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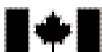

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RIDING THE THIRD WAVE: Rethinking Criminal Legal Aid within an Access to Justice Framework

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Albert Currie
Principal Researcher
Access to Justice and Legal Aid

Research and Statistics Division
Department of Justice Canada

The views expressed herein are solely those of the author and do not necessarily reflect those of the Department of Justice Canada.

ABSTRACT

Criminal legal aid has traditionally been conceived as access to criminal justice. However, the traditional concept of access to justice has moved beyond the idea of access to justice as access to the justice system, and in-court representation by a lawyer. Employing the classic model of the evolution of access to justice by Cappelletti and Garth, this paper proposes that the revitalization of the restorative justice movement represents a major step in the evolution of access to criminal justice, and examines how adopting restorative justice approaches might make the delivery of criminal legal aid an integral part of a more modern concept of access to justice.

A NOTE ON THE CONCEPT OF ACCESS TO JUSTICE

The traditional concept of access to justice is easy to understand, although, because it becomes manifest in so many ways, is not easy to define precisely. Most generally, access to justice has traditionally referred to a range of institutional arrangements to assure that people who lack the resources or other capacities to protect their legal rights and to solve their law-related problems have access to the justice system.

> The words "access to justice" are admittedly not easily defined, but They serve to focus on two basic purposes of the legal system - the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state.[1]

The origins of institutions for providing access to justice to the poor reach back for centuries in several European countries in which craft guilds and other organizations provided assistance to members with legal problems.[2] The modern point of reference for the access to justice movement is the rise of the welfare state, out of which the access to justice movement arose as a major element.

Especially in western common law countries, the legal profession has tended to dominate the institutions for providing access to justice.[3] Thus the hegemony of the legal professions has shaped the character of access to justice movement. Traditionally, access to justice

[1] M. Cappelletti and B. Garth, (eds.), Access to Justice: A World Survey, Vol. 1, Sitjoff and Noordhoff, Milan, 1978. p. 6.
[2] Mauro Cappelletti and Bryant Garth.
[3] Don Fleming, Reconsidering the Theory Behind Legal Aid, Paper presented to the "Legal Aid in a Changing World" Conference, Legal Aid Board Research Unit, London, 1999.

rested on a rights-based paradigm[4]. Access to justice has meant access to the courts. Problems were defined mainly in legalistic terms, and resolved in the solutions to them being mainly those services provided by lawyers.

Traditional access to justice focuses on devising institutional arrangements so that people can exercise their rights within the existing justice system. Traditionally, the *problematique* of access to justice is overcoming barriers to accessing the justice system. These may be characteristics of individuals, such as poverty or language limitations. The barriers may be aspects of the justice system itself, such as complexity and cost. The barriers may be systemic problems. Curiously, even though the need for access to justice was based largely on a challenge to the effectiveness of the justice system to properly protect the rights of the poor and the disadvantaged, traditionally it does not challenge the central role of the system.

The concept of access to justice in the sphere of civil justice has been undergoing considerable change for decades. Modes of resolving disputes have progressively moved out of the courts and into a variety of forms of alternative dispute resolution. The pace of change in new forms of access to criminal justice has not occurred nearly so rapidly. This is no doubt because the criminal justice process leaves little discretion for persons accused of crimes, whereas in matters of civil law people can often choose a wider range of options in dealing with their problems. However, changes in concepts of access to criminal justice are beginning to gain prominence.

The idea has been current in the literature for some time that the problems thrown upon the door of the criminal justice system reflect the institutional failures of the educational, social services, and family systems. The justice system is ill-equipped to deal with these problems because of their underlying social and economic dimensions.[5] Recently, the restorative justice movement has taken hold as a major movement in the justice system. Restorative justice places an emphasis on dealing with the aftermath of crimes, and resolving the issues that brought the offender into conflict with the law in a manner satisfactory to the victim, the community and the offender.[6]

The evolution toward more progressive forms of access to criminal justice has lagged behind the evolution of access to civil justice by decades. The argument in this paper is that the movement toward "holistic" approaches in criminal justice, with restorative justice being the *hallmark* of the movement, marks a major, and apparently sustained, movement in the evolution of access to criminal justice.

Two recent justice events in Canada appear to confirm the observation in the title of Professor Clairmont's article. The restorative justice movement has moved from the margins to the mainstream of discourse about the most appropriate and effective ways of dealing

[4] James Gordley, "Variations on a Modern Theme" in M. Cappelletti, et. Al., Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies, Dobbs Ferry, N.Y., Oceana, 1975. p.86.
[5] Kayleen Hazelhurst, Migration, Ethnicity and Crime in Australian Society, Australian Institute of Criminology, 1987. p. 143.
[6] Don Clairmont, Restorative Justice: From the Margins to the Mainstream, Atlantic Institute of Criminology, Dahhousie, 1999. p. 1.

with justice issues in Canada. In March 2000 the federal Department of Justice sponsored a national symposium on access to justice called Expanding Horizons: Rethinking Access to Justice in Canada.[7] The symposium was a one-day discussion among about one hundred justice system leaders and from other areas concerned with social justice issues. The symposium produced a number of themes that point the direction for rethinking the concept of access to justice, in both civil and criminal justice spheres.[8] The symposium revealed an enormous amount of discontent with the criminal justice system, a strong appetite for change, and a willingness to experiment with alternatives that depart from traditional concepts and processes.

In 1998 the Government of Alberta held the Alberta Summit on Justice. One hundred and fifty-one delegates were invited to the summit, 83 of whom were selected at random based on demographic factors such as age, gender, occupation and Aboriginal status. The mandate of the summit included the following: to identify issues and challenges, to determine effective ways to make use of justice system resources, to identify priorities for change and future direction. The Alberta Summit on Justice produced well over one hundred recommendations from nine groups of participants. Some of the recommendations were very similar to those arising from the department of Justice Symposium; that the system embrace alternatives to the formal justice system, and solutions to accessibility should be community-based.[9]

This paper is an attempt to apply the emerging thinking about access to criminal justice to the field of criminal legal aid. The paper invites legal aid policy makers and managers to consider the role of criminal legal aid in the context of changes occurring in the criminal justice environment, of which legal aid is an integral part.

A BRIEF HISTORY OF ACCESS TO JUSTICE

The next two parts of the paper will apply the messages that emerged from the symposium to access to criminal justice. This will focus mainly on the "third wave" of access to justice and how it applies to the criminal justice system.

