service needs, and many problem-solving courts use computer software linked to off-site partners to alert judges immediately about violations of court orders.

Collaboration

Problem-solving courts employ a collaborative approach, relying on both government and non-profit partners (criminal justice agencies, social service providers, community groups and others) to help achieve their goals. For example, many domestic violence courts have developed partnerships with batterers' programs and probation departments to help improve the monitoring of defendants.

Non-Traditional Roles

Some problem-solving courts have altered the dynamics of the courtroom, including, at times, certain features of the adversarial process. For example at many drug courts, judges and attorneys (on both sides of the aisle) work together to craft systems of sanctions and rewards for offenders in drug treatment. And by using the institution's authority and prestige to coordinate the work of other agencies, problem-solving courts may engage judges in unfamiliar roles as conveners and brokers.

System Change

Problem-solving courts promote reform outside of the courthouse as well as within. For example, family treatment courts that handle cases of child neglect have encouraged local child welfare agencies to adopt new staffing patterns and to improve case management practices.

Rigorous, independent evaluations of problem-solving courts are just starting to emerge, but the early results have been promising.

Results

Drug Courts

As the most well-established brand of problem-solving court, drug courts have the longest track record. The evidence suggests that drug courts have achieved solid results with regard to keeping offenders in treatment, reducing drug use and recidivism and saving jail and prison costs.

The most authoritative review of drug courts is a meta-analysis by Columbia University's National Center on Addiction and Substance Abuse that looked at fifty-nine independent evaluations covering forty-eight drug courts throughout the country. Among other findings, this study revealed that drug court participants are far more likely to successfully complete mandated substance abuse treatment than comparable participants who seek help on a voluntary basis. One-year treatment retention rates are sixty percent for drug courts, compared to ten to thirty percent among voluntary programs.

Community Courts

The most detailed evaluation of a community court is the National Center for State Courts's recently-published assessment of the Midtown Community Court (see "Dispensing Justice Locally: The Implementation and Effects of the Midtown Community Court," by Michele Sviridoff, David Rottman, Brian Ostrom, and Richard

Curtis, Harwood Academic Publishers, Amsterdam, 2000). The National Center's team of researchers found that the Court had helped reduce low-level crime in the neighborhood: prostitution arrests dropped sixty-three percent and illegal vending dropped twenty-four percent. The compliance rates for community service at Midtown were the highest in New York City – an improvement of fifty percent. Supervised offenders performing community service contributed more than $175,000 worth of labor to the local community each year.

Others

Less is known about the impacts of domestic violence courts, family treatment courts, mental health courts, re-entry courts and other newer forms of problem-solving justice. Their self-reported results are, perhaps predictably, positive – improved services for victims of domestic violence, reductions in probation violations, and increased numbers of respondents receiving needed services.

Moving Into the Mainstream

The press has taken note of these results – problem-solving courts have been widely featured in national magazines and television shows. Congress has noticed as well, authorizing the U.S. Department of Justice to make grants to promote drug courts and mental health courts across the country. (For example, in the most recent fiscal year alone, the Justice Department distributed more than $50 million in drug court grants.) In addition, the American Bar Association in 2001 adopted a resolution calling for "the continued development of problem-solving courts," and the Conference of Chief Justices and the Conference of State Court Administrators together passed a joint resolution in 2000 pledging to "encourage the broad integration, over the next decade, of the principles and methods employed in problem solving courts into the administration of justice."

Chronology

This chronology sets out some of the important milestones in the development of problem-solving courts. It is not intended to be a comprehensive history, but rather a starting place for those interested in exploring how problem-solving courts have developed.

1979

Herman Goldstein authors Improving Policing: A Problem-Oriented Approach in the journal Crime and Delinquency. Goldstein argues that the police should replace a preoccupation with procedures and law enforcement with a focus on developing effective responses to commonly observed problems.

1982

The Atlantic Monthly publishes Broken Windows, by George Kelling and James Wilson, in which the authors argue that low-level crime and community disorder creates an environment that encourages more serious crime.

The Protection from Abuse Court in Philadelphia, Pennsylvania, becomes the first court to assign one judge to hear all civil protection orders in one courtroom. The dedicated court staff makes the system easier to navigate and links victims of domestic violence to needed services.

1984

Cook County, Illinois, establishes a criminal domestic violence calendar with dedicated court staff. A waiting room for abused adults and their children is staffed by security personnel so that children have a place to stay while their mothers appear in court.

1987

Quincy County, Massachusetts, initiates the Domestic Violence Prevention Program, an integrated police, prosecution, and court response to family violence. This program emphasizes strict monitoring of probation for batterers and increased services for victims.

1989

Dade County, Florida, opens the first drug court in the U.S., sentencing addicted defendants to long-term, judicially supervised drug treatment instead of incarceration.

1991

Alameda County, California, founds the nation's second drug court in the Oakland Municipal Court.

1992

Dade County, Florida, establishes an integrated domestic violence court that hears both civil and criminal cases. Three judges are assigned full-time to the court, which is supported by case managers, attorneys, intake counselors, and a 24-hour hotline.

1993

The Midtown Community Court opens in the Times Square neighborhood of Manhattan. The nation's first community court, Midtown combines punishment (e.g., community restitution projects) and help (e.g., on-site drug treatment, job training, counseling) to hold low-level defendants accountable for their offenses.

1994

Congress passes the Violent Crime Control and Law Enforcement Act of 1994, which authorizes the Attorney General to make grants to establish drug courts across the country. By the end of the year, there are 42 drug court programs in the U.S.

Congress passes the Violence Against Women Act of 1994, which provides funding for the creation of the Violence Against Women Office (VAWO). VAWO works with attorneys and the Attorney General to enforce the act and to develop and manage funding programs, which assist states, tribes, and local communities in transforming the way in which criminal justice systems respond to violent crimes against women.

The National Association of Drug Court Professionals is founded. NADCP is the first professional association for practitioners of problem-solving justice.

1995

The Drug Courts Program Office of the U.S. Department of Justice is established to make grants for the development and establishment of drug courts. From 1995 to 2000, more than 275 drug courts are created with support from the Drug Courts Program Office.

1996

Marion County, Indiana, starts the Psychiatric Assertive Identification Referral/Response (PAIR) Program in Indianapolis, which many consider to be the nation's first mental-health court. The initiative is a comprehensive pre-trial, post-booking diversion system for mentally ill offenders.

The Brooklyn Domestic Violence Court, the first domestic violence court to handle indicted felonies, is opened in Kings County, New York. Defendants are monitored closely by the judge and are often mandated to batterer intervention programs. Victims are linked to a variety of services and counseling.

1997

Six states have established drug courts for juveniles, with 25 around the nation under way or being planned.

The National Center for State Courts completes the first detailed evaluation of a community court, Dispensing Justice Locally: The Implementation and Effects of the Midtown Community Court, by Michele Sviridoff, David Rottman, Brian Ostrom, and Richard Curtis. (The evaluation was recently published by Harwood Academic Publishers, Amsterdam, 2000). The team of researchers found that the Court had helped reduce low-level crime and improve compliance with community service.

Broward County, Florida, launches the first court in the country to call itself a mental health court. The court places mentally ill misdemeanor offenders into judicially monitored treatment.

1998

The Drug Courts Program Office reports that close to 100,000 drug dependent offenders have entered drug court programs since their inception and over 70 percent are either still enrolled or have graduated – more than double the rate of traditional treatment program retention rates.

The nation's second community court, the Northeast Portland Community Court, opens. The Court serves a community that has the highest crime, high school dropout and unemployment rates in the city.

Columbia University's National Center on Addiction and Substance Abuse publishes a meta-review that looks at 59 independent evaluations covering 48 drug courts throughout the country. Among its findings, the study concluded that drug court participants are far more likely to successfully complete mandated substance abuse treatment than comparable participants who seek help on a voluntary basis.

The Hartford Community Court, the nation's third community court, opens. It serves the entire city by working with problem-solving committees in each of the city's 17 neighborhoods.

1999

The Office of Justice Programs, U.S. Department of Justice, provides funding to nine jurisdictions interested in establishing re-entry courts, a new kind of problem-solving court that manages the return to the community of offenders upon their release from prison or other detention facilities. The first operating court is a juvenile re-entry court serving Mineral, Grant and Tucker Counties, West Virginia.

The drug court model is expanded to address the effects of addiction on families and parent-child reunification. By midyear there are 10 family drug courts (including the Manhattan Family Treatment Court) operating in the U.S., plus three programs that combine adult, juvenile and family programs.

Homeless Court begins official operation in San Diego, California. Most homeless defendants, many of whom have multiple cases pending, have their cases heard and resolved in one hearing, from arraignment through disposition and sentencing. Sentences, instead of fines or custody, often involve assistance at the homeless shelters or other community services as supervised by the shelters.

Newsweek publishes an opinion piece entitled Making the Case for Hands-On Courts, by New York Chief Justice Judith S. Kaye, in which she endorses the problem-solving approach.

2000

New York State Chief Judge Judith S. Kaye announces an ambitious plan to provide court-mandated substance abuse treatment to nonviolent drug-addicted offenders throughout the state. The new program makes New York's court system the first in the nation to adopt the drug court model on a statewide basis. The court system estimates that it will put nearly 10,000 additional defendants into court-mandated treatment and will generate over $500 million a year in incarceration and long-term taxpayer savings.

In a joint resolution passed at their annual meeting, the Conference of Chief Justices and the Conference of State Court Administrators agree to promote the widespread integration of problem-solving courts into state

court systems, citing their ability to improve court processes and outcomes while preserving rule of law, enhancing judicial effectiveness, and meeting the needs and expectations of litigants, victims and the community.

President Clinton signs the Law Enforcement and Mental Health Project Act. The bill, which received bipartisan support in both houses of Congress, authorizes the appropriation of up to $10 million in fiscal years 2001 through 2004 to fund up to 100 mental health courts.

California voters approve Proposition 36, endorsing treatment instead of incarceration for offenders arrested on drug possession charges.

By the end of the year, over 300 courts in the U.S. have developed special processes to address domestic violence.

2001

There are over 580 drug court programs operating in 47 states, and hundreds more in development.

New York's Chief Judge Judith S. Kaye announces the formation of a groundbreaking pilot project of integrated domestic violence courts which will ultimately be implemented statewide. A single judge has the authority to hear criminal domestic violence cases and any related issues, such as divorce, custody or visitation, that bring a family to court. A more informed judge will ensure that court orders are consistent and that appropriate crisis intervention services are provided to families.

The American Bar Association adopts a resolution at its annual meeting calling for "the continued development of problem-solving courts." The resolution asserts that problem-solving courts have the capacity "to improve court processes and court outcomes for litigants, victims and communities." The resolution also encourages "law schools, state, local and territorial bar associations, and other organizations to engage in education and training about the principles and methods employed by problem-solving courts."

6.2. Judicial Involvement And Understanding -2002[48]

Gone are the days when we juvenile judges limited our leadership to courtroom judgments and service club pontifications. Today's communities don't want to be told. They need involvement and they want to understand. In response, we have transformed ourselves into stewards of involvement and understanding.

One might say we are uniquely qualified to call people "to the table". Our ability to balance competing interests, facilitate discussion and encourage collaborative problem solving are indispensable to our communities. As juvenile judges, we are charged with working with our constituents to provide the best possible services and outcomes for our young people.

Yet there is need for restraint in our activism. It is difficult to discern a bright line between Canons which proscribe the appearance of impropriety and those which exhort us to improve the law and the administration of justice. Above all we are judges. We represent the third branch of government, whose independence and impartiality cannot be sacrificed. We are stewards of the court as well as of our communities.

Restraint is required also to temper judges' penchant to control. From my personal experience, I know how hard it can be for a judge to share decision-making power outside the courtroom. In meetings we may act as battering rams, while feeling we are just one of the group. We may interpret deference accorded us to be consensus, then proceed to announce conclusions, which are taken as edicts. Our lack of awareness of how this behavior can chill the participation of others can sabotage our goal of promoting community involvement.

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[48] Judge Don Owen Costello, Involvement And Understanding: Tools Of The Sublime, Reclaiming Futures, Building Community Solutions to Substance Abuse and Delinquency, March 2002?http://www.reclaimingfutures.org/pgJudicial.shtml Don Owen Costello's judicial career spans 16 years in state, municipal and Native American jurisdictions

Our challenge is to balance others' needs to be involved with our own. It is my calling to help judges develop this balance, a calling that comes to me rather naturally as a result of the continuing influence of my father, Howard Costello.

A family friend describes my father in one word: sublime. For 33 years, he was a high school math teacher and coach. His classes were clinics in group involvement. Nothing could sway him from his conviction that we teenagers could solve the most difficult problems. He posed questions carefully, made sure we understood them, peppered us with questions, facilitated our discussions, listened to our questions, responded with clear direction, rallied us when we became discouraged, and congratulated us when we had achieved the solution. From him we would hear: "What if you moved this number over there?" "Do you remember a similar problem we solved last week? Do you remember who solved it? Bob? Bob, will you come up here and help us out?" "Don't get discouraged." "Let's go back and redo the proof trying your suggestion, Anita." "You can do it!"

He gave us the questions and the tools, and despite occasional whining from lazy students and coddling parents, almost never provided us with the answer. Through his leadership, he instilled in us the desire to understand and to draw from each other in collaborating to solve problems.

From the start, my father's example has guided my life and my work. Upon first taking the bench, I suffered from an exalted sense of self. I foolishly thought that my office conferred upon me the power to turn juveniles' lives around by telling them the answers to their problems. And then, after realizing that young people in court rarely understood what had been said, I remembered my father and I tried listening. After this, I found it easy both sincerely and deliberately to respect and to involve young people in fashioning their own balanced dispositions. My next step was to involve the community in building a justice system which works with young people to build solutions to their problems. I became a steward of the court and of the community.

Recently I accepted the position of Co-Director of a five-year, national initiative funded by The Robert Wood Johnson Foundation. "Reclaiming Futures: Building Community Solutions to Substance Abuse and Delinquency" will provide funding and technical assistance to community collaboratives dedicated to the initiative's stated purpose.

Integral to the initiative is an ongoing Fellowship of twenty juvenile court judges to be first convened in late 2001. The Fellowship curriculum - now in the planning stages - will develop judges as leaders of community-based programs for substance abusing juvenile offenders. Fellows will be chosen nationwide. The Fellowship will reach out to other judges to encourage their involvement in our effort to create a culture of judicial activism and community stewardship.

A test of a judge's effectiveness is the ability to lead the community in building solutions to baffling problems. One such problem is juvenile substance abuse and delinquency. My father knows that involvement is the essential tool for solving such a problem. Like the Lakota Sioux, he knows that from involvement comes understanding. From understanding come solutions. We who understand these principles and practice them cannot support a system of justice entrusted to judges who merely lecture and threaten substance abusing delinquents. A judge should have far more to offer than that.

Stewardship presents a creative challenge. We are asked to leave the world in better condition than it was when we came. That requires engagement and involvement. Let it be said that during our watch we achieved the sublime.

6.3. Problem-Solving Who? - 2001 [49]

Don't look now, but the courtroom as we know it, the rigid legal arena of yesteryear, could be in for some significant changes in the not-so-distant future. There is a reform movement afoot, a decade in the making at

[49] Berman, Greg and Feinblatt, John, "Problem-Solving Courts: A Brief Primer" Law and Policy, Vol. 23, No. 2 (April 2001). This article, along with others by the same authors, represents the source material for the content of the above comments. The other articles can be found in Judicature, Vol. 84, No. 2 (September-October 2000) and Vol. 84, No. 4 (January-February 2001). cited in DeNovo, Problem-Solving Who? Volume XV, Issue VI, November/December 2001, http://www.wsba.org/DeNovo/2001/06/editor.htm

this point, and by some accounts gaining steam, that promises to shake things up a bit. Converts consider the new paradigm to be an answer to many of the difficult issues that the judicial system is facing. Skeptics, as always and not surprisingly, will require some additional convincing. In any case, for us forward-thinking young lawyers, it doesn't hurt to be ahead of the curve in thinking about such things.

The movement in question? Does the term "problem-solving courts" mean anything to you?

Well, if you haven't already, chances are that you will be hearing about the notion in the near future. It has been a topic of some discussion among, as Homer Simpson so eloquently calls us, law-talkin' guys. In fact, several jurisdictions have progressed beyond the talking stage and have successfully implemented innovative programs exploring the possibilities that the concept presents—indeed, even locally. Local specimens of this novel approach include Drug Diversion Courts and Mental Health Courts. Likewise, across the nation you will find philosophically-related courts in New York, Florida, Oregon, and California.

In a recent article on the subject[50] a couple of authorities on the matter characterized the nature of problem-solving courts. As they describe them, such courts

(1) "Use their authority to forge new responses to chronic social, human, and legal problems [such as] family dysfunction, addiction, delinquency, and domestic violence that have proven resistant to conventional solutions."

(2) "Seek to broaden the focus of legal proceedings, from simply adjudicating…facts and…issues to changing future behavior of litigants and ensuring the future well-being of communities."

(3) "Attempt to fix broken systems, making courts…more accountable and responsive to…victims, jurors, witnesses, litigants, [and] defendants."

Of course, there are well-reasoned arguments both supporting and questioning the value of changing the courts such that they follow the problem-solving model. The arguments in favor of modifying the traditional court in this manner are convincing.

Problem-solving courts are seen as a way to address issues such as the increasing costs and decreasing space in our jails. These courts turn to options other than incarceration when punishing individuals for their behavior, focusing on community service or work crews and the notion of restorative justice. These courts attempt to target the roots of criminal behavior and are designed to assist individuals whose behavior is the result of problems such as substance abuse and mental illness and, by doing so, reduce recidivism rates. For some judges the courts provide a welcome opportunity to remove themselves from they refer to as the "McJustice" assembly line theory of processing cases where success is largely based on disposing of a high number of cases.