The Evolution of Access to Justice

Cappelletti and Garth provide the classic statement of the evolution of the access to justice movement.[10] These authors describe the evolution of access to justice in terms of three

[7] Expanding Horizons: Rethinking Access to Justice in Canada. Proceedings of a National Symposium, Department of Justice, Ottawa, 2001.

[8] The main themes were: meeting needs is equally important as protecting rights, justice is achieved when a solution is achieved that satisfies all the affected parties, access to the courts is not the same as access to justice, restorative justice is the desired approach to dealing with justice problems, approaches to dealing with justice issues have to be tailored to fit diversity and community differences, and the justice system must share power and resources with community groups.

[9] Alberta Summit on Justice, Summary of Group Discussions, Barriers to Accessing Justice, Alberta Justice , 1999. pp. 1 and 2.

[10] M. Cappelletti and B. Garth (eds.), Access to Justice: A World Survey, Vol. I, Sitjoff and Noordhoff - Alpehenaandenrijn, Milan, 1978.

"waves" of change. Although there are many antecedents, the access to justice movement emerged in a major organized way in most western countries during the immediate post-World War II era. The "first wave" was the emergence of legal aid. This wave focused on providing access to legal representation in the courts for the economically disadvantaged. Subsequent waves of change progressed from an emphasis on assuring the right to legal representation in the first wave, to an emphasis on group and collective rights in the "second wave". In this phase, test case and public interest litigation began to address systemic problems of inequality. In the "third wave" of the access to justice movement one sees the development of a range of alternatives to litigation in court to resolve disputes and justice problems, as well as reforms that simplify the justice system and thus facilitate greater accessibility. Cappelletti and Garth refer to the third wave as the emergence of a fully developed access to justice approach.

Access to Criminal Justice in Canada

The following sections of the paper use the Cappelletti and Garth model as a framework to examine briefly the development of access to criminal justice in Canada. Then the paper proposes holistic approaches to justice as a significant development in the third wave of access to criminal justice, and examines how holistic justice might influence criminal legal aid as a mechanism to provide access to justice

What do we find if we apply the Cappelletti and Garth model to Canada? It is fair to say that in Canada the vast majority of the cognitive map of access to justice terrain is presently occupied by legal aid. The entire terrain of access to justice includes other important components. However, historically, legal aid emerged as the first expression of access to justice - the "first wave". The broader access to justice movement has undergone several transformations, described by Cappelletti and Garth's waves of change. We need to think of legal aid as an integral part of the justice system, and ask the question: how does legal aid fit with the most progressive concepts of justice and access to justice?

The First Wave

The first wave, borrowing from the Cappelletti and Garth model, is legal aid. Federal funding encouraged the development of legal aid programs in every province and territory beginning in 1973. Since then legal aid has grown from a system representing expenditures of some $15 millions in 1973-1974 to a peak expenditure of about $215 millions in 1998-1999.

It is fair to characterize criminal legal aid in Canada as providing a traditional style of service that mirrors the requirements of the criminal justice process. Legal aid is mainly a case advocacy, representation at trial style of service. The basic coverage criterion for criminal legal aid is having committed a criminal offence for which there is a risk of incarceration. This focuses the priority for legal aid service on representation at trial for persons accused of serious crimes.

Duty counsel is available in most courts in most jurisdictions to provide advice and assistance at first appearance court. Legal advice and assistance at arrest and detention is available, usually through some form of telephone consultation. This is known in Canada as Brydges duty counsel, after the court decision that made this form of representation necessary to protect the evidence that might be gathered by the police.

There is an increasing recognition of the importance of duty counsel in the overall service delivery system of legal aid. The development of the expanded duty counsel approach in the Province of Manitoba[11] has encouraged a number of innovations in duty counsel service throughout the country.[12] Expanded duty counsel pilot projects figure prominently in the Legal Aid Ontario program of pilot projects in service delivery innovation, with experimental projects in both criminal and family duty counsel.[13]

However, the focus of legal aid remains largely on individual case-advocacy. This reflects the preoccupation with access to the courts as access to justice. It reflects the fact that legal aid remains largely within the traditional protection of rights paradigm of access to justice.

The extent to which the existing service is meeting the needs for criminal legal aid is not known with any empirical precision. While there are no data to represent the extent of need, a few basic figures illustrate the uncertainty as to whether the need is being met. Criminal legal aid service, as measured by approved applications grew continuously on a national level between 1972-73 and 1991-92, reaching a high of 372,861 approved applications. From that point, the number of approved applications declined through the 1990's to 228,787 approved applications in 1997-98, a decline of 38.6 %. At the same time, offences cleared by charge, a good indicator of the demand for criminal legal aid declined by only 18.2 %. The much greater rate of decline in approved applications suggests that there may have been created during the 1990's a pool of unmet need from criminal legal aid.

The data also show that there is considerable variation in the levels of service in different parts of the country. Per capita approved applications range from 3 per 1000 population to 22 per 1000 population. The number of refused applications as a percentage of total applications varies from 6 % to 40 %. These variations, coupled with the decline in the level of service throughout the 1990's suggest that the first wave of access to justice is, for legal aid, a project that is far from complete.

These figures represent changes in the delivery of the basic form of criminal legal aid: representation at trial for persons charged with an offence for which there is a risk of imprisonment. This is the first level of need. There are other levels of potential need that lie outside the most basic one. The nature and extent of all of the possible levels of needs have not been examined: 1) representation at trial for a person charged with a criminal offence for which there is a risk of imprisonment (as above); 2) representation at trial for people

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[11] A. Currie, The Legal Aid Manitoba Expanded Duty Counsel Project: An Evaluation, Department of Justice, Ottawa, 1995.
[12] A. Currie, Legal Aid Delivery Models in Canada: Past Experience and Future Directions, Department of Justice, Ottawa, 1999.
[13] For a brief description see Delivery Models, page 290, footnote 13.

charged with a first offence and at risk of receiving a criminal record; 3) representation at trial for a poor person is rejected because s/he fails to meet financial eligibility guidelines, secures a lawyer privately, but experiences significant financial hardship in doing so; 4) a person pleads guilty at first appearance/ disclosure court against the advice of duty counsel, anticipating that s/he will be unable to afford a lawyer; 5) accused does not have the services of duty counsel at first appearance court, 6) accused does not have legal advice at arrest and detention.

These six levels of needs of criminal legal aid clients reflect the manner in which the criminal justice process structures the needs for legal aid services. This reflects access to criminal justice at the first wave stage; access to justice as access to the system, and legal needs as legal representation in court. This phase of the criminal legal aid is the traditional form of access to criminal justice. It has been in existence in Canada as an organized national system for thirty years. Legal aid plans have been in existence a few years longer in some provinces, and longer than that as pro bono legal assistance. However, we still do not have a very complete, empirically-based view of the nature and extent of the needs for criminal legal aid, from representation in court for very serious legal matters, to good advice and assistance when a person is arrested and detained and the process of evidence gathering begins. Even as a first wave access to justice movement, criminal legal aid is very much an unfinished project.

The Second Wave

The second wave of the access to justice movement is the representation of diffuse interests. The passage of the Canadian Charter of Rights and Freedoms[14] in 1982 marks an important stage of the second wave with respect to access to criminal justice in Canada. Of the first 100 Charter cases heard by the Supreme Court, 74 involved legal rights provisions.[15] Legal rights under the Charter include the right to life liberty and the security of the person (Section 7), the rights to retain and instruct counsel upon arrest and detention (Section 10), the right to be presumed innocent until proven guilty (Section 11), and that every individual is equal before and under the law (Section 15). The Charter also provides that if any of these rights have been breached, a person may apply to any court of competent jurisdiction for a remedy. The Supreme Court has used the Charter to develop a new constitutional code of conduct for police officers dealing with suspects and accused persons. According to one author, this has had the overall effect of pushing Canadian criminal justice process away from the crime control model that emphasizes the punishment of the guilty, toward the due process model that emphasizes the protection of the innocent.[16] Other students of the history of Charter decisions view the overall direction of Charter decisions as being less

[14] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982. Hereafter referred to as the Charter.
[15] F.L. Morton, Peter H. Russell, and Michael Withey, The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistics Analysis, Osgoode Hall Law Journal, Vol. 3, No. 1, 1992. p. 21.
[16] Ibid., p. 22; For the crime control and due process models see H.L. Packer, Two Models of the Criminal Process, U. Pa. L. Rev., 113:10, 1964.

decisive. That view holds that the earlier years saw decisions expanding rights, while later decisions slowed the expansion of legal rights.[17]

The second wave has effected legal aid in two broad ways. First, a body of Charter litigation has defined more clearly who should receive legal aid. Second, the Charter has put upward pressure on the cost of criminal legal aid.

Charter gave rise to a series of legal challenges to legal aid eligibility decisions. This gave rise to a body of Charter-driven case law that now defines the extent of the rights to legal aid. A detailed discussion of the right to counsel jurisprudence is well beyond the scope of this paper. A good discussion of the jurisprudence can be found in a Department of Justice Working Paper, from which the brief summary below is taken.[18] An Ontario Court of Appeal case, R vs Rowbotham, concluded that there is no absolute right to state-funded counsel under the Canadian Constitution. There is a right to counsel only where it is necessary for a fair trial. In the particular case the court ruled that the length and complexity of the case required a lawyer. Even though the accused did not meet financial eligibility requirements of the legal aid plan, the judge ordered a new trial and directed that legal aid be provided at the pre-trial hearing.

Right to *choice of counsel* is another issue that has been addressed by the courts. In a 1989 Alberta Court of Appeal case, R vs Robinson, the court agreed with the judge in Rowbotham that there is no unqualified constitutional right to counsel, and held that nor is there a constitutional right to choice of counsel.

Finally, the Supreme Court of Canada has held in R vs Brydges that both the provincial and federal governments have a shared responsibility for the provision of legal aid. However, the courts have also held that they have no jurisdiction to determine what level of government shall pay for state-funded legal aid.

This series of Charter cases has had an important impact on access to criminal justice by clarifying the right to legal aid. There was a steady increase in approved applications for criminal legal aid from 1982 until the early 1990's. Then the volume of service declined. Obviously there are many factors at work influencing the accessibility of legal aid. The Charter was one. The effect of the Charter, net of other factors that effect the accessibility of legal aid is not clear. However, the Charter did have an important effect.

The Charter is a phenomenon that is characteristic of the second wave of the evolution of access to criminal justice. It affected access to criminal justice systemically by defining the rights of criminal accused as a class. Paradoxically, however, the net effect of the Charter, a second wave movement, was to consolidate legal aid as a first wave access to justice institution. The Charter is a classic, philosophically liberal legal document. The effect of the body of Charter decisions was the enhanced protection of legal rights by entrenching the

[17] I am indebted to Mr. Stan Cohen, Senior Counsel, Department of Justice who is a specialist in the Charter for this assessment.
[18] Mona Klinger, The Right to Court-Appointed Counsel in Canada: It's Status and Limits, Department of Justice, Ottawa, 1998.

right to legal representation in court. That is characteristic of the first wave of the access to justice movement; access to justice as access to the courts.

A second way in which Charter litigation has affected criminal legal aid has been by putting upward pressure on the cost of all litigation, including legal aid cases. There are three ways in which this has occurred. First, cases have become more complex and thus more expensive. Second, the practice environment has changed since the implementation of the Charter, again placing upward pressure on legal aid costs. Third, over time there appears to be an increasing number of extraordinarily high cost legal aid cases.

Canadian jurisprudence has produced a large volume of Charter decisions, covering important elements of criminal procedure such as the right to be secure against unreasonable search and seizure, rights upon arrest, protection against arbitrary detention, and the rights of persons charged with an offence.[19] Although careful empirical studies on the impact of the Charter are absent, the overwhelming view of legal aid managers is that as a result of the Charter, a significant portion of the case load has become on average more complex and expensive.[20] The Charter has had a dramatic impact on criminal legal aid. Charter litigation has had the effect of driving up costs, by making the law more complex, and by introducing constitutional bases for legal arguments.

The vast majority of the cases that have reached higher courts and have resulted in significant impacts on criminal justice have no doubt been funded by legal aid plans.[21] However, from a policy and service delivery perspective, the role of legal aid organizations in the body of Charter decisions that expanded access to criminal justice was more accidental than the result of any deliberate plan. They are the product of individual decisions to fund cases with merit over a period of time.

The Charter has also had an impact on legal aid by altering the practice environment.[22] According to one informed observer, the Charter has given rise to a "revolution of rising expectations" in legal practice. Bar societies have raised the standards of excellence in advocacy, and Bar discipline committees are increasingly zealous in pursuing complaints. Finally, disgruntled clients who feel they have been poorly represented more easily find lawyers among a less collegial bar who are more willing to take their case. The combined effect of this is to oblige defence counsel to "leave no stone unturned", to spend more time on each case than was typical in the past. Time is money, and this has placed upward pressure on the cost of legal aid.