On the other hand, it is not too hard to sympathize with those who are less-inclined to offer their full support. Some are uncomfortable tinkering with the court system, an institution based on tradition and precedent, certainty, reliability, and impartiality. They will question whether it is a place for overt judicial activism and collaboration amongst traditionally adversarial courtroom participants. Additionally, there are the issues like the potential for misguided coercion, equal protection problems, and paternalism, all of which, obviously, make legal-profession sorts slightly uncomfortable. Indeed, they are all valid concerns.

Ultimately, it is hard to predict the degree of willingness that the judicial system as it currently exists has to fundamental change. It may very well be a matter of evolution that the courts are powerless to resist. Likewise, it may remain a boutique notion that happily co-exists with the system that we all know and love…or at least tolerate. In any case, it is a topic that will be a point of discussion for some time to come and something about which we courthouse denizens should be aware.

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[50] Berman, Greg and Feinblatt, John, "Problem-Solving Courts: A Brief Primer" Law and Policy, Vol. 23, No. 2 (April 2001). This article, along with others by the same authors, represents the source material for the content of the above comments. The other articles can be found in Judicature, Vol. 84, No. 2 (September-October 2000) and Vol. 84, No. 4 (January-February 2001). cited in DeNovo, Problem-Solving Who? Volume XV, Issue VI, November/December 2001, http://www.wsba.org/DeNovo/2001/06/editor.htm

6.4. Alaska Court System – 2001 [51]

- In 1972 Chief Justice Boney gave the first State of the Judiciary address, in an effort to foster better understanding between the legislative and judicial branches of government and to engage in a dialogue between our two branches on how we can improve the justice system for the people of Alaska.
    - The legislature invited Chief Justice Boney to appear through a Senate Concurrent Resolution, dated in 1971 and signed by then Speaker of the House Gene Guess and President of the Senate Jay Hammond.
    - It expressed the hope that a State of the Judiciary address might bridge the "communications gap" between the legislature and the judiciary. I believe that this purpose of strengthening the cooperation and understanding between the legislative and judicial branches is as valid today as it was in 1971.
    - There are three touchstones by which we can measure Alaska's justice system as it enters the new millennium. They are Innovation, Collaboration, and Improved Access to the Justice System.
        - **Innovation**
          The face of justice is changing in response to new challenges and needs. In the criminal law arena, traditional justice approaches have produced some disappointing results, with repeat offenders who cycle through the criminal justice system.
            - ***Cost:*** *This is expensive for the justice system: Judges see the same defendants repeatedly, and the jails are housing these offenders in expensive beds with no realistic hope that once released they won't be back.*
            - ***Therapeutic Court:*** *Courts nationwide have been trying new approaches. One example is the therapeutic court model. These therapeutic court projects also referred to as* ***problem-solving courts*** *encourage prosecutors, defense attorneys, and judges to work together to reach beyond the immediate dispute that brings a defendant to court.*
                - Instead, there is a focus on the defendant's underlying problem, whether drug or alcohol addiction or a mental health problem.
                - How do these therapeutic courts work?
                    - An individualized plan is developed for a defendant, which usually includes drug or alcohol testing, treatment, and such other requirements as attaining a GED, finding and maintaining a job, and making restitution.
                    - Defendants are closely monitored and must come to court often, before the same judge. That judge becomes familiar with the defendant, and imposes immediate jail- time for non-compliance with the plan's requirements, while providing positive reinforcement when a defendant lives up to the plan's expectations.
                - ***National results*** show a distinct reduction in repeat offenses for the defendants who are involved with these programs.
                - ***In Alaska,*** we have three very promising ongoing projects that are based on this therapeutic court model:

[51] Alaska Court System, Chief Justice Dana Fabe, State of the Judiciary, Speech to President Halford, Speaker Porter, Senators and Representatives, and guests, February 28, 2001, http://www.state.ak.us/courts/state01.htm

- The ***Mental Health Court*** project began in the Anchorage District Court in 1998 as a collaborative effort of the court system, the Department of Corrections, law enforcement, and social services agencies.
    - This project has developed under the leadership of Judge Stephanie Rhoades, and is supported with funds provided by the Alaska Mental Health Trust. Mental Health Court focuses on chronically mentally ill offenders who would otherwise end up in jail for a variety of minor criminal offenses.
    - Appropriate treatment and residential alternatives have been developed for this vulnerable and under-served population.
    - As a result of their participation in this project, these mentally-ill individuals are spending fewer days in expensive jail beds. Instead, they are being directed into programs that can help them to avoid future criminal behavior and receive appropriate support and mental health treatment.
- Also in the Anchorage District Court, Judge James Wanamaker is using a therapeutic court model in conjunction with ***administration of the physician-prescribed drug Naltrexone*** to address criminal behavior influenced by chronic alcohol abuse.
    - The initial results are very promising. It appears that the use of drugs like Naltrexone, which curb an individual's craving to drink, may be an effective tool in our efforts to deter criminal behavior caused or aggravated by abuse of alcohol.
- Finally, in the Superior Court in Anchorage, work is underway to establish a ***felony-level drug court***.
    - We have received a federal grant to support the operations of this court.
    - Non-violent drug offenders who meet established screening criteria will be channeled into this project, which will emphasize intensive treatment and offender accountability.
    - Judge Stephanie Joannides has led the team that hopes to have this drug court up and running later this year.

- **Evaluation:** We expect that the Alaska Judicial Council will be conducting a formal evaluation of all three of these therapeutic justice projects. The Judicial Council does an outstanding job in its evaluations of the justice system, and with its help, I hope to be able to tell you more about the effectiveness of the therapeutic approach next year.
- I understand that the legislature may be interested in the possibility of ***using the therapeutic court model to address repeat DWI offenders.*** The court shares your interest in this approach, and we look forward to cooperating and collaborating with you as you develop this or any other appropriate model programs. Perhaps I can take a moment now to expand on this idea of collaboration and partnership between the court and the legislature, as well as the executive branch and local communities.

- **Collaboration**
  Projects such as the therapeutic courts not only incorporate innovative thinking but work best when there is a cooperative working relationship between the court and the legislature, as well

executive branch justice agencies including the Department of Law, Department of Corrections, Department of Public Safety, Public Defender Agency, and Office of Public Advocacy.

- **The delicate balance that exists among the three branches of government is the genius of our American system of government and of the Alaska Constitution. Yet, the checks and balances that are designed to protect individual rights and ensure individual freedom can quite naturally cause tension between our branches. One way of easing that tension is by increasing communication and by working on projects of common interest and concern.**

- **Legislature**
  The judiciary and the legislature share an interest in providing the citizens of Alaska with an efficient, cost-effective, and accessible justice system.

- **Executive**

  - *The court has worked collaboratively not only with the legislature but also with the executive branch.*

- **Community**

  - *The court also needs to reach out to develop partnerships within our communities, both to promote public understanding of the courts, and to ensure that the needs of its citizens are heard and recognized.*

  - Let me give you some examples of how we have been working to achieve this goal:

    - **Schools**
      For two years now, the Supreme Court has asked all judicial officers in the state to participate in a program in their local schools on May 1st, Law Day.

      - Last year, seventy-six judges and magistrates statewide put on educational programs for students either in the classroom or in the courtroom in over thirty communities. In this manner we were able to reach out to over 3200 school children and members of the public.

      - For example, right here in Juneau, Judge Patricia Collins presided over the trial of Goldilocks, who was found guilty of trespassing on the Three Bear's property. However, Goldilocks appealed, and Justice Bud Carpeneti found that errors had in fact occurred at trial and reversed her conviction.

      - School-court events like this occurred all over Alaska in conjunction with Law Day. Alaska's judiciary received national recognition for this program from the American Bar Association, and it is an effort that will continue in years to come.

    - **Youth courts**

      - Another example of the court's work with youth throughout the state is through the youth courts.

      - The Anchorage Youth Court has been in existence since 1989 and has provided a model for youth courts throughout the state and the country.

        - There are now 12 established youth court programs throughout the state, the most recent in Tetlin.

        - And there are five emerging youth court programs, in Klawock/Craig, Nome, Shishmaref, Wrangell, and Tok.

- In these youth court programs, young people who commit minor offenses consent to be judged and sentenced by their peers, rather than in the state court system.

- They are represented by student lawyers and judged by student judges who are trained and supported by volunteers of their local legal community.

- These programs are incredibly effective. Youthful offenders seem much more able to hear the judgments of their peers than the lectures of adults. And when a youth court judge imposes a sentence, it sends the clear message that these are not just the rules of adult society that have been violated -- they are the rules of our entire community. Although these youth court programs are not formally a part of our state court system, we support their operation by allowing use of state courtrooms and court facilities in many communities, and by providing other assistance when we can. For example, many judicial law clerks volunteer their time in the evenings to work as legal advisors to youth court participants. I have sworn in youth court attorneys and judges in Anchorage, Kenai, Mat-Su, and Homer, and I believe this movement promotes responsibility and accountability among our younger community members. It is a prime example of a successful partnership between the court and the communities that the court serves.

- **Adults in the community**

  - But our outreach efforts should not stop with the young people of our state.

  - *Justice Thurgood Marshall once reminded us that "the only real source of power that we as judges can tap is the respect of the people."*

  - I am convinced that the more Alaskans know about their courts, the more trust and confidence in our justice system they will have. We have a wonderful court system in Alaska with committed judges who work hard, with the goal of providing a fair trial in every case, according to the law.

  - And that is what **judicial independence** is all about members of the public trusting that when they bring a dispute of great importance to their lives into court, the judge is not going to be deciding based on personal whim or prejudice, public opinion or fear. The judge is going to be providing a fair trial, and deciding the case according to the law.

    - *Yet judicial independence and judicial neutrality do not depend on court processes being shrouded by mystery or judges being detached from their communities.*

    - *Maintaining a wall between the court and the community prevents the community from understanding the role of the court and keeps the court from fully enlisting the resources of the community.*

- Judges need to take a leadership role in reaching out to the public to provide education and to make our processes more understandable.

  - For the past two years, for example, the court's Fairness and Access Implementation Committee, led by Justice Robert Eastaugh and Fairbanks Superior Court Judge Meg Greene, has been developing and offering outreach programs to cultural and ethnic minority groups within Alaska's diverse population.

- To further promote judicial outreach efforts, the court is planning to conduct a "Meet Your Judges" program in all thirteen superior court locations throughout the state. This will provide an opportunity for community members to meet their local judges in an open forum and to ask questions in an atmosphere where they are not stressed by their own traffic ticket or divorce case. As chief justice, I plan to participate in all thirteen "Meet Your Judges" forums. We conducted one last week, right here in Juneau. But this is just one example of what we can do.

- In order to continue coordinating these outreach efforts on a statewide basis, I have just formed a new, blue ribbon commission, composed of representatives from the courts, the bar, the community, and the legislature. This should present a perfect opportunity for all of us to collaborate in developing new ideas to promote public understanding of our justice system. I believe that better understanding of the courts will promote better access to the courts, and that is the last topic I'd like to mention this morning.

- **Improving Access to the Courts**
  - Access to justice is a fundamental right of all Alaskans.
  - There are many in our community, however, who do not have the resources or the knowledge to participate equally in our justice system.
  - It is the responsibility of the courts and of our entire profession to ensure that all Alaskans enjoy affordable access to the courts.
  - The Supreme Court's Access to Civil Justice Task Force that I was privileged to chair explored many solutions to this challenge.
    - One option suggested was to expand the scope of the Pro Bono program, in which lawyers provide free legal services. Over 42% of Alaska's lawyers have volunteered to provide free legal services to the disadvantaged and that number should increase.
    - The Task Force also recommended increasing the funding and presence of Alaska Legal Services, particularly in rural communities, and exploring ways to provide legal assistance to those who do not qualify for Legal Services but are of moderate means.
    - But in addition to looking for ways to provide lawyers for those who can't afford them, the Task Force also explored the special problems faced by those who venture into court without a lawyer the pro se litigants. An extraordinary number of persons attempt to represent themselves, in all types of cases but particularly in domestic cases. The court has responded by developing new forms and informational material for pro se litigants, providing much of this information on the court's web page.
    - One exciting development is an agreement that the court has just completed with the federal Department of Health and Human Services and the State Child Support Enforcement Division. It will allow the state to recover from the federal government a percentage of state funds spent in certain child support cases.
      - If you authorize us to do so, the court plans to use these funds to establish a pro se center, located in the Anchorage courthouse but serving statewide needs, to provide further assistance to pro se litigants. In this center, litigants will be given information about court procedures, provided assistance in filling out court forms, and directed to appropriate offices and service providers, both within the court and within other agencies.
      - People in locations outside of Anchorage will be able to access the services of the pro se center through the use of an "800" telephone number. With the assistance provided through the pro se center, we hope that coming to court will be less of a mystifying experience for those who choose to represent themselves.
    - Also of significance to both unrepresented and represented parties are several small mediation projects around the state, funded through a variety of federal grants.
      - These projects assist parties in their efforts to resolve their disputes through compromise, outside of the traditional adversarial processes of the court system.

    - In the past, the legislature has encouraged the judiciary to explore mediation. With funding from federal sources, we are now able to provide mediation services in some child protection and domestic relations cases.
    - And in a new project, we are collaborating with a non-profit association that provides volunteer mediators, many from the business community, to help resolve small claims cases.
    - Through such projects, we can increase the number of cases in which mediation can promote satisfactory resolution of disputes outside of the courtroom.
- Yet another aspect of access to the courts is physical security.
    - As parties, witnesses, jurors, court employees, and members of the public enter onto court premises, they must feel that their physical safety is secure and protected.
    - In this regard, many of our court facilities are not providing an adequate level of security, either through screening devices such as metal-detectors, or through the presence of trained court security officers.
    - During this past year, I visited several court facilities, and court employees reported to me incidents involving physical threats and intimidation.
    - Our employees, jurors, witnesses, and other members of the public deserve to feel safe in court. We have to recognize that many court proceedings, especially in the areas of domestic violence, domestic relations, and criminal cases, involve volatile people and dangerous situations.
    - We have included in our budget request this year funding for screening services at two key court facilities, Kenai and Palmer, and we have forwarded a request from the Department of Public Safety for new court security officers. I urge you to give serious consideration to these requests, before we see an incident of violence of the type that has already occurred at so many courthouses in other states around the country.
- But helping people navigate through the courthouse easily and safely is not the complete answer to the question of access. Because if citizens are not able to have their disputes resolved swiftly and fairly, we as courts have not done our job.
    - Our courts need to be prompt in our decision-making. We recognize that individuals, businesses, families, and governmental entities put their affairs "on hold," as they wait for the resolution of court actions.
    - Justice cannot be administered instantaneously, but courts can and must take steps to ensure that every attempt is made to streamline procedures and that cases are handled as swiftly as possible, taking into account the resources available to resolve them.
    - In order to accomplish this goal, the Supreme Court adopted performance measures for Alaska's trial courts in the form of a set of Time Standards.
        - These standards, developed by a committee co-chaired by Justice Alex Bryner and Presiding Judge Elaine Andrews, create target time frames for the disposition of various categories of cases.
        - Now, we are hard at work collecting information about the age and status of our caseload to target particular problem areas and to work to improve procedures.
        - Our plan is to have relevant data about our caseload collected quarterly to insure a process of continuous review and improvement.
        - It must be noted that our efforts in this regard are hampered by the limitations of our antiquated computer system. However, last year, you generously appropriated approximately 40% of the funds we estimate will be necessary to acquire a modern case management system. We are asking you to appropriate the remainder of the funds this year. With a modern system, we will be able to monitor and manage our trial caseload much more efficiently.
    - And our work does not end with the trial caseload.
        - The Appellate courts are also developing **time standards**. We are currently in the process of adopting time standards for the Supreme Court, covering the period of time between submission of a case to us for decision, and our publication of that written decision.

- Moreover, the Supreme Court has, over the past year, piloted new internal procedures to increase the speed with which we are able to resolve most of the cases that come before us.
- In all of these efforts, we balance the need for efficiency and speed against the time necessary to make reasoned and thoughtful decisions. In the Supreme Court, the great majority of litigants are facing the last possibility of review of their cases.
- While we are committed to handling these cases more expeditiously, we are also charged with giving each case and controversy the attention and time it deserves in this last stage of review.

- In conclusion, the state of Alaska's judiciary is strong. It is strong because Alaska's judges and court staff have worked hard to find innovative ways to meet old and new challenges. And it is strong because we have been working in partnership with you and with the community on many projects that will improve access to the courts and the quality of justice that our citizens receive.

6.5. U.S. Conference of State Court Administrators -1999 [52]

Definition of Therapeutic Justice

- refers to court interventions that focus on chronic behaviors of criminal defendants, usually imposed over a period of time, in conjunction with some sort of treatment.
- Generally the model involves a single judge devoted to a class of cases, using pending or impending sanctions to compel compliance with treatment over a long period of time.
- While specialty courts are the most tangible manifestation of therapeutic justice, it is the concept of using judges and the judicial system as therapeutic agents that is the focus of this paper.
- Recent years have seen exponential growth of "specialty courts" and other approaches that place the court system in a non-traditional role - that of a participant in the therapeutic processes imposed on defendants and others. Drug courts, mental health courts, domestic violence courts, tobacco courts, and some forms of family courts have all gained popular favor because of their success, as compared to traditional court processes, at resolving chronic underlying causes of criminal or other inappropriate behavior. These approaches come under the general scheme of "therapeutic justice."

Traditional Role of Courts and Judges

- The traditional role of courts and judges is to provide a fair process for those with a dispute or criminal charge. The process usually involves an adversarial forum, moderated by an impartial judge, according to agreed upon rules and procedures.
- Particularly in criminal and quasi-criminal matters the focus of the process is on the facts and law presented relative to the specific charge, and great effort is spent to ensure that prior conduct and propensity of the defendant is kept from the fact finder.
- The pertinent goal, from the perspective of the court, is a fair process.

Compare Traditional vs. Therapeutic

- Under a therapeutic justice model, however, the process and the rules may be regarded as secondary, and what is preeminent is the whole defendant, the provision of some sort of treatment, and the outcome of that treatment.
- While a traditional criminal proceeding focuses on past behavior and its consequences, a therapeutic justice proceeding is directed at immediate and future behavior.

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[52] Conference of State Court Administrators, Policy Committee, Position Paper on Therapeutic Courts August,1999 http://cosca.ncsc.dni.us/therapeuticcourts.pdf. Note: The paper which follows was prepared by the Policy Committee of the Conference of State Court Administrators (COSCA) for presentation at that organization's Business Meeting on August 5, 1999, in Williamsburg, Virginia. The purpose of the paper was to generate discussion and debate, preparatory to the membership being asked to take a policy position on "therapeutic justice". The paper was written in a deliberately provocative manner in order to generate debate. The paper itself was not adopted by the membership; rather, it was a vehicle used by the membership to better understand the issues and the implications of taking various policy positions. Appended to this paper are the formal motions adopted by the membership at the August 5, 1999, COSCA Business Meeting.

- When compared to traditional processes and outcomes, the results of these therapeutic justice programs have been overwhelmingly positive.
- Of course the relative success of the two processes depends on the definition of success.
    - From a public, legislative and political perspective, success is defined as ending the criminal behavior, and therapeutic justice efforts frequently do.
    - From a judicial system perspective, success has always meant that the *process* was fair.
    - Given these different expectations, it is not surprising that the public and politicians have gravitated towards therapeutic justice as an alternative to traditional court.
- In fact, in some instances therapeutic justice initiatives have been foisted on the courts, out of a frustration with the perceived ineffectiveness of the criminal justice system to deal with basic societal problems.
- Executive branch agencies, legislators, local governments and special interest groups have placed these programs, along with money or the promise of money, on the courthouse steps, and courts have had little practical choice but to adopt them.
- Regardless of the courts' view of their constitutional role, they are expected to be a part of the solution when a solution is presented.
    - As society's expectations of courts change, or at least become more explicit, courts can either dogmatically continue to declare their traditional role, or they can change their objectives to conform to those of society, and then market that change.
- The response of the courts to this widening gulf between public/political expectations of the judicial process and the expectations of the judiciary is critical to winning the public's trust and confidence.
    - As innovations like treatment courts gain public notoriety and support, court systems that drag their feet in adopting these innovations appear more and more out of step with public sentiment, and judges and courts look increasingly out of touch and bureaucratic.

Advantages

- But beyond political and public relations concerns, there are sound practical and policy reasons for courts to actively lead the establishment of processes that utilize the principles of therapeutic justice.
    - First among these is that there is good reason to believe they work, particularly drug courts, where we have the most experience.
        - The ongoing empirical results of the hundreds of studies of drug courts, as an example, are that recidivism rates among drug court graduates conservatively average out to about 10%.
        - Drug courts also save money as compared to the costs of incarceration, free jail beds, reduce the number of drug exposed infants and children (thus avoiding medical costs), and they successfully treat thousands of substance abusing individuals each year.
        - Other types of treatment courts have similar outcomes that result in tangible savings for the system as a whole, and other long term successes for individuals. While these are outcomes that are not traditionally owned by courts, they should be.
    - The second advantage to therapeutic justice programs is that they require and promote collaboration among a number of entities.
        - Treatment providers, local governments, law enforcement, prosecution, defense counsel, private counsel, multiple state agencies and the courts are all generally required to communicate and cooperate in order to run one of these programs.
        - This process of collaboration transcends the individual project and develops good will and institutional relationships that benefit the courts in subtle and not so subtle ways for years to come.
    - The third direct benefit of these efforts is that defendants are held accountable.
        - Whether it is a drug addict, a mental health patient, an abusive parent or cohabitant, or a teen smoker, the system demands respect and gets compliance.
        - The treatment may or may not ultimately be successful, but the participant complies with the orders of the court, or they face swift consequences - frequently a sentence for an already entered guilty plea.

        - This is one goal where the courts and the public are on the same page, but one where there is rarely agreement that the goal has been attained.
    - The fourth advantage to promoting therapeutic justice programs is the tremendous public relations benefit.
        - Successful outcomes sell a lot better than sound process.
        - Being able to tell these amazing stories of personal triumph over adversity, stories of caring and dedicated judges, and stories of firm but compassionate programs, all in the context of public safety, go a long way toward developing public trust and confidence in the judiciary.
        - The resulting atmosphere of success and satisfaction without the grind of the adversarial process rejuvenates judges and energizes staff.
        - These stories also provide one of the few opportunities the judiciary has to instigate positive media coverage and to tell "good news."

Disadvantages

- While the public, politicians and advocates focus on these advantages to therapeutic justice initiatives, there are also disadvantages from the perspective of the courts.
    - The first is the potential impact on judicial neutrality.
        - When a court system steps away from its traditional role of providing a process for dispute resolution and becomes a service provider intent on a specific outcome for those over whom it exercises control, the "separateness" frequently claimed by the judiciary is harder to justify.
        - When the judge becomes a part, if not the focus, of a treatment team, the objectivity of the court can be questioned.
        - And when the outcome of the treatment becomes the court's goal, the court has to then assume some accountability for the effectiveness of the program.
        - When judicial systems assume accountability for social programs, judicial independence is eroded, and the line between the branch that interprets the laws and the one that implements the laws is blurred.
        - As a judge acts as part of a treatment team, that judge sits as an equal member of a work group exercising traditionally core executive branch functions, and the accountability, criticism and political and administrative oversight of that function is hard to avoid.
    - The second concern about judges serving in these non-traditional roles is that rules and expectations about judicial conduct haven't in the past taken into account this therapeutic role.
        - As the objectivity of the system can be called into question, so too can that of the judge.
        - Among other things, the Code of Judicial Conduct requires judges to avoid the appearance of bias, and to deter ex parte communications.
        - Yet when the judge is a part of a therapeutic team, frequently cast in the role of the enforcer of treatment's decisions, bias may be inferred.
        - In treatment courts, defendants step into a machine where they may be the only interchangeable part, and to view the judge as "one of them" rather than as a neutral arbiter is understandable.
        - Likewise, ex parte communications are commonplace.
        - Judges may talk with defendants without counsel present, and treatment discussions and decisions about the defendant can occur with only one side or neither side there, with or without the defendant.
        - At a recent national drug court conference, drug court judges opined that all of them present arguably violated ethical rules on an almost daily basis - they have to in order to make a treatment court work. To institutionally put judges in this position should be a cause for concern.
    - The third disadvantage to therapeutic justice approaches is the strain they put on basic court organization, administration and on court resources.

- Though most courts are organized into broad departments, or even smaller divisions, a general principal of therapeutic justice is one judge one court.
- While there are exceptions, the idea is that the same judge needs to see the same participants repeatedly in order for consistent treatment and rapport to result.
- How this specialized assignment fits into the general scheme of case assignment and judicial rotation can be problematic, although not insurmountable.
- Philosophically, these trends toward specialization and splintering of court processes are contrary to the prevailing movement of the last several decades of court unification.
- The generalist judge, and the efficiencies and flexibility of a unified, single level trial court can quickly go by the wayside if specialty courts become more than an anomaly.
- But perhaps the larger issue is the toll these programs take on court resources.
    - Obviously it takes more judge and clerk time to see a defendant 15 or 20 times over the course of a year or more than it does for a judge to take a plea and sentence someone.
    - Only the longest of trials is going to consume as much court time as the multiple hearings involved in a course of treatment in a treatment court.
    - This additional workload affects not only the treatment court judge and the court clerk or clerks, but also other judges and clerks in the judicial district that have to make up the difference.
    - These resource demands put the court system in the position of having to solicit resources for the judiciary to do work that is not generally considered a core judicial function, yet few court systems would argue that their core responsibilities are adequately funded.
    - Some courts have also chosen to directly provide many of the treatment services, and employ case managers and treatment professionals.
    - Frequently the money available to procure these resources is grant money, so courts start programs on the grant money and then scramble to find permanent funding after the programs have been in existence for a period of time and built constituencies and expectations.

Recommendations

- Despite all of these concerns, it is clear that the upside to supporting therapeutic justice initiatives is still greater than the downside, so long as courts are willing to drive the train rather than just ride along.
- Therefore, the recommendations are:
    - Courts should assume administrative leadership in developing, implementing and evaluating therapeutic justice programs.
        - Rather than letting external entities define the programs, the goals, and the judiciary's role, judicial administrators should assert the courts' centrality to these processes and shape the progression of these initiatives.
    - Each judicial system should choose a level of programmatic and fiscal participation in therapeutic justice initiatives that makes sense for that system.
        - Courts can be full partners in a therapeutic justice effort and still maintain degrees of independence.
        - For example, by choosing to pass through funds to the service providers or contract with those providers rather than taking on the service delivery role, the court function looks more like a traditional adjudicative model, and the responsibility for the efficacy of the program as a whole is diffused.
        - In some settings controlling the money and providing the services may be the only way to be at the head of the table, but the judicial independence concerns are greater then.
        - The greater the extent to which courts can ask legislatures for traditional resources like judges and clerks rather than treatment beds and money for urinalysis, the more resource flexibility the court will have now and in the future.

- COSCA and or CCJ should create a study group with appropriate organizations to recommend changes to the model Code of Judicial Conduct to allow for appropriate participation by judges in these unique settings.
- COSCA and CCJ should formalize and institutionalize the therapeutic justice role for the judiciary by seeking membership on appropriate national forums.
    - As treatment courts in particular gain in prominence, governing entities are emerging to steer their development, frequently without much representation from COSCA, CCJ or their members.
    - For example, there is now a National Association of Drug Court Professionals, as well as a federally funded Congress of State Drug Court Associations.
    - Adequate representation of the unique interests of the judiciary should not be left to happenstance.

Alternatives

- As an alternative to adopting some or all of these recommendations, courts could just stay the course and see what develops.
    - Some jurisdictions would continue to actively pursue therapeutic justice alternatives, some would be merely facilitative, and most would wait for some other part of the community to make proposals and then respond as they came.
    - Programs would grow at their own pace, as appropriate for each individual jurisdiction, with control of that growth primarily left to others.

- A second alternative would be to retreat, to take "justice" out of therapeutic justice, and insist on a traditional role.
    - Therapeutic interventions would be left to therapists, to administrative processes and to the executive branch.
    - Courts would be left to focus on fairness and process, rather than on individual outcomes and the accountability that comes with it.

Conclusion

- The human and political success of therapeutic justice programs is too great to ignore.
- Being perceived as hiding behind judicial independence and administrative concerns make courts look less responsive to communities and their concerns than ever.
- But if a court system leads out on the design and implementation of these programs, then a balance can be struck, where the courts are responsive to changing times and changing expectations, but not at the cost of their fundamental roles and responsibilities.

MOTIONS ADOPTED AT COSCA BUSINESS MEETING AUGUST 5, 1999, WILLIAMSBURG, VA

1. State courts should assume administrative leadership in court programs which seek to address and solve the underlying causes of disputes brought before the courts.

2. Each Judicial System should determine a level of programmatic and fiscal participation in therapeutic court initiatives that is appropriate to that system.

3. COSCA and CCJ should create a study group with the American Bar Association and other organizations deemed appropriate, in order to examine the Code of Judicial Conduct in light of the development of these courts for the purpose of clarifying questions of judicial behavior.

4. COSCA and CCJ should seek membership on all appropriate national forums addressing issues relating to therapeutic courts, and establish clear lines of communication with federal agencies.

5. The Presidents of COSCA and CCJ should form a task force and invite the presidents of appropriate organizations to nominate representatives to address and to advance strategies, policies, and recommendations on the future of therapeutic courts to their respective conferences.

ADDENDUM II

DISCUSSION POINTS

Following are some of the points on Therapeutic Justice raised during the discussion by the members during the August 5, 1999 COSCA Business Meeting

" The origin of these courts varies from state to state, with the judiciary or individual judges taking the initiative in some states, while in others the impetus is coming from outside the courts with courts coming along as reluctant partners. Where court systems are being brought along, they are not likely playing much of a role in shaping such programs.

" Where executive and legislative initiatives are leading to the establishment of the courts, there may be an agenda to make the courts more of a social service type agency at the expense of the courts traditional role.

" The title "Therapeutic Court" is problematic and may send an unintended message. Alternatives should be considered.

" Should a policy position on this topic be made only if it is in concert with the Conference of Chief Justices and the court administrators and chief justices are in agreement?

Should COSCA lead out on an issue where there may be disagreement with individual chief justices?

" Should unanimity be required in order for COSCA to take a position on such an issue? To only take positions when there is unanimous agreement may result in abdicating to other organizations on issues of importance to courts.

" Taking more ownership in therapeutic courts may result in courts also taking on more responsibility for outcomes and the "quality" of justice being dispensed.
A call for judicial accountability for these outcomes will likely emerge.

" Do we know enough about how these courts are actually working to declare them a success?
What about the application of this model for actions other than drug cases. Is there enough experience to endorse this model for other case types?

" Isn't there a high level of judicial burnout for these courts and can they be sustained when those who have lead out can no longer continue?

" Are we abandoning the institutional trend of the last several decades of less specialization, more unification, and generalist judges?
Are therapeutic courts at odds with this trend and, if so, what are the long term implications if we move these types of courts from the periphery to the mainstream?

6.6. Delinquents or Criminals: Policy Options for Young Offenders-1998[53]

[53] Jeffrey A. Butts , Adele V. Harrell, Delinquents or Criminals: Policy Options for Young Offenders, Urban Institute, June 1998 http://www.urban.org/crime/delinq.html

Community Courts
Community courts, or community justice courts, have been described as M.A.S.H. units for neighborhood crime problems. Drawing upon local resources and local knowledge of offenders and their families, community courts offer a less bureaucratic and more timely response to offenses committed against the community.

Typically, an offender in community court will be required to complete a restorative contract, including restitution payments, counseling, neighborhood clean-up service, etc. The goal is to empower community residents to teach offenders that their behavior has consequences.

Midtown Community Court (New York City)
One of the most widely known community court programs is the Midtown Community Court in Manhattan. As of 1996, the Midtown court was handling 65 cases per day, making it one of the busiest arraignment courts in New York City.

Offenders sentenced by Midtown perform the equivalent of $175,000 worth of community service work per year. The court emphasizes immediacy and requires offenders to report to a community service or social service center immediately after sentencing. Nearly 75% of all offenders complete their community service sentences as mandated.

Resources:
"Juvenile justice: Community courts." *NPRI Issue Brief* (January 1997). Nevada Policy Research Institute [http://www.npri.org/issues/juve_justice.htm].
"Community Courts: A Manual of Principles," Center for Court Innovation, and the Bureau of Justice Assistance [http://www.communityjustice.org/].

Alternative Dispute Resolution
Several types of alternative dispute resolution are becoming popular for relatively minor, usually non-violent offenders. The programs with the most promise for youthful offenders may be "family group conferences" and "restorative justice conferences." Both approaches involve carefully structured meetings between offenders, victims, their families, and other members of the community. Family group conferences and restorative justice conferences are already widely used in some countries (e.g., Australia, New Zealand).

Participants in these programs discuss and confront the harm resulting from an offender's behavior. The goal is to teach young people how their behavior affects others and to devise a way for them to repair whatever damage or harm they may have caused. This process empowers the families and parents of young offenders, encouraging them to exert their natural influence over the behavior and judgment of youth. Findings from evaluation research have been encouraging. Young offenders who meet their victims directly in the company of other family members seem less likely to re-offend.

Resources:
Bazemore, Gordon et al. (1997). *Balanced and Restorative Justice for Juveniles: A Framework for Juvenile Justice in the 21st Century*. Washington, DC: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention [http://www.ncjrs.org/pdffiles/framwork.pdf].

Braithwaite, John (1989). *Crime, shame and reintegration.* Cambridge, England: Cambridge University Press.
Hudson, Joe, Allison Morris, Gabrielle Maxwell, and Burt Galaway (Editors), (1996). *Family Group Conferences: Perspectives on Policy & Practice.* Monsey, NY: Willow Tree Press, Inc.

6.7. Crime Victims/Restorative Justice in Juvenile Courts: Judges as Obstacle or Leader? -1998[54]

ABSTRACT

The central role of crime victims in restorative justice creates a number of dilemmas for offender-driven justice agencies.

Neither the traditional juvenile justice response to youth crime focused on the "best interests" of the child nor the new retributive emphasis provide a role for crime victims as recipients of service or participants in juvenile justice.

Based on the results of focus groups with juvenile court judges and victims of juvenile crime in four states, this paper presents qualitative findings on judicial support and resistance to the idea of the victim as a "client" of juvenile justice and a co-participant in the justice process.

The implications of restorative justice for reform in juvenile courts are also examined.

According to restorative theory, justice is best served when the needs of victim, community, and offender are met and each is involved in the process to the greatest extent possible. An essential and important insight of the restorative approach is that the practices, programs, and processes that best address the needs of the victim and the community are often the same ones that ultimately serve the "best interest of the child." According to advocates, the restorative justice perspective has the potential to elevate the status of reparative programs and practices and victim needs. Hence, the practical importance of the movement in juvenile justice toward a restorative justice framework and a "balanced" intervention model is that it appears to place the victim squarely within a restructured mission for juvenile justice (Bazemore and Umbreit 1995b). In doing so it creates a context and incentive for change which makes the role of crime victims central to the juvenile court mandate.