Finally, apart from a general increase in legal complexity and costs for a portion of the criminal legal aid case load, the Charter appears to be producing an increasing number of

[19] Don Stuart, Charter Justice in Canadian Criminal Law, Carswell, 1991; Jamie Cameron, The Charter's Impact on the Canadian Criminal Justice System, Carswell, 1995.
[20] A. Currie, Factors Driving High Cost Criminal Legal Aid Cases, Department of Justice, Ottawa, 1999.
[21] Legal aid plans are not able to identify specific cases funded through legal aid because of client confidentiality rules. Identifying cases for detailed research in this area is difficult.
[22] Written communication to the author from Mr. Gerrard Lukemsn, Executive Director, Nova Scotia Legal Aid Commission, February 17, 2000.

extraordinary high cost cases.[23] These can be so expensive as to jeopardize the financial viability of the smaller legal aid plans. A recent case in Manitoba, known as the Manitoba Warriors case, provides a good illustration. Thirty-seven members of an Aboriginal Street gang were charged with a series of weapons and drug offences and, central to the case, with a recent Criminal Code provision intended to combat organized crime, making it an offence to be a member of a criminal organization. The Criminal Code provision prohibiting membership in a criminal organization is being challenged by defence under the Charter. The cost of the defence for 37 co-accused was initially estimated at about $7 million, more than the total annual criminal legal aid budget for Legal Aid Manitoba.

The Third Wave

According to Cappelletti and Garth, the third wave represents a broad range of efforts to make truly effective the rights of individuals who are denied the benefits of equal justice.[24] For the most part, the third wave seems mainly to refer to a range of means to improve the accessibility to civil justice.[25] However, I think that the third wave can be applied to access to criminal justice. These programs seem to fit the criterion of improving the accessibility of justice to people facing particular barriers to access to justice.

Programs and projects such as court workers and court interpreters attempt to assure that accused persons, especially people who experience linguistic or cultural barriers to fully comprehending the justice process that they are facing, and the options open to them.

One good example is the Court Information Program operated in Vancouver by the Law Courts Education Society. This program, that serves Spanish and Asian people, addresses both system goals and service equity goals. In terms of system goals, the program has dramatically reduced the number of adjournments required to process the cases of people facing linguistic and cultural barriers.[26] With respect to service equity, the project has improved the quality of justice for immigrants who face linguistic and cultural barriers to access to justice. [27]

A notable national program in Canada is the Native Court Worker Program. This court worker program serves the interests of Aboriginal people who are charged with criminal offences. Native people trained as court workers provide legal information and other assistance to Aboriginal accused. The court workers also educate the judiciary and Crown prosecutors about the special circumstances facing Aboriginal offenders charged with criminal offences. The cost of the program is shared by the federal government and the provincial or territorial programs in ten of thirteen jurisdictions.[28]

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[23] Supra, footnote 20.
[24] Cappelletti and Garth, p. 53.
[25] ibid., p. 52.
[26] Law Courts Education Society.
[27] ibid.
[28] In the Northwest Territories and Nunavut, court workers provide legal representation in Justice of the Peace courts. These are lower level courts that deal with minor offences.

Canada also has a national network of Public Legal Education and Information (PLEI) programs. An initiative undertaken by the federal Department of Justice between 1983-84 and 1986-87 established one sole purpose PLEI in each territory and province. Subsequent to that, these have been sustained by a variety of core and project funding from the federal and the provincial /territorial governments. These organizations are active in providing information about the criminal law and the criminal justice process. In addition, these organizations provide focussed information about special initiatives such as victim's rights, family violence, and hate crimes.

One experimental project attempted to provide public legal information to people who were accused of criminal offences and refused legal aid.[29] The project was initially intended to provide information to refused applicants in order to assist them in representing themselves in court. Although it was decided that this objective was not being met, the project did serve a number of other purposes. The information was very useful in effectively alerting accused people to the nature of their situation, the options available to them, the nature and consequences of the charges against them, the nature of the criminal process, and possible sources of assistance.

Diversion programs, both pre- and post-charge are widely used in Canada, especially in larger urban centers. These may have some impact on criminal legal aid. In some cases it is within the mandate of duty counsel to play a proactive role in securing alternative measures or diversion for clients. According to the Legal Aid Ontario Duty Counsel manual, "prior to considering a plea, duty counsel should canvass the Crown to determine whether diversion should be used to by-pass the criminal process.[30]

Overall, these kinds of projects occupy a very minor role in the access to justice landscape compared with the prominence of the first wave, legal aid. With legal aid, aspects of access to criminal justice that might be considered, and of the second wave, Charter litigation addressing systemic criminal justice issues.

A Look Ahead; Holistic Approaches to Justice and the Third Wave

Up until now, the third wave of the access to justice movement has mainly been felt in access to civil justice. Third wave developments in access to criminal justice have been weak. This section of the paper argues that the re-emergence of restorative and other holistic approaches to justice is possibly the first major third wave development in access to criminal justice. The paper then explores the implications for criminal legal aid.

Holistic Approaches to Criminal Justice: The "Third Wave"

Restorative justice as a response to the inadequacy of the criminal justice system was a major theme of Expanding Horizons, the access to justice symposium. As was noted above in the discussion of the conference themes, restorative justice is the term that appears

[29] A. Currie and C. McEown, The Assisted Self-Representation Project: An Experiment in Limited Service Delivery, Department of Justice, Ottawa, 1998.
[30] Duty Counsel Manual, Legal Aid Ontario, 1996. pp. 2-9.

to have caught the imagination of leaders in the justice system, and is the focus for action and change. Restorative justice embodies the idea of "a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of an offence and its implications for the future."[31] Restorative justice is not a new concept. Restorative justice ideas and practices have been popular since the 1960's. These early programs included community mediation, victim-offender reconciliation and court-based mediation. Over the past decade the restorative justice movement has gained a second wind, propelled by concerns about the ineffectiveness, coupled with the high cost of the criminal justice system. There is a considerable amount of restorative justice activity in Canada and throughout the world.[32]

The term restorative justice is often reserved for forms of settlement in which the individual is reintegrated into the community, or is reconciled with the victim. There are similar approaches that might be termed therapeutic rather than restorative. The treatment programs associated with drug courts attempt to solve the multidimensional problems of drug users whose habitual criminality is driven by drug dependency. There are common factors, however. Therapeutic and holistic approaches to justice may be alternatives to, or sometimes additions to, the formal criminal justice process. They recognize the multidimensional aspects to the problems of people in conflict with the law. They are solution-oriented approaches. Holistic justice is a term that can be used to encompass approaches with these features.