Some have suggested that the informality in juvenile courts and the public support for alternative responses to youth crime make the juvenile justice system an ideal setting for restorative justice experimentation (Bazemore and Umbreit 1995a). As of the summer of 1997, a dozen states had adopted legislation incorporating the language of restorative justice and/or the balanced approach mission, and a number of others had adopted legislation or policy referring specifically to this mission and/or restorative justice as a guiding implementation philosophy (Bazemore 1997a; Klein 1996). While these jurisdictions vary substantially in the level of administrator and policymaker understanding of and commitment to restorative justice reform, several states (e.g., Pennsylvania, Montana, Idaho, and Minnesota) are investing heavily in implementation of restorative justice policy models by initiating specialized training, strategic implementation planning, and pilot programs. With few exceptions (e.g., Pennsylvania Juvenile Court Judges' Commission 1997), victims and victim advocates have not, however, been meaningfully engaged in these developments. As with previous initiatives related to victim issues, the target audience for these efforts has thus far been limited primarily to probation staff.

In tension with and in opposition to these experiments in juvenile restorative justice reform is the movement of many other juvenile courts toward a criminal court, desert-based approach to intervention. This has brought a more dominant role for prosecutors, mandatory and determinate sentencing guidelines, and less emphasis on rehabilitation in juvenile codes and policy statements (Feld 1990).

The move toward retribution has challenged the once absolute dominance of the treatment or "best interests" mandate of the juvenile court. There is little evidence, however, that this has brought any benefits to crime victims (Bazemore and Umbreit 1995a; Elias 1993). In fact, there is strong support for the view that the most recent reforms in juvenile justice, based on the new "punitive paradigm" (Cullen and Wright 1995), may be diverting funding away from victim services (as well as additional offender services) and into support for more and larger secure facilities.

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[54] Bazemore, Gordon.. "Crime Victims and Restorative Justice in Juvenile Courts: Judges as Obstacle or Leader?" Western Criminology Review 1(1). 1998, http://wcr.sonoma.edu/v1n1/bazemore.html

Judges As Gatekeepers To Restorative Justice

In the absence of consistent and wide reaching legislation, one way to effect changes in the juvenile court may be through the judges. Judges act as gatekeepers, and exert critical influence over procedures, court management, adjudication, decision-making and dispositional priorities and protocols in juvenile court. Moreover, judges are best situated to exert leadership on behalf of crime victim services in the juvenile justice system and in the community. They may also enhance court capacity and improve staff willingness to provide victims with more sensitive treatment. At the same time, judges also experience strong constraints as a result of recent changes in the structure of juvenile courts and juvenile justice systems (Bazemore and Feder 1997; Edwards 1992).

Judges have been left to defend the individualized treatment ethos of the juvenile court in the face of new laws that have mandated more punitive approaches and usurped court jurisdiction (e.g., Bazemore and Feder 1997; Feld 1990). Judges have adapted to this dilemma in a variety of ways, for example, by focusing attention on internal court management issues, on detention intake, or on extending the child advocacy and community leadership role of the court and juvenile court judges (Bazemore 1994a; Edwards 1993). Some research has documented this latter trend toward judicial community activism (Bazemore, 1994b; Rubin, 1985). Becoming an advocate for the interests of victims of juvenile crime, however, has not yet been articulated as part of the role of the future juvenile court judge.

While some juvenile justice decision-makers have strongly endorsed restorative justice ideas (Edwards 1996; Pennsylvania Juvenile Court Judges' Commission 1997), other juvenile justice advocates have expressed concerns about whether the court can accommodate the needs of victims and manage their involvement in the court process (Hurst 1997; Torbet et al. 1997). According to recent research, circuit court judges assigned to the juvenile bench give lower priority to victim satisfaction and reparation relative to more traditional intervention goals (Bazemore and Feder 1997). Judicial resistance to victim concerns, or ambivalence about the victim's role in court, may be a function of the historical mandate of juvenile court and the policy crisis now threatening the survival of juvenile justice systems around the country (Bazemore and Umbreit 1995a; Lemov 1993). Even in the context of these competing pressures, there is no evidence that juvenile court judges are, as a group, antagonistic or insensitive to victim needs, or that judicial support for victims is necessarily associated with the punitive values of the new juvenile court (Bazemore and Umbreit 1995a; Feld 1990).[1]

The purpose of the present study is to closely examine one perceived source of judicial resistance--the lack of opportunity for dialogue between judges and crime victims. Using a unique qualitative research design that incorporates both victims and judges, we address a number of key questions. Can the juvenile court change to meet the needs of crime victims? Can a system that has traditionally been closed open itself to victim involvement? Can the court strike the balance between the needs of victims, offenders and communities that restorative justice advocates view as optimal? To understand the nature and implications of judicial response and possible intervention, we examine how judges and victims of crime in four states perceive one another, the justice system, and restorative justice principles and practices.

Methodology

Survey and interview methodologies have a vital place in improving understanding of the perspectives of judges (e.g., Bazemore and Feder 1997) and crime victims (e.g., Umbreit and Coates 1993). To allow both judges and victims to engage and explore issues of victim involvement, victim services and the value of restorative justice interventions in greater depth, however, this study provided a format to elicit more complex and open-ended responses to questions and promote dialogue. The dialogue desired was a discussion between judges and their colleagues and also between judges and crime victims. These goals, as well as the multiple-action research objectives of the funding agency for this project, seemed to be best accomplished by designing a series of focus groups to be held during one-day forums in each of four states. The states were chosen because of recent or pending passage of new victim rights legislation for the juvenile court and new juvenile codes or policies adopting balanced and restorative justice.

Focus groups are increasingly recognized as a valid and potentially rigorous qualitative methodological procedure by criminal justice researchers (e.g., Griffiths et al. 1995; Maxfield and Babbie, 1997). As a form of group interview aimed at capturing collective sentiments about issues generally too complex to be reduced to questionnaire or interview formats, focus groups are especially useful in exploratory studies and can also help

researchers define key issues for further investigation. Although often confused with "brainstorming" or other discussion forums, when implemented according to strict research protocols, true focus groups can be viewed as qualitative case studies (Yin 1994) that provide a unique form of contextual data. Like any other rigorous research approach, achieving qualitative external validity with focus groups requires systematic attention to issues of sampling, interview format, procedure, analysis, and inference.

Sampling and Recruitment

The selection of participants for focus groups is almost never random (Krueger 1988; Stewart and Shasmadi 1990). One reason for this is that the parameters of populations are generally unknown. Moreover, bias is likely to be inherent in the process of relying on a group of self-selected participants. More importantly, a focus group is comprised of a homogeneous group of respondents who share a common interest, experience, or characteristic that is more important than their statistical representativeness. In addition, focus groups permit purposive sampling of categories of participants who represent subpopulations of theoretical importance (e.g., Yin 1994). The mix of participants in focus groups therefore depends on the theoretical or policy purpose.

In this study, strategic considerations limit the ability to generalize findings but ensure that the results take on practical significance.[2] First, we sampled four states that were either adopting or had recently adopted new victim rights legislation, as well as policy and/or statutes based on balanced and restorative premises, in their juvenile justice system. Second, we sampled one geographic region of each state. This regional emphasis helped promote a more focused dialogue by limiting diversity due to system administration issues while allowing for rural/urban variation.

Judges in predefined geographic regions of each state were identified from lists provided by judicial training organizations of eligible judges in the circuit courts. A letter was mailed to the judges by the project director. A member of the research team called the judges to determine their availability. Fortunately, this method generated a list of judges more diverse in terms of gender, age, and ethnicity than one might have expected given the proportion of middle-aged and older white males assigned to juvenile courts nationally. The final participant group of 20 judges included three black females, five white females, one Hispanic male, one Native American male, and ten white males, ranging in age from forty to sixty-seven. Most importantly, judges were also reported by local advisors to differ substantially in political and sanctioning philosophies. Judges also differed in their views of crime victims and the victims' role in the court, although this was not known in advance.

The sampling frame for victim focus group recruitment consisted of all juvenile crime victims whose cases were closed in the year prior to the group meeting in each circuit court region. Using criteria developed by the research team, local victim advocates screened cases to identify a final pool of eligible victims who were diverse in race, gender, age, and type of offense. Of these, a group of seven potential participants were selected in each state based on their willingness to participate and a decision by victim advocates that the participant would be able to do so without adverse consequences. This procedure did not produce a random group of victims, but it is common in focus group research (Krueger 1988). It also did not appear to introduce the kind of bias that might have resulted if advocates had sought out only those victims known to be publicly critical or positively disposed toward the juvenile court. Only two victims were known personally to advocates or system professionals prior to the focus group -- in one instance because of the advocate's involvement in the victim's case, and in the other because of the subsequent involvement of a victim in providing victim awareness classes for offenders.

Judging from the participant groups that emerged, screeners did an effective job of maximizing participant diversity and avoiding harm to victims.[3] The final list of eighteen participants included nine victims of violent crimes. These included a badly burned victim of arson, three parents of murdered children, two robbery victims, and two rape victims. Property crime victims included seven participants whose homes had been burglarized or vandalized, an owner of a small business whose store was burglarized, and two victims of auto theft and/or auto vandalism.[4]

Procedure

The daily format for each focus group included time for judges and crime victims to work separately in break-out sessions, for report-outs to the larger group, and for group dialogue and discussion about differences and

similarities in the perspectives of judges and victims. Each session began with a welcome by a local judge or other host for the session, introductions of the focus group moderators and the research team, and introductions of judges and victim participants. Victim participants described their experiences with the juvenile justice system. To set the context for the focus group discussions, participants were presented with a brief overview of victims' rights legislation in their state and principles and practices of restorative justice.[5] Each of the judicial break-out groups was moderated by a former judge, and each of the four respective victims' break-out groups was moderated by a victims' advocate. Judicial and victim break-out groups had the same moderator in each of the four states.

The discussion guide used in break-out groups consisted of parallel sets of questions, with some slight variation for each group. Deviations in wording or format permitted judges to consider more technical legal and practical issues influencing services to the victim at different stages of the court process; the victims' groups could discuss the related issue of what services and responses they would *like* prior, during, and after the court process as part of a meaningful continuum.[6] All sessions were tape recorded and later transcribed and coded into content categories within each general section of the focus group protocol.

Data Analysis

For purposes of this study, comments in the break-out and general sessions were sorted into categories based on the discussion question addressed. Because judges frequently digressed from the topic at hand, however, some comments in a particular session were more relevant to questions posed in later or earlier sessions. Thus, except when part of an ongoing dialogue, quotes are presented not in linear form but rather under the appropriate conceptual category. For the most part, all comments pertinent to the specific question being addressed are included in this paper. An effort was made to represent the diversity of topics covered and opinions expressed. Comments that digressed from the topic or repeated earlier themes are excluded.

While the presentation of dialogue is an attempt to illuminate the disparate voices of both judges and victims, the biases of the research team come through in the questions we chose to ask in the discussion guide. These questions assumed that crime victim needs should be an important consideration in any court or justice system. In addition, our interpretation and critical analysis of participant comments and rationales recognizes the possibility of juvenile court reform and the potential value of restorative justice policies and practices. But we remain objective in reporting overall findings, both by presenting dissenting views and by attempting to place what might be viewed as "insensitive" comments of judges in the context of other demands and pressures on the juvenile court.[7] To protect the identities of participants' and avoid painting a biased or pejorative picture of the views of all judges, for purposes of this paper the four states are identified as States 1, 2, 3, and 4.

Results

Crime victims viewed the juvenile court and justice system experience in almost uniformly negative terms. With the exception of a husband and wife whose son was murdered and who believed they had been treated *well* by the court, the nearly unanimous conclusion of victim participants was that there was a lack of respect for their dignity as human beings and little in the way of court acknowledgment of them as victims. In its mildest form the perceived lack of respect was generally inadvertent and seemed due to a lack of either time on the part of juvenile justice professionals or understanding of the victimization experience. In the most severe cases, however, victims were accused of lying, told that they were being inappropriate or vindictive, and were denied even the most basic information about their cases. Stories varied, from episodes recognized as unfortunate but commonplace to most participants, to tales that involved abuses by juvenile justice professionals that evoked shocked reactions from focus group organizers and judicial participants.

Numerous judges and citizens are aware that the experience of crime victims with courts and justice system agencies is often unpleasant. However, the reasons for chronic dissatisfaction are not well understood by many juvenile justice professionals. Judges' perceptions of the victim experience in juvenile court are critical to the court's openness to viewing the victim as a client. On the whole, these judges were sympathetic with the plight of victims--some were highly empathetic. However, judges in each state identified distinctively different sources of victim frustration and expressed differing views regarding the need for judges to know more about this frustration and of the responsibility of the court to crime victims.

What Victims Need and the Court's Role in Meeting Those Needs

Victims were unanimous in their view that the most important expectation they had of court professionals was to be treated with respect. This expectation was manifested especially in the voiced desire to be trusted with information about the crime, the offender, and about what options the court might consider in responding to their case. A second priority for victims was the opportunity to be heard, and to have input into the court's decision-making process. Their need for restitution was important, but if these initial needs for respect, information and input were addressed, restitution decreased in urgency. Interestingly, most victims expressed little interest in punishment for its own sake, but were more concerned that juvenile justice professionals follow through with their commitment to hold offenders accountable with regard to restitution or other reparative actions. On the other hand, most judges seemed surprised to hear a strong victim interest in offender rehabilitation; some participants, including victims of violent crimes, had also gotten personally involved in offender treatment programs.

As leaders in the juvenile court, judges have the power to prioritize services and modify processes that affect victim satisfaction. Their beliefs about what victims want and need, as well as about the role and responsibility of the court in meeting these needs, are therefore of great importance. In State 1, for example, the dominant theme among judges was that victims were misinformed about both the role of the court and its limited capacity to meet perceived victim needs. At times this was expressed as a sense of frustration:

Sometimes I think about myself in the courtroom, especially when I deal with the victim, as in the construction trade--particularly heating, venting and air conditioning...I feel like my restitution hearings are my chance to sit there and allow the victim to vent...A lot of times that's all I can do...the prosecutor has not told the victim that this child is from a welfare family, so don't expect to get restitution paid.

Judges in this state often expressed feelings of helplessness in responding to victim needs and expectations, ranging from restitution to services and related information. Some felt "set up" by their prosecutor, and abandoned by a probation department under the control of an executive branch that they considered to be incompetent in collecting restitution.

Often a dialogue that began with a discussion of the victim's experience and needs was redirected to a discussion of the overwhelming problems of juvenile *offenders,* such as the perceived need for more specialized treatment programs to manage a growing number of highly disturbed juveniles who lack the capacity to understand restitution and their obligation to victims. In one state, judges responded to a variety of victim concerns, including failure to receive restitution, by lamenting the weakness of punishment alternatives for offenders, including their lack of authority to detain offenders for crimes that do not meet mandated policy criteria. While this response was at times an attempt to educate victims about appropriate use of secure facilities, including detention, it also suggested a belief among some judges that the absence of a threat of confinement--rather than a low priority given to restitution enforcement and collection--was the source of the problem.

Judges reported that they see and hear from very few victims. Judges agree, however, that when they hear from victims and their advocates the message is often negative. Some also feel that victims do not often belong in court because they are emotionally incapable of participating in the process:

...a prosecutor will come in and say, the victim wants to be present (at disposition). Sometimes what they [the victims] want is not what you're going to do. You have to explain to them. *Every time they say there is a victim in the courtroom, I panic!* [judge emphasis] You're very lucky; you've got rational victims here--those we had this morning [referring to the focus group participants]. But I've had many occasions to call security in because the victim is upset. And the fact that I had just sent this kid away to a level eight [locked secure confinement program], barbed wire fences with razor wire on top, doesn't mean anything to them. They (victims) still want their pound of blood.

When a victim advocate participating in this session responded that the few victims who engage in such emotional outbursts in court have not been properly prepared for the process, this judge responded: "I don't see that; I just thought they were so emotionally involved they were unable to be rational." While no other judges vocalized such a strong concern about the presence of victims in the court, others expressed reservations about a victim's capacity to understand the court process and to participate with rationality and respect.

The more sympathetic or responsive judges expressed a desire to make their court process more user-friendly to victims and were open to community-based restorative justice alternatives to court processing, such as

victim-offender dialogue. However, others expressed the view that most victims do not really want to participate and attempted to identify victim frustration as negligence on the part of victims. In discussing court backlogs and postponement of hearings, for example, one judge insisted that:

I want to be fair about this delay thing. Seventy-five percent of it is delay caused by the victim...victims not showing up for the court hearing, and the prosecutor is asking for continuances because our victims aren't here.

Perhaps the most negative comments attributed victims' complaints to questionable or unethical motives. Defending the court's role as impartial arbiter of the facts, one judge observed that:

...Sometimes victims come in and they are not always telling the truth. That is why we need a system that determines truth. Unfortunately, that system designed to determine truth will hurt the person (the victim) because lawyers will ask questions in a hurtful way. My job is to educate the defense bar to act [civilly] toward the victim.

Another judge agreed with the first, and then added: "We have some victims who are more dangerous than our offenders."

In one state focus group, a responsive, warm, and meaningful reaction to a victim who had been abused at virtually every stage of the system set a very positive tone for much of the day's dialogue. In this particular state, several judges quickly acknowledged to participating victims that they were often in the dark about the victim's experience in the juvenile justice process because they were "isolated" from it. These judges viewed the *lack* of, rather than the presence of, victim participation and input as a problem for them and the court. Moreover, they were more likely to emphasize court process and management, rather than victim attitude and behavior, as the primary source of victim dissatisfaction with juvenile justice. From this perspective, the court and the juvenile offender need to hear the victim's story, which is best told by victims themselves. One judge notes that having victims speak at dispositional hearings is a great opportunity for offenders and others present to hear first-hand about the damage caused by the crime, but that it rarely occurs. In State 3 one judge noted that approximately one victim per month provides a statement in court.

These more pro-victim judges and others in the group also noted that their colleagues were also often "too arrogant" to simply take account of and acknowledge the victim's experience. Furthermore, in one judge's view, reducing the frustration level of victims with the court process is not necessarily something that takes a lot of time:

If you read the statement and you look at the victim and you say I really appreciate your taking the time to fill this out and this must have been a terrible thing that happened to you...and I'm sorry, that is all that matters. Even if there is no effect on what you do and you're not changing your mind, it is really important...I think it makes the judge's job a whole lot easier...victims rarely complain about sentences when they've had the chance to tell the judge and the judge says "thank you" for your input.

Ranking of Victim Needs. Several key needs were ranked highly by judges in all of the focus groups: notification about hearings and court processes, restitution, and safety. As noted previously, these needs also received very high priority with victims and were a major focus of their discussion in break-out groups.

Perhaps because it has been a visible component of juvenile court dispositions for almost twenty years and is the most tangible response to crime victims available in the juvenile justice system, the need for efficacy in monitoring and collecting restitution probably received the most attention in the judges' groups. Judges in general acknowledged court responsibility in ensuring restitution to victims, although they often faulted probation and/or other juvenile justice staff for their failure to collect restitution.

A consistent theme addressed extensively in two judges' groups was the lack of education given to victims about the court process. This was believed to lead to unrealistic expectations about the court process, which in some groups appeared to be the dominant problem. Victims agreed that the court process remained a mystery to them. (Indeed, in two groups victims expressed appreciation to judges for explaining various aspects of the process to them.) Victims concluded, however, that the failure of the court to meet their needs and treat them with sensitivity and respect had more to do with the culture of the court and competing priorities of juvenile justice professionals' than with their lack of education about court procedures.

One State 4 judge echoed what a number of victims have confirmed about the importance of restitution. While the value of restitution to victims often varies by socioeconomic status, it often assumes exaggerated symbolic significance because:

Restitution represents all the other stuff...it's not really always so important, but it's the tangible thing...and an awful lot of victims living in poverty and who don't have insurance ...for them the car won't be repaired.

However, at another point, this same judge expressed the view that relative to other offender-focused responsibilities, the court places *too much* emphasis on restitution, observing that:

We're doing a good job (with restitution), but we're spending a hell of a lot to do it...[in fact] we spend so much trying to collect, it would be better if we just had a state fund to pay the victim back directly.

Most judges acknowledged that their courts, and other courts they were familiar with in their states, do a poor job in the restitution collection process. While many were also aware that restitution was not the only concern victims had, the symbolic importance heightened their concern that courts improve this very tangible aspect of the juvenile justice response to crime victims. Victim notification, information, and input, for example, received highest rankings among judges in these states. As one State 2 judge put it, notification is "the [court's] nonverbal communication with the victim...the most eloquent way...to let them know that their participation is important." In addition, judges in States 2 and 3 discussed dignity and respect as critical in all court interaction with victims. State 2 judges added the need to be more respectful of the time of crime victims--an issue that was reported as among the most frustrating by many crime victim participants.

Perceptions of the Appropriate Role of the Court in Meeting Needs. There was persistent interest in groups concerning the appropriate role of the court in meeting victim needs. In State 1, for example, judges said that the court was responsible for ensuring that victims were provided with a central place to report and get information about victims' rights, that victims of domestic violence could get assistance in obtaining an injunction, that victims not be "badgered" in restitution hearings, that victims are notified ahead of time if a plea is being negotiated, that victims experience part of the process and have input on plea and dispositional hearings, and that a "practical monitoring system is available to victims for restitution." Interestingly, another court responsibility in this state was said to be to:

Train juvenile justice [the independent department responsible for probation, disposition and residential placements] on victims' issues, because there is a whole mode of thinking there...there are so many issues that they don't understand and one of them is restitution...I do a restitution order and sometimes I think they just throw it away, that they are really not going to spend time on it...they don't think about money coming in and restitution being collected.

Although the list of court responsibilities in this state was more extensive than most, the line of argument here--though more critical of the probation function because in this state probation officers work for the executive rather than the judges--was about placing boundaries on the *court's* role in addressing victim needs. More to the point:

The judge, I think, has a limited role [although it] is becoming bigger. I wrote down [in response to the moderator's probe about the court's role] helping victims understand the process, notice of subsequent proceedings, referrals to mediation and victim services. I would like *that* to be our role but a lot of time we have to take on a greater role than that [returning to probation critique]...to me that's a system's issue [in that department] that is top down...people at the bottom feel inundated, and they don't feel empowered.

You can say it's not my [the judge's] job to notify, but I want to make sure, and that the victims have an opportunity to say something...If they aren't here, why? We can still afford decent status to them.

On other occasions, judges seemed to assume that what victims described as practical access-to-information problems, poor treatment by the court, or redundancy in the court's information collection process were a result of victim ignorance of due process. For example, in response to a victim's question about why he had received repeated requests for the same information from police, prosecutors, defense, and other court representatives, one judge responded somewhat defensively as follows:

You are a victim of the Constitution. How do you translate that [your complaint] into "the judge isn't doing a good job?" He is seeing you for the first time to have your day as the victim in court...ninety-nine percent of the time we won't know anything about what you have been through, what you've done, what information you've given to police...we don't know that.

...I'd be very careful about changing the Constitution [because it] has actually created a certain balance...we want to make sure that when government asserts power that it asserts power in a fair manner with due process...we are trying to develop power to do things for the victim, but our power is really to do things *to the juvenile*. We can send the child to a state school but we want to make sure the process is an accurate process and that is what Constitutional protection is all about...I would hate to lose some of those protections.

Perhaps realizing that the victim in this dialogue was in fact questioning management of the court process, rather than the Constitution or due process, this same judge then made a statement about the court's role and concluded by acknowledging that:

...although we [have to try] to keep someone from being convicted when they shouldn't be, if we manage the overall system better, we are able to give them [victims] more dignity, quicker process and to give them some reasonable restoration at the end, and *you don't have to trash someone's constitutional rights to do that*...As a system, we haven't emphasized that at all. We owe you that [looking somewhat puzzled, the victim noted his agreement with this statement] (emphasis supplied).

In other states there was somewhat less discussion about the court's role, although in State 4 there was a strong effort to assign the bulk of responsibility to prosecutors and victim advocates, especially for notification issues. In response to another question about whether the court should keep victims informed of restitution payments, it became clear that judges were ambivalent, if not highly resistant, to expanding the court's role with victims:

How much money are we going to allocate to a limited pie even in [State 4]. How much are we going to allocate to doing these 'feel good' things?

[Response from a more supportive judge]: Remember the Gideon case?...the argument there was how much it was going to cost the states to provide *defense counsel* [emphasis ours]...Remember that? And we are doing it today

...But we are talking about staff that does not exist and we are talking about states that do not send money with their mandates...I want a probation officer before I want a community service group [or victims' advocate].

[Third judge:] The truth is that the more notification you give, and the more input you have, the slower the court system will go, which means more money, more time, more delays, more kids who won't show up. And less justice. And the victims will not show up either.

Commitment to providing victims' services also varied widely among these judges. Some viewed it as their job to press for a range of services through the court or other agencies. Others questioned the value of the court's support for victims, such as a judge who argued (in a discussion of separate waiting rooms) that victims deserved no special treatment:

I don't want to sound anti-victim. However, whether they are punitive victims, etc.... anyway at the early stages, we know that somebody has hurt them. But the idea that they are *entitled* to all sorts of special treatment because they have special status ...Many of our victims are also offenders...I live in a working class community...trailer park kids, low-end apartment kids. Setting up these special room categories (crime victims) for them just does not make sense to me. By the way, our county board has to spend the money and then the property taxes go up. This is not first priority when someone is running for county commission.

In contrast, despite the same fiscal and political considerations, judges in State 3 view waiting rooms both as a right and high priority for judicial advocacy. Indeed, one State 3 judge reported threatening to hold his county administrators in contempt unless they agreed to build a new separate waiting area for victims. In this state judges also gave high priority to providing special services for victims such as rape counseling, crisis intervention, referral, and general advocacy. Although not all of these services should be provided by the court, more than one judge argued that it was the judge's responsibility to ensure that funding is provided for them at the county or state level. Judges in States 2 and 3 were the only groups to acknowledge that gaps in these basic services may be the most debilitating to victims.

While generally agreeing that information and input were important to victims, State 4 judges expressed very different feelings about the court's responsibility in addressing victims' needs and sources of victim dissatisfaction. In their list of victims' needs, these judges also emphasized victim understanding of due process, having a good relationship with the prosecutor, safety, and having the opportunity for "spiritual resolution and

catharsis." In this group, the needs of victims were at times reduced to symptoms of assumed underlying psychological problems, as when a participant argued that:

One thing we should address is whether or not we should provide therapeutic services for the victims...victims come in with their emotions and they want to let loose in the court system and I want to consider if *this* is what the court should provide.

[Another judge in this breakout group summarized victim needs as follows:]
What do they want? They want a piece of the offender...Everyone comes in with their own agendas which makes it very hard. Recently, I had a kid who was acquitted, and the mother of the victim was so cruel...she wrote me a nasty letter...I mean this is the kind of stuff we are dealing with; she even went to the judicial standards committee.

Another judge, challenging what he viewed as "unfounded" victim concerns, observed that:

Sometimes it's just the split side of the crime. Many times the victims know the perpetrator. I was struck by the man downstairs (a victim focus group participant) and his need for safety...his fear of retribution. *We know the chances are minuscule that it will ever happen* (emphasis supplied).

Ultimately, the discussion in this State came to the conclusion that what victims felt they needed--for example, spiritual resolution or safety--*could not be provided* by the court. In contrast to the victims' stated desire to be treated with dignity and respect, this was not mentioned by judges as a need the court might address until after a second probe by the moderator as to "whether the judges wished to list it." A judge's response was: "If we don't rank it a 10, we'll look like idiots!"

Judges Rate Court Effectiveness. How well does the court presently meet victim needs? After prioritizing services in terms of their importance to victims, judges were also asked to rate (on a ten point scale, with one low and ten high) their courts on how "well we are doing now" in providing services. In general, judges admitted that their courts were not doing well in providing the services to victims that they considered most essential. In State 3, for example, after agreeing on the importance of information, replacement of loss (restitution, property, emotional), services, and victim dignity, judges gave themselves a three on notice and information to victims, a two on restoring loss, and a "0" on dignity (noting the difficulty of providing this in an unfriendly system). On special victim services, however, their courts rated a "7" for victims of violent crime, but only a "2" for victims of nonviolent crime.

State 4 judges gave themselves equally low ratings in most of their victim priority needs with the exception of restitution, but they spent a great deal of time debating the role of the court and the limited prospects for improvement. Ironically, while safety was given a high ranking, two judges insisted that the court was "incapable of ensuring victim safety." Similarly, State 1 judges admitted that the *system* was not doing well in meeting their priority needs for crime victims, but focused their discussion on how to make juvenile justice workers (especially probation) fulfill their responsibilities regarding notification and restitution.

The Victim as Client or "Customer" of the Court and Juvenile Justice System

Many citizens and victim advocates believe that the crime victim should be viewed as a client or customer of the justice system. As discussed in the applied literature of restorative justice (Bazemore and Washington 1995; Dooley 1995), the idea of victims as clients has two dimensions. First, *client* refers to a member of a group who must be viewed as a legitimate recipient of service by an agency. Because this idea has not been part of the traditional ideology and mission of juvenile courts, the judges considered a set of questions about whether the victim is viewed as a client, and what this would mean in terms of expectations for the court. The second meaning of *client* comes from the literature of total quality management and reinventing government (Martin 1993; Osborne and Gaebler 1990). It defines a client as an active customer who is expected to be involved in the decision-making processes of an agency (Pennsylvania Juvenile Court Judges Commission 1997). Using the latter meaning of client we asked the focus groups a number of questions about the role of victims as participants in various parts of the court process.

Victim participants were unanimous in their view that the victim should be a client of the juvenile court. Although the victim's role is often limited to that of witness to the crime, and victims emphasized that "the victim role should be his or her choice," participating victims agreed that they had much more to offer in the way of relevant information that needed to be heard in court. Several victims pointed out the need for their

roles to be defined by *agency policy*, in addition to state law**.** The lack of consistency in victims' roles was directly linked to the lack of consistency in both juvenile justice practices and related victims' rights across jurisdictions within states and the absence of a "unified system."

The general consensus among participating judges was that the victim is indeed a client of the *juvenile justice system* and has some role in *juvenile court*. The distinction is an important one because the court in various jurisdictions may include various agencies and staff, ranging from the judge and clerical assistants alone, to the judge, probation and parole, a range of special programs, and even victim services. All judges were more comfortable with the notion of the victim as a client of the system as a whole than of the court in this most narrow sense of the term. In every state judges expressed the view that the court itself was responsible for accommodating certain victim needs (e.g., notification, impact statements) and ensuring that victims are invited to participate in the process. For a vocal minority of judges, providing basic services, including information, to victims was a moral and ethical requirement as well as a statutory obligation.

Judges and victims talked about issues that arise with victim involvement in family court. These include the perceived challenge to judicial impartiality presented by victim involvement in the court process; the points in the process at which victims should be allowed to participate; and how much information should be available to victims.

The Challenge to Judicial Impartiality. A key concern in much discussion was whether victim accommodation would threaten judicial impartiality. For example, a State 1 judge who was asked if he viewed the victim as a client of the juvenile justice system responded as follows:

Sure, but I can't get involved with making the victim *my* client or I lose my impartiality...the victim is a consumer of the judge just the same as the defendant is...do you agree with me that it will look awfully funny if letters are going out on letterhead to victims telling them that they need to prepare their case, gather information, and be at the hearing? I don't think the criminal defense lawyers would think that way..The reason they pay us the big bucks is so we can stay in the middle and we are only shifted by the facts. Once you start claiming the victim is a client or customer you lose neutrality.

This comment suggests a view of clients as adversaries. This may have led to a misplaced fear that victims want to take the place of the prosecutor in the process, or perhaps retain their own counsel as a third party. Indeed, in the report-out from the judges' first break-out session in this state, this idea was expressed as a view that victims were "the state's client."

Of all the judges, those in State 4 appeared most uncomfortable with the idea of victims as clients in any sense of the term. In general, State 4 judges limited victim input to disposition. Even at this level, there were many more restrictions mentioned than in other states and a belief that the court has only one client:

...This does not mean my role is to be an advocate of that juvenile...my role is to be neutral but the focus is [still] *on the juvenile*. The focus is on ensuring due process for that juvenile in the adjudication...the focus remains on the juvenile in the disposition phase...and certainly the victims are "players" or "stakeholders" in the process and [the victim] has to be honored as a player, but I see the one and only client as the juvenile and the juvenile's family...we need to keep the focus on them.

The Nature and Amount of Victim Participation. Beyond concern with whether or how the victim is viewed as a client are more specific questions about the *nature* and especially the *amount* of victim participation that is desired by both crime victims and system professionals. The role of victims as participants in specific components of the juvenile court and justice process (e.g., diversion, disposition, etc.) was discussed in both victim and judicial breakout groups. Victims viewed input as desirable and important at every stage of the juvenile court process if the victim was *willing* to participate. Judges' opinions varied within and between state groups. Their discussions examined the desirability of victim input, the most efficient ways to obtain input, and the nature of input desired. The bulk of discussion, however, focused on the relative appropriateness and usefulness of input at different stages of the process.

There is a great deal of variation between states concerning when a victim should become a client. In States 2 and 3, judges scarcely questioned that there should be some role for victims at virtually every stage of the process. Some State 1 judges, on the other hand, were uncomfortable with the view of victims as a client prior to adjudication and disagreed about the role of victims in plea bargaining. Overall, however, judges expressed surprisingly little opposition to victim involvement in pre-adjudicatory stages of the process. While

involvement was generally viewed as "input but not discretion," as one judge put it, the surprise was that at these front-end points in the process, guilt has not been formally established (e.g., at diversion, and at preadjudicatory detention). While judges in States 1, 2, and 3 bemoaned the fact that case processing protocols made it difficult to provide victims with opportunities for involvement prior to court hearings, they were generally receptive to the idea that victim input would be valuable even to prosecutors and intake workers considering diversion, plea bargaining and secure detention.

Several State 4 judges, on the other hand, questioned both the feasibility and value of notifying victims to allow input prior to adjudication.

I mean these kids are arraigned within a short period of time after arrest. It would be impossible to notify the victim. And the truth is that most kids plead guilty at that initial appearance.

[Question]: "Do you mean (speaking to moderator) you would have to delay this because the victims have not been notified?"

[Answer from another judge]: "That would be absurd and it would bring the system to a standstill." [Point made by the judge that only domestic cases in her court might result in an arraignment being delayed unless the prosecutor has contacted the victim.]

Regarding detention, judges' in State 4 focused objections on both the relative benefit to victims and system impact:

[Moderator]: What about detention?

You have a balancing. If you notify the victim, the victim is going to come to a hearing that deals with nothing but detention. Then they come to a pretrial where we spend two seconds setting a trial date. By the third hearing, they're not going to show up anymore... or they come down and somebody's sick...or whatever, and the victim loses all that time and then they get mad.

The victims are saying that (they make) repeated appearances at these hearings and nothing happens. Then one day *everything* happens and they are out of the loop.

At the disposition phase, there was little disagreement with the idea that victims should have at least some role. Most of the discussion revolved around who was responsible for notification and how the process could be improved, given the low rate of victim participation. For some judges a primary concern was that victims be prepared ("lowered expectations" was a term used more than once) for the possible outcomes in a dispositional hearing. Notification was presented as a tremendous problem in jurisdictions where collapsed adjudication and dispositional hearings are frequent. In some courts, according to these judges, arraignment hearings may be used to accomplish a variety of other court objectives, including much of the work of adjudication and disposition. In States 3 and 4 the brief time between hearings and key decision points creates problems for adequate notification.