Holistic Justice and Access to Justice

It is a fair statement that as a field of scholarship and praxis access to justice has focussed too much on access *to* justice and too little on the quality of justice itself. Holistic approaches to justice propose not only new standards of justice but also new ways of achieving justice. These processes imply participatory roles for accused persons, victims, and other affected parties. They imply non-traditional roles for judges, prosecutors, and defence lawyers. These evolving concepts of access to justice do not involve the development of mechanisms to provide access to official and formal law. The older programmatic approaches to access to justice are a form of conservativism that preserve official law.[33] Rather holistic approaches to access to justice propose mechanisms for problem-solving and negotiation that replace both the traditional concepts of justice and the formal mechanisms to attain access to justice.

Criminal Legal Aid, Access to Criminal Justice, and Holistic Justice

The overall feeling that emerged from the Symposium is that the criminal justice system is nearly totally bankrupt, and there is a strong appetite for a "fix". Holistic approaches to

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[31] United Nations Working Group on Restorative Justice, 1996 cited in Don Clairmont, Restorative Justice: From the Margins to the Mainstream, Atlantic Institute of Criminology, Dalhousie, 1999. p. 1.
[32] Don Clairmont, Restorative Justice: From the Margins to the Mainstream, Atlantic Institute of Criminology, n.d.
[33] D. Trubek, "Critical Moments in Access to Justice Theory", in A. Hutchinson (ed.), Access to Civil Justice, Toronto, 1990, p. 108; Roderik Macdonald, "Theses on Access to Justice", Canadian Journal of Law and Society, Vol. 7, No. 2, 1992. p. 27.

justice may provide that fix. Holistic approaches to justice are coming into use in some areas of criminal justice, notably in drug courts and other drug intervention programs. Court-based drug intervention programs represent a shift from a criminal justice focus based on punishment of offenders to one directed toward protecting the community and reforming the offenders. The primary goal is not to prosecute and punish. Rather, it is to "interrupt the revolving door of arrest, detention, release and re-arrest".[34] This is a social defence model of justice, a shift away from assigning blame to ensuring personal accountability and minimizing risk to the community.[35] Judges, prosecutors and defence counsel work collaboratively to deliver a mix of treatment to achieve a desired result, not to administer punishment.[36]

Holistic Justice and Defense Counsel

The defence bar does not appear to have warmed to restorative justice and other forms of holistic justice to the same extent as the judiciary and Crown prosecutors.[37] Legal aid is public defense. Legal aid lawyers, either staff lawyers or private bar lawyers, are part of the legal profession. Staff lawyers have the same professional training and are part of the same professional organizations as private bar lawyers. Of course, private lawyers who provide legal aid are the same individuals who provide legal advice and representation to fee-paying clients. Before looking specifically at legal aid and holistic justice, it may be instructive to look at the receptivity of defense counsel more generally to holistic forms of justice.

One impediment to embracing restorative justice may be the professional training and socialization of lawyers. Criminal defense was described by one lawyer as "controlled warfare".[38] Lawyers are not trained to focus on social and personal values. They are trained in "the adversarial arts of traditional criminal defense".

A second impediment is that professional players within the justice system do not want to lose control of the process. One lawyer from the Collaborative Justice Project in Ottawa described the negative reaction of opposing counsel in a case in which he was involved, to the idea that the accused and the victim might meet without the presence of counsel. Within the adversarial framework, defense counsel typically wants to maximize the chances of winning by limiting the elements of the process over which they do not have control.[39]

Finally, from a strategic point of view, there is a very good chance, usually said to be about 50/50, that a client will be found not guilty if a case goes to trail. Why admit guilt at some

[34] Adele Harrell, Findings from the Evaluation of the DC Superior Court Drug Intervention Program, The Urban Institute, Washington, 1998, p. 4.
[35] Ibid., p. 5.
[36] W. Clinton Terry III, "The early Drug Courts", Judicial Change and Dedicated Treatment Courts: Case Studies in Innnovation, p.7.
[37] This information was gathered in interviews with private bar lawyers who are partial to restorative justice approaches. However, it is a controversial point of view. More research needs to be carried out on the attitudes of both Crown prosecutors and defence counsel concerning the use of restorative and reparative forms of justice.
[38] Authors notes from a Roundtable on Restorative Justice.
[39] Authors notes from a Roundtable on Restorative Justice.

earlier stage in the process? According to the characterization of normal legal thinking by one lawyer: “better to feel bad and go free than to admit some guilt and face some consequences.”[40]

Legal Aid and Holistic Justice

The Charter represents the legal revolution that most significantly impacted legal aid beginning in the 1980’s. Although it is a systemic instrument, it had the effect of consolidating criminal legal aid as a “first wave” form of access to justice. If the Charter was the revolution that affected legal aid in the 1980’s, sentencing reform is the revolution of the 1990’s. In spite of a persistent “get tough on crime” mentality, throughout the 1990’s, there has been an equally persistent trend toward the limited use of the criminal justice process for minor crimes, and the limited use of incarceration as a penal sanction. Restorative justice, in its latest reincarnation, has come out of the margins and into the mainstream, even if more in principle than in practice. In 1996 the House of Commons passed into law Bill C-41, an Act to amend the Criminal Code and other related statutes on matters related to sentencing. This legislation encouraged the use of alternative sanctions for adult offenders, and established conditional sentences. Conditional sentencing allows a judge to include restorative, and other non-penal sanctions along with, or in place of, incarceration.

Three years later, the Supreme Court of Canada laid down a significant milestone in the use of restorative justice in the case of R *vs* Gladue.[41] Jamie Gladue is an Aboriginal woman who had been convicted of manslaughter for killing her common-law husband. At her trial, the judge said that there were no special circumstances to be considered at sentencing arising out of her Aboriginal status. At the appeal, the Supreme Court rendered a unanimous ruling that section 718.2 (e) of the Criminal Code (that was introduced by Bill C-41 noted above) did apply in the Gladue case. The ruling stated that judges should consider all available sanctions that are reasonable under the circumstances, other than imprisonment, for all offenders, with particular attention to the circumstances of Aboriginal offenders.