The victim impact statement assumed much greater importance than expected. Somewhat surprisingly, judges almost unanimously reported reading these statements quite carefully and relied on them for their information on harm done to victims. While most judges viewed good written victim impact statements as important to dispositional decision-making, some judges reported that the written statement often seemed bland. As one judge put it:

Impact statements have become so routine that sometimes they seem canned...they seem too clean and homogenized, so that they don't really have the 'impact' we think they should have.

To compensate for this weakness and go beyond what could be provided in even the most well-written victim impact statement, several judges report that they value the input of "live victims," especially for their potential effect on the *offender* and others in the court hearing. For various reasons, these judges felt that this input was far too rare. One judge exclaimed that he had grown tired of hearing that there was no time for verbal statements by victims:

There is time if we just build in opportunities for it...often it only takes two or three minutes...and it's worth it because the victim needs to ventilate whether or not the judge needs the extra information.

Availability of Information to Victims. Surprisingly, concerns about confidentiality in dispositional proceedings, anticipated to be a "hot button" issue for judges in every state, received relatively limited attention among judges and was raised as a concern in only two states. In State 2, judges expressed concern that some information was sensitive, but trusted that judicial instructions to keep these materials confidential would be enough to ensure that offenders and families would be protected. Similarly, when judges in State 3 briefly discussed confidentiality, it was in response to the moderator's probe about it, and the discussion itself took the form of how judges could use their discretion to *get around* what on the surface appeared to be prohibitions against openness at the dispositional phase. Moreover, one State 2 judge responded as follows to a colleague's comment that victims should not be allowed to "run the system:"

I think this confidentiality is nonsense. We all know that people who want to know are going to find out. We'd be much better off to open it up and be as inclusive as we can.

On the other hand, in State 4, the issue was discussed in a very different way. In a general group dialogue, with both victims and judges present, a judge raised the issue of the need to prohibit victims from hearing certain information about the offender's background:

There is another important factor that you have in juvenile court, that of confidentiality. And the problem with victim input when we are talking about a juvenile who may have been [sexually] abused, chemical dependency, psychiatric evaluations, is that it cannot be the same as adult court because that information is confidential, and no victim is entitled to know. Especially in the non-public hearing...even in public hearings, we get to kick the public out when we get to speaking about psychological evaluations during hearings...and no statute has taken away that confidentiality.

Following the objections of several victims to this statement, a participating prosecutor informed the victim participants that they were "not entitled to this personal information," and was seconded by a judge who argued that "these families are ashamed, and they don't want victims to hear everything." In response, a victim observed that the juveniles who *burglarized her home* "found out everything about *me and my family."* Others commented that crime victims weren't interested in "gossip" about juveniles and their families, but did want access to information such as prior records, how decisions were being made, and what might have motivated the offender to choose to harm them. Another judge concluded this rather lively interchange by lamenting that in his view, no matter how much he and his colleagues try to protect confidentiality, "in [this state], we're going to open it [the dispositional process] up--we're just crazy enough to open it up."

Prospects for Reform

Judges identified barriers to reform, considered strategies for improving the court response to victims, and evaluated several restorative justice practices as part of an overall plan for court reform. Because these discussions address concerns about whether restorative justice can improve the status of victims of juvenile crime, they are briefly summarized below.

Obstacles To Victim Satisfaction. Barriers to meeting victims' needs include a variety of bureaucratic constraints including poor communication between juvenile justice officials, difficulty in scheduling, the poor quality of victim impact statements, inconsistent notification, and the failure to adequately include victims and the community in the process.

Although court delay was mentioned, it was often actually offender-related issues that consumed resources and attention. In State 1 especially, discussion focused on problems with *offenders,* ranging from the lack of treatment options, to judges' inability to use detention and other punitive options to enforce compliance with court orders. Too often, the concern with the lack of punishment options seemed to link advocacy for repairing harm to victims with "getting tough" on offenders rather than improving court management and system accountability (e.g., for collecting restitution).

In State 4, and to a somewhat lesser degree in State 1, the discussion of obstacles primarily focused on resources and unfunded mandates. Moreover, in these states, judges assigned blame to victims themselves for being uninformed about the process or engaging in inappropriate behavior and being emotional in court. More often, other system professionals (e.g., prosecutors, police) were blamed for creating false expectations. Courts were described as overwhelmed due to the volume of cases, but in two states judges learned ways from colleagues to set new court priorities to increase victim input, improve the flow of information to victims, and

relax traditional confidentiality prohibitions that limited victim involvement and left the victim feeling uninformed.

Judges in the other two jurisdictions, however, viewed the primary barriers as a lack of leadership on the part of judges and a failure to set priorities. The need to promote and provide training on victim sensitivity and to change both the organization and "culture" of the court were discussed, as were specific problems with judges who remained overly protective of offenders and seemed obsessed with confidentiality. As a State 2 judge insisted, judges can *choose to* have the authority to both set a tone for changing the culture of the court and restructuring court management to ensure that victim needs are met. A State 3 judge raised the systemic problem of compartmentalization in court and other juvenile justice system components as a primary barrier to reform. In his view, what was also needed was a "blurring" of professional roles so that--in a more ideal world--judges, prosecutors, defenders, police, probation officers and other professionals would all operate from a core set of values which encouraged both victim and offender advocacy.[8] This judge reported that new judges are the most "rigid" of all juvenile justice professionals but that they can become more flexible (and less fearful of being viewed as victim advocates or community leaders) if senior judges encourage them, and as they gain more experience. Likewise, judicial rotation (which ranged from once a month to once a year) was viewed as an obstacle. This judge also saw "loosening up the adversarial system" and increasing community and victim participation in sanctioning as a key.

Some judges believe restorative justice practices and processes are a primary vehicle for addressing barriers to victim satisfaction, whereas others view them as desirable alternatives but not necessarily required to increase victim satisfaction.

Rating Restorative Justice Practices. Because restorative justice practices are in part intended to address victim needs for involvement and healing, participants in each focus group were given brief descriptions of several restorative justice interventions and asked to discuss and individually rank them in relation to their benefits to crime victims.

So long as participation was voluntary, crime victims were strongly supportive of restorative practices. Judges, however, were equivocal in their support.

Judges were often uninformed about various restorative justice practices with the exception of restitution/community service. Although many were familiar with victim-offender mediation, they were much less familiar with more recent versions of the mediation model (Umbreit and Stacy, 1995) and restorative community conferencing models. The most highly rated restorative practices in *all states* were those that provided work opportunities for offenders to allow for payment of restitution. Examples considered for replication by several judges involved restitution, work programs, community service, and victim impact panels. Only judges in States 2 and 3, however, seemed to link restorative practice directly to the victim needs they had previously discussed.

In States 2 and 3 judges began with the premise that victims need to get information, to be heard, and to receive needed services. Hence, victim notification was most highly ranked, and was viewed as the the key to the success of anything else the court attempted to do to meet victim needs. Similarly, effective victim impact statements were viewed as critical to informing the court and system about victim needs. In addition, effective victim services, coordinated by strong victim advocates, were viewed as essential in helping victims overcome traumatization (rankings of nine to ten on a ten point scale). Other practices received mixed support, with more traditional practices such as restitution, community service (with a restorative focus involving victim and/or community input), and paid public work programs receiving relatively high ratings among these judges (scores of five to seven). Victim awareness education was ranked surprisingly low, perhaps because it was misunderstood (two judges seemed to equate victim awareness with victim-offender mediation). Victim awareness education is a component of offender treatment programs, which often involves asking surrogate victims to tell offenders about their experiences.

Family group conferencing (Braithwaite and Mugford 1994) and victim-offender dialogue--restorative processes that allow victims, offenders, and their significant others to discuss their crime and develop reparative dispositions outside the formal court process--were being piloted in some parts of each state, except State 1, but were relatively unfamiliar to most of these judges. These processes were ranked relatively low (from three to eight on the scale), perhaps for this reason. In addition, the discussion around these mediation and

dialogue alternatives brought strong objections from two judges in State 2, who had been relatively silent for much of the day. These judges expressed reservations and resistance to efforts to bring victims and offenders together:

My gut goes against the whole concept...there is just nothing the offender can say to help the victim. I don't trust them (offenders) to say the right thing. Also, what the victim might do is an unknown.

In response, another judge, experienced in mediation and conferencing, expressed strong disagreement with this view, explaining that his colleague's statement revealed a common misunderstanding of these processes and their goals. Noting that prescreening can take care of offenders who may not be prepared for a meeting with a victim, this judge expressed the view that disposition may well be the *best* time for victims and offenders to talk (in an informal restorative justice context). Indeed, when victims want such a meeting, and when trained personnel conduct them in community based settings with input from victim advocates, such dialogues were in his view "almost never inappropriate."

Another judge expressed doubt that the *offender* would benefit from meeting the victim, noting that, "the kids I see wouldn't be helped by putting a face on a victim...their remorse is shallow." This judge appeared to view victim-offender meetings primarily as a type of therapy or education for the offender and went on to insist that:

Victim satisfaction is misleading. They [victims] think they have helped the offender, but victims don't have the skill to communicate that to kids...treatment staff are better able to communicate that...this [mediation] just gives kids a false sense of power.

In contrast, State 3 judges ranked restorative practices very highly. This is also a state where restorative justice practices and processes were being used rather extensively by two quite vocal judges. While notification and impact statements were also ranked a ten, reparative boards, victim-offender dialogue, and family group conferencing received ratings of eight and above because they were viewed as potentially *good for victims*. State 3 judges saw restorative processes as an important avenue for much more extensive and less formal victim input into court decision-making about diversion and disposition (which in this state was viewed as currently insufficient). One judge reported that his mediation program provided the most effective victim input. He insisted that without it he would be limited to the infrequent and often sterile, cold and impersonal victim impact information typically provided by professional personnel in the court setting. These supportive judges also expressed some concerns about standards for implementation, however, and felt that it would be difficult as one participant put it, "to get certain players (e.g., other judges and prosecutors) to give up enough power" to allow these processes to flourish as a real systemic alternative to disposition.

Judges in State 4 were in many ways a case in point. In this state, where various conferencing models were being widely piloted, restorative justice was viewed as more than just a theoretical possibility. These judges were the most negative of all in their response to conferencing and mediative processes and community reparative boards, but their opposition went beyond concerns about their possible negative impact on victims and offenders. They also perceived a real and growing threat to the courts' discretion over dispositional decisions.

State 4 rankings of victim-offender dialogue, reparative boards, and family group conferencing hovered at around six, perhaps because staff and community members in several of these judges' districts were actively implementing these practices. Judges raised several concerns about how to protect both offender and victims from the "tyranny of the majority." Several of these judges expressed strong fears that community involvement in disposition would erode due process and court protections. In addition, the discourse around restorative alternatives to court processing betrayed a great deal of fear and concern about the implications of citizen involvement for the power and authority of the court (Bazemore 1997b). For example, in an opening session one judge asked questions following a brief description of reparative boards, circle sentencing and conferencing:

Who is this "community" we are talking about here and who empowers them to speak? Are the members of these [reparative boards or circles] really an "elite"?

[Answer by moderator]: Members can include anyone who has a stake in the outcome of the response to this crime.

Judge: We operate under a Constitution and laws. I'm concerned about abdicating that responsibility...about giving it to someone else who may really represent a mob.

[Response from moderator]: There are guidelines for all of these processes, and they are *not* about determining guilt or innocence.

Judge: We play havoc with the Constitution when we do that...Our concern is to have a *uniform* public policy...I'm very concerned if this circle [or other community process] will set conditions of probation, the violation of which will have potential consequences.

[Public defender, agreeing]: This [community involvement] stuff doesn't make much sense because where I work, these kids don't *have* any community...they are transient, moving from neighborhood to neighborhood, school to school almost constantly.

In the private dialogue about practices in this most oppositional judges' group, judges expressed even stronger doubts about community involvement in disposition, or any decisionmaking process. One judge who gave reparative boards a rank of five revealed both an unclear understanding of and a deep general opposition to the objectives of such initiatives:

"If this involves community members discussing what [sanction] an offender is going to get, I'd rate it a zero!...I'm uncomfortable with [letting the community] do anything that labels people." This statement was neither challenged nor corrected by his colleagues, and a public defender who observed the session was positively received when she added that "all of this must be ordered *or* done on a strictly volunteer basis."

Judges in State 4 focused primarily on obstacles to accomplishing basic, traditional court services, which they felt were compromised because various directives had been imposed on them by the legislature. For them, victim rights and restorative justice were very much "on the scene" and perceived as yet another top-down policy requirement. The State 4 response must also be seen in the context of a national attack on juvenile justice generally and the traditional mission of the juvenile court specifically. These judges, who spoke for other less vocal judges in defending this offender-focused mission, may have also lumped victims' rights and restorative justice in with efforts to criminalize the juvenile court and efforts to associate victims' rights with being anti-offender or opposed to rehabilitation. As one judge in this state expressed to victims in the final dialogue session, the bottom line is that:

Our discretion over resources and the rest of the system is pretty much gone [we have no control over the police, prosecution, disposition, etc.]. On top of that, the legislature is constantly giving us unfunded mandates.

SUMMARY

Today the very existence of juvenile courts is threatened and the role of juvenile court judges is changing. Fortunately, there is presently the motivation and opportunity to engage juvenile court leaders in a constructive dialogue about experimentation and reform that would have been considered radical, regressive or unnecessary a decade earlier. Moreover, these changes create an opportunity for crime victims and their allies to influence the direction of this transformation and the shape of the new role in a way that includes victim advocacy as a core component.

Judges in the four focus groups discussed both risks and opportunities associated with increasing victim involvement in the court and shifting priorities to better accommodate crime victim needs. Although restorative justice reform is not limited to changing the formal justice process, and not only to courts, change in court practices, judicial leadership and risk-taking will be necessary if restorative justice is to move from the margins to the mainstream of the juvenile justice process (Umbreit 1998).

Unfortunately, juvenile court decision-makers may perceive that they have much to lose by moving their courts in this direction. As comments from a number of these judges suggest, restorative efforts to serve and involve victims raise many unanswered questions about the court's responsibility for meeting victim needs, ensuring fairness and uniformity, and protecting the rights of the accused as well as victims. More troubling was a resistance of some judges to reform that seemed based more on concerns about a loss of power or about perceived challenges in dealing with crime victims. However, as the positive response of some judges to restorative justice reforms suggest, courts and juvenile justice professionals may also have much to *gain* by transforming the focus of the court response to take account of the needs of victims and communities, as well as the needs and risks presented by offenders.

Endnotes

1. Attitudinal research based on a statewide survey of Florida judges found that support for a victim emphasis in juvenile court disposition is inversely related to judicial punitiveness (Bazemore and Feder 1997). Moreover, some juvenile court judges have shown leadership on behalf of crime victim concerns, especially in areas such as restitution and victim services (Schneider 1985; Armstrong, Maloney, and Romig 1988; Rubin 1985; Stuart 1995a)

2. The Office for Victims of Crime (OVC) does not typically fund pure research projects. The objectives of the current focus group project included: educating judges about crime victim needs, promoting ongoing discussions and collaborations between judges and victim advocates, and improving implementation of victim rights legislation and restorative policies. Strategically, the action research objectives of the funding agency for this project were to maximize opportunities for implementing improvements in victim services and promote continued dialogue between crime victims and juvenile justice professionals. These guided our decision to target one region of each state for victims and judges for focus groups. This also made it easier for victims to travel to the focus group site and enhanced the possibility of replication in other parts of each state.

3.One reason for using local victim advocates in the recruitment process was to maximize the degree of protection that could be offered to crime victims who might not be emotionally prepared. Advocates were instructed to exclude victims they felt might be adversely affected by the focus group experience. However, no victims were excluded for this reason. The research team attempted to randomly select victims from prosecutor and court administrator files but was unable to do so in three states.

4.The sampling protocol initially was intended to over-sample victims of property crimes since they constitute the bulk of crime victims who go through juvenile court. Many property victims are never heard from because their relatively less serious cases do not merit the scarce resources of victim advocates. The research team sought to avoid an exclusive focus on victims of violent crimes. The moderator did this by focusing on the court experience of and calling on property crime victims, frequently by name. In addition, violent crime victims generally encouraged victims of property crime to tell their stories and present their perspectives.

5.Prior to the session, each participant also received a letter and package of background materials that included a short definitional statement on restorative justice and a list of restorative practices, information an victims' rights legislation pertaining to juvenile crime in that state, and a description of balanced and restorative justice legislation or policy in that state.

6. Victims were asked a parallel set of questions in separate break-outs. We briefly consider victim responses for comparison purposes in the conclusion of this paper and occasionally describe dialogue sessions in which victims and judges exchanged views on specific issues.

7. Portions of the dialogue became more pro-victim in two states because of the deference granted to a judge in each group who had been a leader in promoting victim services. In another state, two dominant judges set a much more critical, if not anti-victim, tone that was infrequently challenged by the other judges. However, even in these states polls of individual judges on various issues did not reveal wide disagreement. In more than one state, strong dissenting views were recorded on various issues, even though the dissenting opinions were often less well elaborated than the dominant view. Some bias is always apparent in any group setting where "politically correct" responses by public officials can be expected in response to new policies or statutes--especially in the presence of "outside experts" and local constituents. While some of this bias was apparent on the part of judges, both groups were invited to speak freely and critically, and each did so on numerous occasions.

8. This idea is not unlike the recent challenge of a State 2 victim advocate to probation managers in her state. This advocate, who now requires that her staff be trained on offender issues, suggests that probation must get away from specializing in offender needs and develop a core victim sensitivity and service capacity in all staff (Bender, 1997). Getting juvenile justice professionals to "wear different hats" is not as difficult as it sounds if judges would serve as a model for others. But as with all restorative justice reforms, there are risks involved when prosecutors try to see things through the eyes of public defenders or police, and when all system professionals try to see things through the eyes of crime victims.

6.8. Responding to the Community: Principles for Planning and Creating a Community Court -1997[55]

6.9. Court Reform on Trial: Why Simple Solutions Fail - 1983 [56]

- This is an excellent analysis of why adult diversion programs accomplished very little in practice in the United States during their heyday in the 1970s.
- Essentially he contends, and the data bear this out, that too few cases were handled, largely because eligible arrestees did not select this option for very good reasons.
- Divertees' rates of re-offending did not differ significantly from those of other comparable offenders.
- In his view the courts, unlike their image in diversion theory, have already adopted flexible and informal alternatives on their own, with the result that "diversion is no big deal" and offers the defendant little while it may provide more hassle and fewer procedural safeguards.

[55] John Feinblatt and Greg Berman, Responding to the Community: Principles for Planning and Creating a Community Court. Center for Court Innovation Series: BJA Bulletin Published: November 1997 http://www.ncjrs.org/txtfiles1/bja/166821.txt

[56]Feeley, Malcolm. Court Reform on Trial: Why Simple Solutions Fail. New York: Basic Books, 1983 cited in 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/e199805/e199805.htm

7. Relevant Documents, Studies and Practices – International

7.1. Judicial Activism and Restorative Justice -2001[57]

In the seminal case of *Marbury v. Madison* (1803), Chief Justice John Marshall of the United States Supreme Court declared: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."

The ensuing two centuries of American Jurisprudence have witnessed ongoing controversy regarding the boundaries and appropriateness of "judicial activism," defined by Judge Richard Posner as the use of judicial power to second-guess the policy determinations of the non-judicial branches of government.

The utilization of Restorative Justice (RJ) principles has been cited as example of judicial activism by proponents and detractors alike. This presentation will review the American debate concerning judicial activism, its contextual relevance to other methods of legal analysis (such as therapeutic jurisprudence and jurisprudent therapy), and its impact upon the role of judges embarking upon RJ initiatives in various jurisdictions throughout the world.

Courts of Limited Jurisdiction

This presentation seeks to highlight the ongoing debate concerning the role of the courts in the United States in developing and implementing Restorative Justice (RJ) principles in criminal cases. Focused primarily on the federal criminal justice system, and by referring to the various state court models for comparison, we seek to examine the interaction of restrictive concepts of limited jurisdiction courts, "Judicial Activism," and determinate or "guideline" sentencing. Continued development of RJ principles in the federal system, short of an expansion or alteration in the jurisdiction of the courts, must come from legislative and executive action.

By way of example, United States District Courts maintain jurisdiction to try offenders accused of federal crimes and to impose sentence upon conviction. The District Courts, however, are courts of limited jurisdiction, in that their very existence is not constitutionally mandated, but left to the United States Congress "from time to time to ordain and establish." As courts of limited jurisdiction, the District Courts possess only such powers in criminal cases as the Congress bestows upon them by statute.

The Sentencing Reform Act of 1984

Prior to 1984, the power of criminal sentencing in the federal courts was limited only by the statutory maximum sentences set by Congress. The District Courts were given broad discretion to structure sentences as they determined to be appropriate in any given case. Because of the increasing perception that District Court judges were frequently imposing disparate sentences in similar proceedings, and too often imposing unacceptably lenient sentences, the Congress enacted the Sentencing Reform Act of 1984. Among other features, the Act created the United States Sentencing Commission, whose purpose it is to create and maintain a set of sentencing guidelines which the District Courts must follow in most cases. Other sentencing reforms included minimum mandatory terms of imprisonment, particularly in drug trafficking and firearms offenses, and mandatory victim restitution in certain types of offenses.

To be sure, the federal sentencing guidelines are complex and voluminous, attempting to account for nearly every possible nuance affecting the propriety of a sentence in a given case. To be equally sure, the guidelines

[57] Eric Y. Drogin, J.D., Ph.D., ABPP, Attorney and Forensic Psychologist, Associate Clinical Professor, University of Louisville School of Medicine, Kentucky, and Mark E. Howard, J.D., Assistant United States Attorney, Adjunct Professor, Criminal Law and Federal Courts, New Hampshire, Judicial Activism and Restorative Justice: The American Debate Restorative and Community Justice: Inspiring the Future An International Conference Winchester, England March 28 – 31, 2001 http://www.law.soton.ac.uk/bsln/rj/rjsumhow.htm

significantly restrict the discretion of the court, requiring imposition of a sentence within a fixed range of incarceration as determined by the application of relevant sentencing considerations to a grid system.

This constitutes a significant restriction on the court's discretion, manifestly affecting the ability of the federal courts to develop and implement Restorative Justice principles. The core theme of federal guideline sentencing is incarceration, and the primary justification for the incarceration is retribution. Such a sentencing culture, especially when it emanates from a determinate sentencing scheme, leaves little room to deviate from the established cultural norm.

Mental Health Departures in General

District Court judges do retain some degree of sentencing latitude, as embodied in the opportunity to employ "departures" based, *inter alia*, on a criminal defendant's alleged mental health condition. Regardless of the source of the mental health departure issue, a basic analysis must be performed by the sentencing court before a departure can be made. Although the Circuits have described this analysis in slightly varying ways, it can be adequately summarized as:

1. there must be a lawful ground for the departure (*i.e.*, a ground not prohibited by the Guidelines or one not adequately taken into consideration by the Commission in formulating the Guidelines) which will be reviewed *de novo*;

2. the ground must exist to an unusual or exceptional degree so as to take the case outside the "heartland," a determination that will be reviewed for clear error; and

3. the court must articulate the reasons for the extent of the departure imposed, which will be reviewed for abuse of discretion.

Downward Departures

The Diminished Capacity Policy Statement, an "encouraged" ground for departure, was amended by the Commission in 1998 and provides:

A [downward departure] may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not [downwardly depart] if (1) the significantly reduced mental state was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

Upward Departures

Mental health issues under the Guidelines do not always relate directly to the defendant. Section 5K2.3 provides for an upward departure from the applicable guideline range "[i]f a victim . . . suffered psychological injury much more serious than that normally resulting from commission of the offense . . . .? The Policy Statement then provides some guidance on the extent of the injury contemplated under this encouraged factor:

Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, *and* when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

Conclusion

Given the vociferousness and practical, structural consequences of the American debate on Judicial Activism, RJ principles will only flourish in the federal system subsequent to comprehensive and focused intervention of the executive and legislative branches of a tripartite governance system. RJ proponents are thus more likely to effect change through lobbying efforts than attempts to persuade the federal judiciary to embrace more creative approaches within a determinative sentencing paradigm.

7.2. Restorative Justice: Justice Of The Future – A View From The Bench-2001[58]

1 INTRODUCTION

A few years ago in New Zealand, while driving a car, a young Samoan man was careless, and hit and killed two young Tongan boys aged 5 and 6. After the accident, the young man panicked and drove away from the scene. He eventually abandoned his car five or six kilometres away. The incident attracted considerable media publicity, and because of this publicity, he gave himself up. Shortly afterwards, before the matter had been resolved by the courts, the two families convened a meeting according to Pacific Island custom, at which the nature and consequences of the offence could be addressed. The offender and his family admitted what had happened, made a genuine apology and pleaded for mercy. After considerable discussion, the apology was accepted. The grieving community embraced the young driver and forgave him. "His deep shame, his fear, his sorrow, his alienation from the community was resolved." The offender was given a red scarf representing the blood of the boys, which he subsequently wore at all his court appearances.

When he was sentenced for the offence by the court, the family of the victims were not consulted. They felt completely excluded from the process, and despite the fact that they did not wish the offender to go to prison, he received 15 months imprisonment. The family of the victims were so upset by the outcome that they publicly indicated that if they had the power to appeal they would do so.

This example, one among many, highlights a "fundamental clash of values and interests" between two alternate processes of criminal justice. Under the conventional model of criminal justice, the focus is on a violation of the state and its laws. Justice focuses on establishing guilt through an adversarial process that pits the offender against the state. Victims and offenders alike are unable to participate meaningfully in the prosecution processes. "One side wins and the other loses."

By contrast, under the restorative justice model the focus is on the injuries caused by the offence: injuries to the victims, communities and offenders. The aim of restorative justice process is to repair those injuries. To facilitate this aim, the focus shifts away from the state and the court; to the victims, the offender and their community. A response from the community most relevant to the offender is negotiated rather than imposed. A healing process is sought for both victims and offenders:

Successful restorative sanctioning begins with a single principle that structures the entire process: respect. As used here, respect is a sense of dignity, worth and recognition accorded oneself, another individual, a physical object, or an abstract concept. Crime and the criminal lifestyle are driven, to a large extent, by the pursuit of respect by the offender and a lack of respect for those affected by the offence. From the viewpoint of the victim, crime is the ultimate statement of disrespect for her privacy, autonomy, property, security, and general well-being. For the community and its members, offending is a sign of disrespect – of law and authority, the concept of civility, the benefits of organised society, and so on. The human tendency is towards reciprocity, to meet disrespect with disrespect, leading victims and community members to reject the offender as being worthy of dignity.

In the example I referred to above, the restorative justice process initiated by the families helped restore the family of the victim. It addressed their emotional and material needs. The restorative justice process helped the offender to apologise and to undo some of the harm he had caused. It helped him to reconcile with the family of the victim and reintegrate into his community. For the people involved, the process stimulated and reaffirmed their respect for one another. The conventional justice process did not help anyone.

The reality is that our conventional system of criminal justice does not work. It fails to engage offenders and the victims of offences. It fails to stimulate their respect for themselves or for each other. On the one hand,

[58] His Honour Judge David Carruthers, Principal Youth Court Judge of New Zealand Restorative Justice: Justice Of The Future – A View From The Bench http://www.law.soton.ac.uk/bsln/rj/rjfprog.htm Restorative and Community Justice Inspiring the Future An International Conference March 28 – 31, 2001 Winchester, England

Courtroom justice systems give predominance to the state's role. "Courtrooms seem primarily to serve the needs of 'experts' or 'professionals' who represent the state." The system seeks to deal with crime dispassionately without reference to emotion. On the other hand, the adversarial nature of the system also creates "a hostile environment where concern for mutual respect is replaced with the desire for victory in a pure winner-take-all scenario." Neither of these tendencies is helpful for the victim or offender. Despite the best efforts and intentions of Judges, counsel and court staff, this system does not provide victims or offenders with meaningful justice.

Accordingly, I would like to focus today, in my portion of this address, on why I believe that the restorative justice model represents the way forward for criminal justice. I would like to focus on the way in which, in contrast to the conventional model, restorative justice upholds people's rights, engages and interacts with the people affected by criminal activity, and begins to rebuild their sense of respect: as a community, for one another, and for themselves.

2 CONVENTIONAL CRIMINAL JUSTICE

2.1 MY VIEWPOINT

There is little evidence to suggest that the ritualistic conventional model of criminal justice is successful in achieving its supposed aims. In fact, the research clearly shows that the conventional model is a failure. It increases crime rates, wrecks relationships, fails to deter crime and fails to address the factors that lead to crime. Furthermore, with its reliance on imprisonment, it is expensive.

When I look back on the introduction of New Zealand's Children, Young Persons and Their Families Act 1989, it seems impossible to consider that we could have acted in any other way than to move away from the old system. As I have travelled around New Zealand, I have not met anyone involved in youth justice conferencing who wants to return to the inadequate old processes. Under a conventional criminal justice model, young offenders are sent to prison to become better-educated criminals. All the research shows this. We must deal with these problems in ways that are more imaginative. The conventional model makes no effort to address the factors that lead to criminal offending.

In relation to youth justice, a great deal of effort has gone into determining factors increasing the likelihood of criminal offending by our youth. Factors that make youth offending more likely include:

1. Having few social ties, mixing with antisocial peers and showing aggressiveness.
2. Having family problems such as neglect or a poor relationship with parents.
3. Having problems at school such as academic failure and truancy.
4. Having poor self-management.
5. Abusing drugs and alcohol.
6. Living in a neighbourhood that is poor, disorganised, with high rates of crime and violence, in overcrowded and/or frequently changing living conditions.
7. Experiencing barriers to the treatment of these problems.

Roughly speaking, these common factors can be divided into four areas of a young person's every day life: Their family, their school, their peer group and their neighbourhood.

It is ridiculous to assume that any police force or any court system can replace the day-to-day involvement of family members in the life of a young person. That is not how the world works. As a Judge, I deal with young people on a snap shot basis. I see them for a brief period of time, deal with a particular moment in their lives, and then move on. The people who are there all the time are family members and the close community; brothers and sisters and uncles and aunts; church leaders, sporting contacts, friends on the street, school teachers and social workers. Sending young offenders to prison usually does not help anyone. Calling on the

strengths of their families and community can produce astonishingly helpful results.

In order to tackle crime and its underlying causes, it is necessary to enlist the aid of the community. The community is able to rally around victims and provide them with support; it is able to provide an opportunity for the offender to make amends; and the community is able to address the underlying issues. The conventional approach to criminal justice fails to achieve these important aims because it fails to enlist the community in the justice process. Instead, it exacerbates a cycle of isolation and weakened community bonds. Offenders are deliberately cut off from the community, and victims are ignored and seem to fall by the wayside. The very adversarial nature of the process reinforces we/they constructions, exaggerates the differences between people, encourages separation and weakens the community. Crime is a community problem. We need a system that enables communities to become involved in fixing the problem.

2.2 THE COMMENTS OF OTHER JUDGES

His Honour Judge F W M McElrea, a senior District Court and Youth Court Judge shares my views:

While there is a variety of views about the theory of punishment, the one thing about our criminal justice system today that seems to be agreed by all is that in practice it is not working. Crime rates keep climbing and prison populations keep growing, at considerable expense in human and financial terms. The needs of neither offenders nor victims are satisfied. The existing theoretical bases of punishment seem bankrupt. The deterrent aspect of imprisonment is questioned by the failure of longer prison sentences to reduce serious crime; convictions for violent offending increased by 41 percent between 1985 and 1992 despite custodial sentences for violent crime increasing in length by 58 percent over the same period. Whether the courts are meting out "just desserts" satisfactorily from the public's point of view seems to be always the subject of challenge. … [T]he area of rehabilitation is bedevilled by a lack of resources and a dearth of publicised success stories. In my view, morale in the criminal justice system is low and a siege mentality prevails.

3 RESTORATIVE JUSTICE

3.1 MY VIEWPOINT

New Zealand's Children, Young Persons and Their Families Act 1989 created a system for responding to youth offending based on principles of restorative justice. It aims at having the young person accept responsibility for their actions and reconciling the young person with their family and community. Family group conferences play a key role in this process. We use them as the central diversionary process. Where it is not possible to divert young offenders from the formal Court system through informal Police action, family group conferences are used for resolving offending on a negotiated basis that takes account of victim's interests, holds the young person accountable, and prevents further offending. They involve the family and young person in a fair decision making process. They force offenders to re-engage their conscience and face up to the effects of their crime on the victim.

Successful restorative justice also helps the healing of the victim because it removes the aggravating and distressing effect of the unmoved, unremorseful offender. Also, an angry victim, when confronted with the humanity of a vulnerable and genuinely remorseful offender is seriously challenged to re-examine their own "derogating view of the criminal as a moral monster" They look for lasting solutions to underlying problems. Approximately 50% of these conferences are held without any reference to the Court.

I believe this method of operation has been more successful than any other of which I am aware. A crucial aspect of the success of family group conferences has been that they have enabled the people involved to deal with problems creatively. In a 1998 paper on Family Group Conferences, His Honour Judge F W M McElrea noted:

Although the figures just given do not show a reduction in youth offending since the implementation of the 1989 Act, they do show that juvenile offending as a proportion of total crime has not increased - despite the decreased use of the courts and of state institutions.

"[On]ly 16 per 1,000 young people appeared in the Youth Court in 1990 [the first full year of operation of the new Act] compared with an average of 63 per 1,000 in the three calendar years immediately preceding the Act".

This indicated a 75% immediate reduction in the number of young people appearing in the Youth Court. Certainly judicial experience confirmed that the allocation of Judges, courtrooms and other resources to this work was able to be reduced substantially. … The number of prosecutions against young people dropped from 8193 cases in 1989 to 2352 in 1990 (a 71% reduction) and has slowly risen since then to 3908 in 1996, but this is still less than half of the 1989 number. …

Custodial outcomes for young persons fall into two broad categories - first, orders for supervision with residence …, and secondly sentences of Corrective Training (three months detention) or of imprisonment, imposed in the District Court or High Court.

[Within] the second category, there were 255 cases involving such sentences in 1989, but only 108 in 1990 and 1993, and 138 in 1996. … [T]he number of young persons received into prison fell sharply (from 173 to 64, a drop of 63%) in 1990, the first year of operation of the new Act, and although rising slightly since then (to 81 in 1996) has remained at less than half the earlier number, representing only 1% of the total prison admissions. …

These reductions in custodial solutions for young offenders have occurred despite both a high overall use of imprisonment in New Zealand (which, in the developed countries of the western world, is second only to the USA) and an increasingly "get tough" line evident in the news media and in public opinion, and are a direct reflection of the legislative policies … underlying the FGC system and their implementation by the police, courts and other officials. The statutory model and its underlying principles have therefore proved remarkably resilient.

This creativity and movement away from traditional custodial sentencing is exemplified by cases in which reparation has been paid. Large amounts of reparation have been achieved in New Zealand, well in excess of what could have been ordered under the adult system. Typically, the offender and his or her wider family have taken it as a family responsibility to ensure that the victim's losses are covered; particularly so when the wider family has had an opportunity of hearing from the victim personally regarding the hardship and difficulties which the crime has caused. The strengths of the families when called together properly, and the involvement of victims, have produced some dramatic changes.