> “The broad role of the provision is clear. As a general principle, section 718.2 (e) applies to all offenders, and states that imprisonment should be the penal sanction of last resort. Prison is to be used only where no other sanction is appropriate to the offence and the offender.”

If holistic justice does indeed represent a new and powerful development of the “third wave” of access to criminal justice, what is the potential role of legal aid? What should it be?

In the symposium workshop focussing on the cost of access to justice, an economist argued that legal aid funding was cut so drastically in many jurisdictions during the latter part of the

[40] Authors notes from a Roundtable on Restorative Justice.
[41] Supreme Court of Canada, R *vs* Gladue, No. 23600 (April 23, 1999) on appeal from the B.C., Court of Appeal.

1990's because legal aid plans did not have the measurement tools to demonstrate effective cost and benefit. According to another economist participating in the symposium, looking through a more political and a less technical lens, "the gravy days are over". Governments are looking hard at a range of priorities, and it is more of a zero sum game than in the past as resources become more limited.

The result of the more constrained financial environment is that legal aid needs to become more strategic, innovative and proactive to compete for scarce dollars. This may mean not accepting a passive institutional role, at the end of the string of failures of other social and economic institutions, poorly equipped and dealing poorly with the problems dropped on the doorstep of the justice system. Justice must become more proactive and problem-solving, at least contributing to solutions to the human problems that surface in the justice domain as criminal offences.

So it may not be simply that legal aid has been unable to protect itself from funding cuts over the past decade because it could not count well what it was doing. Perhaps the traditional individual, case advocacy version of access to the justice system that legal aid represents is falling too far out of step with the newer ideas about providing access to justice. This is, certainly, a perspective, and not an authoritative judgement. It does, however, invite legal aid to consider the position of legal aid within the context of the changes occurring in the justice system, of which it is an integral part.

There are some alternatives to dealing with criminal offences that occur at the pre-charge stage that do completely by-pass the stages of the criminal justice process that are relevant to criminal defence. However, restorative and therapeutic approaches to justice can occur at all of the major points in the criminal justice process. The waves of change in access to justice do not replace one another. They are cumulative, adding elements to access to justice. Restorative justice does not replace the conventional justice process. Restorative and other holistic approaches can combine with conventional legal representation.

An illustration of the way in which holistic justice combines with, but does not replace, conventional justice was described by a lawyer participating in the Ottawa Collaborative Justice Project.[42] The case involved a charge of impaired driving causing death. The offender was sentenced to two years less one day plus two years probation, a relatively light sentence. The sentencing package included several other requirements. The offender was required to meet with the family of the victim and to attend an alcohol abuse program. The meetings with the offender, helped the family members, who were victims because of their loss. The meetings and the alcohol program helped the offender come to terms with his drinking problems. The offender was required to make public presentations to schools, which he chose to continue after the required period.

In this case restorative justice was not an alternative to prosecution. It was a renewed approach to the legal process. It may not have saved money. The supervision of the

[42] Restorative Justice Round Table.

sentencing enhancements was labour intensive. However, in the view of the defence counsel involved, it was better justice.

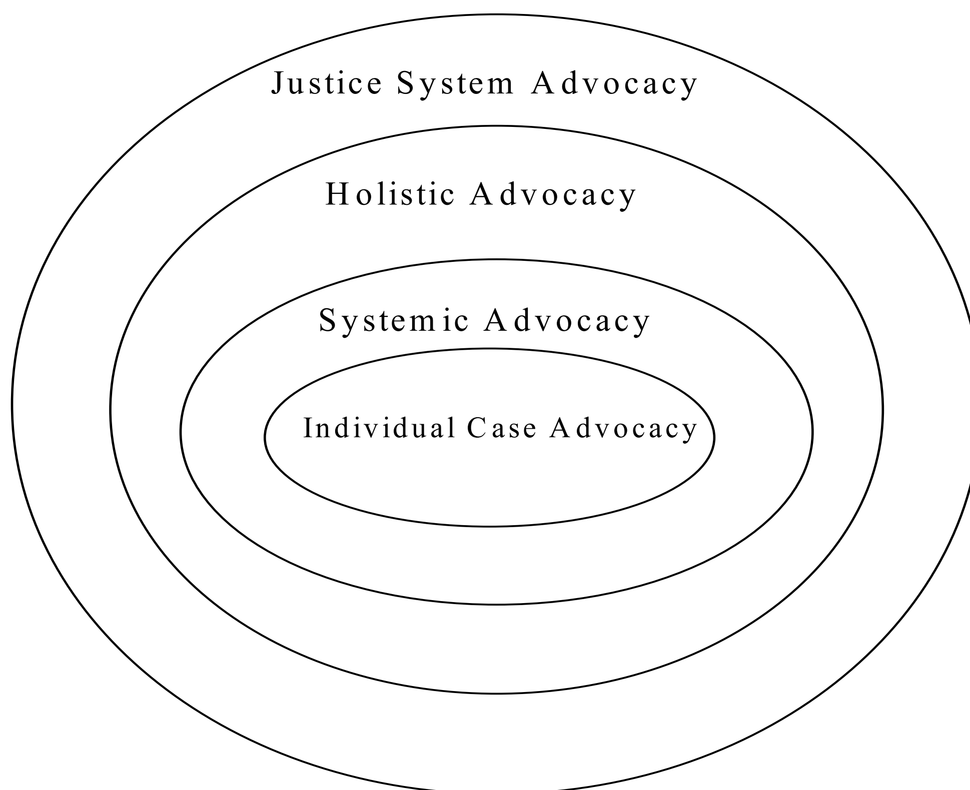
A Model of Legal Aid Service

If we think of legal aid within a broader access to justice framework, a model for legal aid emerges that can account for a number of roles. As has been noted before, the progressive waves of access to justice do not replace one another. Ideally, they add to and complement one another.

The diagram on the following page represents a simple access to justice model for viewing legal aid. It begins with legal aid as the historical starting point for access to criminal justice. It is a way of representing a discussion about meeting a broader access to justice agenda through legal aid.

Figure 1

An Access to Justice Model of Criminal Legal Aid



The focus is on holistic justice as a major development of the third wave of access to justice, and about the role that legal aid might play in it. Legal aid can not, and should not be expected to do everything. The criminal justice system as a whole has its limitations. A great deal of restorative and other holistic justice approaches may occur outside the boundaries of the conventional justice system. However, when people are charged with an offense and are processed through the criminal justice system at least to some point, the issue of legal representation arises.