I have seen many cases where large amounts of money have been collected from large family communities to assist a young offender in meeting his obligation to a victim. This impacts enormously on the young persons themselves, who feel very much the sacrifices which have been made for them. There is a huge sense of continued family responsibility engendered by such generosity.

Remarkably, very often in New Zealand, victims have become advocates for young people and the offenders have ended up doing work for the victims, and being assisted by them to be rehabilitated. The family group conference allows victims to express their anger, frustration and outrage. This release of emotions changes the victims' outlook such that they often decide they want to contribute to the solution. This occurs even in the most serious types of offending.

We have recently celebrated outstanding successes in working this system in a highly professional way in the Wellington area. The Wellington Youth Justice Co-ordinator, Allan McRae, has been working in conjunction with Sergeant Tony Moore of the Wellington Police, to implement community programmes focused on helping young persons to move away from criminal offending. One of the essential elements has been the use of family group conference processes to determine and identify patterns of offending. Initially, they identified key patterns of youth offending in the Wellington region:

Fifty-eight percent of court appearances involving young people happened because of crime resulting from an association with an adult who had gang affiliations. Approximately sixty percent of young people coming to the notice of youth justice in Wellington were using drugs regularly.

Young people coming to notice "tended to be culturally isolated, had no adult role models, and had suffered some sort of trauma in their lives." In addition to their behavioural problems, many young people "had learning difficulties that had not been addressed. They also tended to have school attendance difficulties going as far back as primary school."

In response, Mr McRae and Sergeant Moore then used the family group conference processes to conference the community and government agencies to establish programmes and projects aimed at preventions which have been identified as necessary. They began a number of community based initiatives in an effort to lower the rate of youth offending in the Wellington region. The results of these initiatives were outstanding.

A program called Tu Rangitahi was initiated to target a group of youths that regularly appeared in court, predominantly because of gang associations with the Black Power Movement. The programme focused on the problems flowing from associations with antisocial peer groups. It aimed to provide activities that would enhance the self esteem of the young people and increase their cultural links and awareness of support within the community. The programme was an outstanding success when measured against its aim of significantly reducing the offending of the target group. It resulted in a major drop in offending. The group members targeted by the programme did not return to court. "The recruitment of 'prospects' by the gang was stopped in its tracks."

A programme targeting youth offending in schools was initiated. It addressed problematic college students, and the educational and learning problems that have been shown to cause youth offending. Instead of automatically suspending students who broke the law, schools called in Police Youth Aid and the youth justice process with the aim of strengthening family involvement. Schools were also helped to access community resources providing drug rehabilitation and anger management courses. The aim was to enhance each student's chance of completing a college education. The result was a major drop in school suspensions, a consequent drop in police referrals and a decline in criminal activities.

Another programme promoting alternatives to mainstream education was also initiated. It focused on young people who were difficult to maintain in mainstream education. Students who had been expelled from college were encouraged to attend alternative community education or continue their education by correspondence. Thus they remained a part of an educational community and supervised family without the stigma of being isolated and excommunicated. The success of this scheme is evidenced by new policies adopted by the Ministry of Education focusing on similar objectives.

In creating these schemes, Mr McRae and Sergeant Moore adopted many of the principles central to restorative justice. The programmes initiated focused on the needs of the offenders. For example, they aimed to take young people away from the influence of antisocial peers and poor role models. They aimed to keep the young people within the education system and provide them with a future. The programmes involved the communities of the offenders. They aimed to involve the families in rehabilitating the young people. They were the community-based efforts of the people closest to the offenders. The results were impressive. Youth offending in Wellington has been significantly reduced over the last four years:

- The number of youth justice family group conferences convened in Wellington dropped from 160 in 1996 to 74 in 1999.

- The number of charges dealt with at Wellington Youth Justice Family Group Conferences dropped from 554 in 1996 to 176 in 1999.

Even more exciting was the impact their programmes had on persistent offenders.

- The number of serious recidivist youth offenders dropped in Wellington from 30 in 1996 to 2 in 1999.

This is an example of the potential for the restorative justice model, applied with very good operational practice targeted at the identified risk factors, to greatly reduce youth offending and even to reduce offending amongst the "tough end" offenders. By strengthening family and community involvement with youth offenders, their various initiatives had a significant and positive impact on youth offending.

The success of the Wellington area team highlights the need for community involvement with youth offenders. One of the concerns that I have had is that the skills in running a family group conference process properly have never been dissected, identified, and valued. There is a very great skill in all this. A crucial part of the conference process is making connections with the community so that key people from the community are

invited and are able to support the family decisions by action, resources and intervention.

I believe that the restorative justice model is particularly effective because of its community-based nature. The victim's community and the offender's community can support and negotiate with victims and offenders about appropriate outcomes through restorative justice processes and are in a better place than judges and other professionals to identify what might prevent future crime. Communities are where criminal offenders, victims and their families live. It is from within our communities that our lives are shaped. The Honourable Hal Wootten AC QC, a former Australian Royal Commissioner once wrote:

An individual's identity is not a purely personal thing. It is built on a social identity, on seeing oneself as a part of a family and a community, each of which has its own history, traditions, culture and sources of pride and self-esteem. These are critical things for the development of the individual personality as a social personality accepting and conforming to the society in which the person lives.

One of the most exciting aspects of the restorative justice process is that it taps into the traditions, culture and wisdom of communities. Crime is a community wide problem. In order to solve the problem, it is necessary to involve the community. "Restorative approaches look for involvement, commitment, direction and resources from the communities of those most directly affected by a crime." Restorative approaches strengthen the bonds between members of the community. The more these bonds are strengthened, the more able the community is to restrain impulses and actions that would be disapproved by the community.

3.2 THE COMMENTS OF OTHERS

Former Principal Youth Court Judge Brown:

All my life experience to date convinces me that there are great strengths within our community. … When we talk of communities, we must include victims of offending. The primary objectives of a criminal justice system must include healing the breach of social harmony, of social relationships, putting right the wrong and making reparation rather than concentrating on punishment. The ability of the victim to have input at the family group conference is, or ought to be, one of the most significant virtues of the youth justice procedures. On the basis of our experience to date, we can expect to be amazed at the generosity of spirit many victims and (to the surprise of many professionals participating) the absence of retributive demand and vindictiveness. Victims' responses are in direct contrast to the hysterical, media generated responses to which we are so often exposed.

His Honour Judge Peter McAloon:

In addition to being a District Court Judge I am a Family Court Judge and a Youth Court Judge. The Youth Court has been in existence for nearly five years and represents a vast change from the former Children's Court. I believe that the Youth Court is the brightest star in the justice firmament.

Her Honour Judge Carol Henwood:

[W]e have made outstanding gains in New Zealand by passing the Children, Young Persons, and Their Families Act [1989]. The areas of concern are basically administrative in nature and are easy to adjust if there is a will to do so. I sit in the Youth Court on a regular basis and I am certain that Family Group Conferencing when it is done well is a brilliant solution to the resolution of youth crime.

The New Zealand agency, Victim Support, has commented:

Victim Support welcomed the [Ministry of Justice] Restorative Justice discussion paper published … in 1995, because this policy debate is pivotal to the development of comprehensive policy and services for victims of crime. … The criminal justice system has become culturally inappropriate for both victims and offenders. The purpose of addressing victims' issues should be to restore the victim to a new equilibrium. The existing balance of rights between victim and state needs to be questioned. …

Victim support believes that achieving better outcomes from the criminal justice system for victims and offenders will be dependent on a paradigm shift, embracing a restorative ethos which defines accountability between victims, offenders and the state.

4 RESTORATIVE JUSTICE AND ADULT OFFENDERS

4.1 COMMON CRITICISMS OF RESTORATIVE JUSTICE

Particularly in relation to adult offending and serious offending, restorative justice is often dismissed as an unworkable soft option. Common criticisms are:

1. That restorative is a "soft option".

The restorative justice model is not soft. "Many studies report that it is harder for an offender to confront the victim than to stand in court and accept punishment." In the New Zealand Youth Court, the plans agreed to at family group conferences are "generally quite strict from the young person's point of view," and are more enforceable than "impersonal court orders." In my experience, there is nothing soft about the way families deal with their young people. In fact, my experience is that in terms of outcomes the courts are and have been much softer on young offenders than families ever are.

Being required to confront your victim and negotiate a solution acceptable to your victim is not a soft option. Victims who attend family group conferences are often furious and out for blood. They tell the offender how they feel about his or her actions and what the consequences of these actions have been for them. In one New Zealand case, a victim told an offender who had trashed her house as part of a burglary what it felt like to vacuum from the floor the ashes of her dead parent which had been spilled. In another case, a victim spoke of sadness at the theft of tapes which included a farewell from a dying sister. These are emotionally powerful occasions from which few offenders can remain immune.

2. 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.

First, it should be noted that sentencing is not consistent under the conventional model. Sentencing calculated on two or three variables might create "an appearance of equal treatment, but only at the expense of justice in individual cases. As in other areas of the law, uniformity and flexibility are competing elements of justice." Secondly, it should be noted that the Court retains a supervisory role under the restorative justice model. In fulfilment of this role, the Court can safeguard against discriminatory results. Thirdly, it should be asked whether all inconsistencies are necessarily bad. "Inconsistencies on the basis of gender, ethnicity or socio-economic status per se … can never be right; inconsistencies between outcomes which are the result of genuine and uncoerced agreement between the key parties may be." One author has commented:

Proportionality and equality in punishment are often understood narrowly as calling for the same sentence for people who have committed similar crimes. However, they could just as well be interpreted as requiring comparable sentences for comparable offences. This would mean punishment or responses may vary as long as they are meaningfully related to the nature and effects of the crime.

Is it possible that a narrow focus on consistency and proportionality serves "abstract notions of justice rather than provide justice which is meaningful to those most directly affected by the outcome"?

3. That restorative justice will potentially enable victims to be further victimised by the offender.

This is not a criticism that can be dismissed lightly. At the same time, it is not an insurmountable obstacle. It is very important that good operational practice is used to ensure that victims are not further victimised. It is critical that good information and support is provided for victims. Further, processes can be put in place to minimise or negate power imbalances between the parties. For example, the victim can be provided with more support persons. It is also worth remembering that under restorative justice processes, victims have the freedom to veto proposed sanctions which they do not like.

4. That the offender's rights are likely to be infringed since lawyers are not always present, and the process is not managed by lawyers.

While it is desirable that offenders be encouraged to speak for themselves, there is no necessity to exclude

lawyers from the restorative justice conference process. In this context, the lawyer could fulfil the role of protecting the offender's basic rights in a manner consistent with the objectives of restorative justice. This would require an understanding, on the part of lawyers, of the difference of their role under the restorative justice process.

Having made that point, I want to emphasise that, although the restorative justice conference process inevitably requires a disempowerment of those who previously exercised the decision-making function and in particular, social workers, police officers, lawyers and judges, the disempowerment is necessary and effective. Government officials do not and cannot have the same impact as the community of the victim and the offender because they do not share the same strong emotional bonds with the subjects of their attentions.

5. That, in contrast to the conventional model, community based restorative justice is repressive, retributive, hierarchical and patriarchal.

While community or popular justice can sometimes take on these characteristics, they are "fundamentally at odds with the defining values of restorative justice." Restorative Justice is focused on healing the wounds of those people affected by an offence. In particular, it is focused on the needs of the victim and the offender. It draws on the support of those people closest to the victim and the offender, who share "concerns about the offender, the victim, the offence and its consequences." These people are in the best place to develop solutions that are helpful and restorative rather than retributive and repressive.

6. That restorative justice will not work in situations where the offender is unrepentant.

In New Zealand, if the relevant offence is denied, then there is a hearing under the normal adversarial system. At that hearing, the prosecution has to prove the case beyond reasonable doubt. If the case against the accused is proved, the process in place for young people differs from the process in place for adults. Under the Youth Court Family Group Conference model, a family group conference is held even though the offence was denied. By contrast, in most restorative justice pilot projects for adults that are currently running in New Zealand, the restorative process will only be offered in cases where the offender admits responsibility for the offence.

It is true that restorative justice will not reintegrate all offenders. It is inevitable that there will be some failures. No one can claim 100% success. In trying to do so, one destroys the credibility of a very successful process. However, the restorative justice process has been more successful than any other of which I am aware, and is undoubtedly more successful than the conventional model of criminal justice. Unlike the conventional criminal justice model, restorative justice does "offer the potential … to touch the hearts and minds of offenders and to effect change." There is no justification for refusing to implement an effective policy in cases where it is likely to have significant impact simply because in other cases the policy may not be as effective.

7. 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.

First, the influence of families on people does not end simply because they have left home. People continue to be dependent on their families in many different ways. The relationship may change from one of dependence to one of friendship and respect, but the connection remains. Second, even if family ties do lose their importance, they are usually replaced by other meaningful connections. For example, friends, work mates, fellow sports players, former teachers, local church groups and cultural associations might become increasingly important to a person. In the context of adult offenders, restorative justice processes can look to involve these people as the relevant community for the offender.

4.2 PROJECT TURNAROUND

The potential for the application of the restorative justice model to adult offenders is exemplified by the success of "Project Turnaround," a pilot programme run in Timaru, New Zealand. Project Turnaround, which was set up in 1995, is one of three pilot schemes funded by the Crime Prevention Unit in New Zealand, in collaboration with the Police and local Safer Community Councils. Under the Project Turnaround model, offenders are referred to a community panel process as a diversionary action from the District Court. The scheme operates as follows:

At Project Turnaround, on the first appearance at Court, a case is diverted to the scheme and, if the panel meeting is attended and the plan completed, there is no further court appearance and the Police withdraw their evidence. At the panel meeting, the offender is confronted with their offending and its consequences. The victim is frequently present. The focus on recompense to the victim and the community is consistent with a restorative approach to justice. The plans decided at the meeting involve making amends to the victim and the community and making arrangements of both a reintegrative and a rehabilitative nature that are likely to prevent future reoffending.

If a conference fails to reach an agreement or the conditions are subsequently not met by the offender, the case is returned to the District Court for conventional disposition. "Every case is followed through to conclusion."

According to a 1997 review, half the meetings were attended by victims, and action plans included apologies, work in the community, reparation and programme attendance (for example, at programmes for counselling, anti-violence or alcohol and drug abuse). The review noted:

The interviews with offenders showed that most of them found it a positive and meaningful experience. They thought that the decisions were fair and provided an opportunity to deal with matters constructively and avoid going to Court or receiving Court sanctions. The outcome was often, but not always, increased understanding of the impact of the offending on the victim and genuine remorse.

The review showed that not only had participation in Project Turnaround reduced re-offending by participants, but when re-offending did occur it was at a lower level of seriousness than for a matched group of offenders dealt with by conventional court and sentencing processes:

Data on reconvictions show that, over the following twelve months, there was significantly less reconviction by those participating in [Project Turnaround] compared to control groups matched for offending history, demographic factors and offence characteristics. Reconviction rates at 12 months were: for Project Turnaround 16% compared to 30% for controls … . Not only was there a reduction in the proportion reconvicted but, for those who were reconvicted, the seriousness of the major offence (as judged by a scale of seriousness based on penalties) was not as great among participants in the schemes as it was among the control group. In addition, those referred to the schemes who were seen as having successful outcomes were less likely to be reconvicted compared to those who were seen as not having successful outcomes; however, the small numbers make it difficult to be confident of this last conclusion.

The review also found that offenders were dealt with at significantly lower cost than if they had gone through formal justice system processes:

The costs of the schemes per client were $462 … . At the same time, savings on correctional outcomes compared to the matched controls were $27,811… . A consideration of other savings to the system show that there were more savings at Project Turnaround in court appearances and associated costs and these, together with the savings on correctional sentences were estimated as $85,325.

As one analyst commented:

In the policy discussions which took place at critical times in the project development, two criteria emerged as paramount in terms of assessing the value of the programmes in the criminal justice system and the strength of the case for establishing similar projects at other locations: the demonstrated effect of the programmes in the prevention of reoffending and the comparative cost of the programmes in relation to alternative dispositions. By these two criteria, the programmes have proven successful… .

Recently, Project Turnaround won the "victims" category of the inaugural International Community Justice Awards, which were part of the biennial conference of the UK Association of Chief Officers of Probation and the Central Probation Council. The award was given for "implementation of an outstanding community-based project which places the victim's views at the heart of the process and which has contributed significantly to reducing reconviction rates while retaining public confidence."

5 CONCLUSION

Under the conventional model of criminal justice, the focus is on a violation of the state and its laws. Justice takes the form of an adversarial process that pits the offender against the state. Detached and unemotional professionals manage the process; the community is not involved; victims and offenders alike are unable to participate meaningfully. Ultimately, everybody loses.

By contrast, under the restorative justice model the focus is on the injuries caused by the offence: injuries to the victims, communities and offenders. The aim of restorative justice process is to repair those injuries. The focus shifts away from the justice professionals; to the victims, the offender and their community. The restorative justice process helps restore the victims. It addresses their emotional and material needs. The restorative justice process helps offenders to apologise and to make amends for harm they have caused. It helps them to reconcile with the victims and reintegrate into their community. The conventional justice process does not help anyone.

Though the restorative justice movement has recently experienced remarkable growth of awareness and interest, there are hurdles ahead. In New Zealand, although there is growing support for the restorative justice philosophy, the broader trend in public opinion seems to be in the opposite direction. Moving forward with restorative justice will not always be easy, but it is hugely important that we do move towards a restorative approach to criminal justice. Our conventional system of criminal justice does not work. The restorative justice model does work. It represents the way forward for criminal justice.