Figure I is a schematic of the various levels of legal aid service. These levels are represented as concentric circles moving outward, not replacing one another but adding to the range of service activities. The inner circle is the core of legal aid, individual case advocacy. The core of legal aid is the "first wave" of access to justice. The circles progress outward to systemic advocacy reflecting the "second wave", to holistic advocacy and justice system advocacy representing the potential of the "third wave" of access to justice.[43]

Individual Case Advocacy

The traditional core of criminal legal aid is case advocacy, the representation of accused persons in court. This is the response to the first wave of the access to justice movement. This can range from duty counsel service to representation at trial. Although this has been the business of legal aid for many decades, there may be inadequacies and needs for improvement in the basic levels of service. There may be much room for improvements in meeting needs, and in innovations in the ways in which the service may be delivered. It was pointed out above, the project of providing access to justice at the "first wave" stage is not complete. We do not know how well needs are being met for legal advice or representation at various stages of the criminal justice process: at arrest and detention, duty counsel at first appearance, at bail hearings, or at trial.

Systemic Advocacy

The second wave of access to justice with respect to access to criminal justice was the Charter. The implementation of the Canadian Charter of Rights and Freedoms had several impacts on access to criminal justice and criminal legal aid. Several Charter cases defined the nature and limits of the right to publicly funded legal aid, however, the exact impact in terms of increased volume of cases is not known. The Charter is widely acknowledged to have driven up the costs of providing legal aid by increasing the complexity of the criminal law. The Charter cases that changed the nature of the criminal justice process were very likely funded through legal aid, but this was in no way systematic. Legal aid in Canada has tended to remain largely at the first wave level of individual case advocacy. The second wave impacted legal aid in a number of ways, but not in any way that changed its basic character.

[43] For a similar concept on the use of holistic approaches by public defenders in the U.S. see Catherine T. Clarke, "Defenders Collaborate to Strengthen the Right to Counsel", paper presented at the meeting of the American Society of Criminology, Toronto, November, 1999.

Holistic Advocacy

For the participants at the access to justice symposium, the idea of access to justice involved restorative and other holistic approaches. Two main arguments can be made in favour of the inclusion of holistic advocacy within legal aid service. The first is the protection of rights is non-court based processes. An accused person might easily admit culpability or guilt in the context of a diversionary alternative when they are not in fact legally guilty. This might be especially true in an alien or uncomfortable environment in which the decision to accept an alternative to formal proceedings may take place. This might result in a considerable number of low visibility miscarriages of justice.[44] It is true that many of the offences for which diversion, mediation, or restorative justice alternatives might be employed are minor and the consequences are not too severe. However, we are cautioned by one author "that it is all too easy to get lost in the 'ideology of triviality' which may shroud low level miscarriages of justice."[45] Technical and substantive advice might empower the individual in her or his decision-making in non-court proceedings that might otherwise lead to the neglect of the basic principles of due process.[46]

A second major rationale in favour of the inclusion of holistic advocacy within legal aid services is that these approaches provide better and more appropriate ways to address the problems that bring people into conflict with the law. The view from the holistic perspective is that justice should not be the application of the law; it should involve bringing about a solution that is satisfactory to all the affected parties - especially, in this case, the accused.

Lawyers are obliged to act in the best interests of their clients, whether they are legal aid lawyers acting on behalf of the poor, or privately retained lawyers acting for fee-paying clients. It may be the poor who are most in need of, and who would reap the greatest benefits from, holistic approaches to justice. In conventional terms, legal aid is the publicly-funded institution to provide criminal defence for the poor. With the inclusion of holistic services, legal aid could extend its mandate to providing access to justice for the poor, rather than criminal defence.

There is no logical reason for criminal legal aid, the publicly funded institution for providing legal defence services to the poor, to mirror the conservatism of the organized private bar in these matters. To the extent that restorative and other holistic approaches to justice hold the promise of a better form of justice, it could be argued that it is the public responsibility of legal aid to employ and encourage them - in the best interests of their clients.

The general term used in this paper, holistic advocacy, encompasses a range of alternatives, arranging from diversion for relatively minor offences or first time offenders to restorative and therapeutic approaches (such as drug courts) for habitual offenders and more serious

[44] Adam Crawford, "Alternatives to Prosecution: Access to, or Exits From, Criminal Justice?", Richard Young and David Wall (eds.), Access to Criminal Justice, Legal Aid, Lawyers, and the Defence of Liberty, Blackstone Press, 1996. p. 331.
[45] D. McBarnet, Conviction: Law, the State, and the Construction of Justice, Macmillan, London, 1983. pp. 143-147.
[46] Adam Crawford, p. 332.

offences. This might involve a greater emphasis on the expanded use of legal aid duty counsel at the front end of the criminal justice process, as well as the use of restorative and therapeutic elements of sentencing packages in the legal aid representation service at later stages of the criminal justice process.

Justice System Advocacy

Even if legal aid plans were to embrace holistic approaches to justice, legal aid is unlikely to provide these services directly. They are more likely to play some form of *brokerage role* in securing for its clients the restorative, therapeutic, and diversion services and options that are most appropriate. However, to make use of these options, a healthy range of community-based programs must be available.[47] As a corporate activity, the commitment of legal aid to holistic justice may extend to working with other parts of the justice system and with community organizations to encourage the development of programming that would make the commitment to holistic justice a practical reality.

Another corporate issue involves training. It was noted above the criminal defense bar may have been slower to embrace restorative justice than others within the justice system. Crawford expresses the view that “there are clear dangers that in the assumption that lawyers, experienced in adversarial litigation, and immersed in a culture that celebrates adjudication, can move unproblematically, with a minimum of retraining, into mediatory roles or even act as advisors within an interest-based mediatory process.[48] Speaking to the issue of maximizing control over the process that was raised earlier another author writes: “As active dominant professionals, accustomed to occupying partisan advisory and representative roles, lawyers should recognize that they may have great difficulty in adapting to the posture of impartial facilitator of other people’s decision-making.”[49]

These observations have two possible implications for the involvement of lawyers in holistic justice and in legal aid work. The provincial and territorial Law Societies and branches of the Canadian Bar Association normally provide professional training for their members. These associations might consider developing training packages for practicing lawyers in holistic justice approaches.[50] This might be done in close concert with legal aid organizations, that would encourage staff lawyers and private bar lawyers who accept certificates to take the courses.

A different implication is the possibility of a greater role in legal aid for non-lawyers. Alternative or non-litigation approaches may become a part of the criminal justice process at several stages. Paralegal workers might have a greater role, working with lawyers, at points in cases at which alternative processes come into play.

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[47] The interim evaluation of the Toronto drug court indicates that 25 % of drug court clients were unable to get the services that they required because of long waiting ques or simple lack of availability. Louis Gliksman, et al., The Toronto Drug Treatment Court: A One-Year Summary, Department of Justice, March, 2000.
[48] Adam Crawfrod, p. 334.
[49] S. Roberts, “Mediation in the Lawyer’s Embrace”, Modern Law Review, Vol. 55, 1992. p. 261.
[50] Law Schools might do the same within their legal education curricula.

Concluding Remarks

The access to justice symposium, Expanding Horizons, took the pulse of a group of one hundred justice system leaders, and found out how they viewed justice. What came across was a real sense of disenchantment with the existing justice system, and a surprising consensus that holistic approaches to justice were the direction of the future. There was also the recognition that these new forms of justice are far more demanding and difficult to achieve than conventional justice. Achieving the "new justice" will require the invention of new community-based approaches, and profound changes in the existing justice system.

The issues that emerged from the symposium present a wealth of ideas for developing innovative approaches to access to justice. This paper explores the implications for criminal legal aid, currently the major publicly-funded institution for providing access to criminal justice for the poor. The reason for focusing attention on criminal legal aid is its importance for the criminal justice system overall. State funded legal aid is the public institution for criminal defence, advice, and assistance for the poor. The integrity of the criminal justice system depends on the existence of an effective system for providing legal representation to the poor. The objective of this exercise is to draw on the ideas that emerged from the access to justice symposium, and to bring criminal legal aid closer to being the public institution for access to criminal justice.

Criminal legal aid occupies the vast majority of the existing access to justice terrain. Drawing on the Cappelletti and Garth model of three waves of access to justice, criminal legal aid remains largely a first wave institution. The focus is on individual case advocacy. The services are mainly those that are provided by a lawyer in the traditional fashion. Legal aid largely reflects the norms of the adversarial justice system. The basic criterion for legal aid coverage is risk of imprisonment, and the emphasis on service is mainly, or at least until recently, representation at trial. Recently, some legal aid plans have begun to experiment with more expanded forms of duty counsel emphasizing service delivery at the front end of the criminal justice system. Legal aid tends to be rationed in favour of the most serious legal matters and for the very poor. Although organized legal aid plans have been in existence for at least thirty years, criminal legal aid in its "first wave" form is an incomplete project.

The second wave of access to criminal justice is marked by the implementation of the Canadian Charter of Rights and Freedoms that was part of the new Constitution Act of 1982. The Charter had profound implications for the accessibility of criminal legal aid. The Charter defined more clearly the circumstances under which legal aid must be available, although it is unclear what independent effect the Charter had on the volume of service. It would seem somewhat of a paradox that the major factor propelling the second wave of access to criminal justice, the Charter, also had the effect of more firmly consolidating criminal legal aid as a first wave initiative.

A second impact of the Charter on legal aid was to add increasing pressure on the cost of legal aid, because of the greater complexity of the criminal law, and because of more stringent and exacting standards of legal practice. The impact of the Charter does indeed fit the "diffuse interests" emphasis that defines the second wave of the access to justice movement. The precise impacts of the Charter have not been carefully studied, although

there is general agreement among legal aid managers that the effects have been profound, as it has been for the practice of criminal law generally.

Most of the scattering of projects and programs that might be characterized as "third wave" access to justice initiatives have not touched legal aid. The trend toward diversion of minor offences provides an interesting case. The combination of the greater use of diversion in the criminal justice system, and the tendency of rationing legal aid to the most serious cases appears to have created two streams of criminal cases. The minor cases have flowed away from legal aid coverage, even though the case can be made that many low visibility miscarriages of justice may result. At the same time legal aid has restricted itself to the stream of serious cases that are considered more serious, possibly becoming more complex and expensive over time with the effects of the Charter and criminal procedure reforms such as disclosure provisions.

At the risk of mixing metaphors, the "third wave" is catching its second wind with the re-emergence of restorative justice. This is a new and demanding form of justice that asks that we attempt to solve problems in a multidisciplinary manner, rather than apply the law; we address the needs of the accused rather than assure the protection of their rights as guilt or innocence are determined. Restorative forms of justice are moving out of the margins and into the mainstream, even if this is more in principle than in practice. Recent changes to the Criminal Code and a Supreme Court decision have established restorative justice as an element in Canadian criminal law.

It appears that the criminal defence Bar, including legal aid, has been slower to embrace restorative justice approaches than has the judiciary and Crown prosecutors. This may be because restorative justice remains contrary to the professional socialization of lawyers and the adversarial arts of criminal defence practice.

The traditional justice system, including legal aid, will not be able to satisfy the demands of the "new justice". Implementing holistic and restorative justice approaches will require the invention of novel community-based approaches. However, the traditional justice system, including legal aid, will not disappear. It will come under increasing pressure to change.

The pressure to change may arise for two reasons. One reason rests mainly on principle. Restorative justice may provide better justice, more effective and durable solutions to the problems that bring people into conflict with the law - especially the poor. As well, to the extent that holistic justice approaches are employed, we need to be assured that widespread, low visibility miscarriages of justice do not become a by-product of holistic approaches.

Second, there are politics that accompany the newer forms of justice, because they are new and they hold out the promise of a way out of a justice system that may be more than too expensive and ineffective. If it were only that! The criminal justice system may have those perverse iatrogenic qualities in which the medicine causes or exacerbates the illness it seeks to cure. Legal aid may come under increasing pressure to reassess its role in light of the broader changes occurring in the justice system.

Legal aid is a publicly funded institution. Governments are facing competing priorities and shrinking budgets. It is no doubt true that legal aid meets its clients at the end of a long string of institutional failures that have contributed to their criminality. However, if legal aid as an institution fails to actively pursue holistic forms of justice that would transform criminal defence into a broader concept of access to justice, it may be unattractive in the competition for scarce resources. There may be little sympathy for legal aid if it simply mirrors the conservatism of the private bar, rather than assuming a more proactive role, along with the judiciary and the prosecutorial function, in shaping a more innovative and effective form of justice.

From a more positive perspective, combining attempts to employ restorative and other holistic approaches for clients with legal representation may better serve the interests of clients and produce better justice. If we accept the argument that the re-emergence of restorative justice marks a significant element of the “third wave” of access to criminal justice, this change presents the opportunity for legal aid to enter the “third wave” of the access to justice movement.