

# Restorative Justice and Crime Control: Perspectives on Contemporary Theoretical and Policy Issues

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## Abstract

Over the past three decades a new way of thinking about crime and crime prevention has been gaining ground around the world and is beginning to exercise a significant influence on contemporary criminal justice policy and practice. Known as 'restorative justice', it revolves around the notions that crime is primarily a violation of people and human relationships; that the chief aim of the justice process should be to reconcile those most directly affected by the offending behaviour while addressing the injuries they suffered; and that the resolution of crime-related conflicts demands a positive effort on the part of victims and offenders and the assumption of responsibility by the community. This paper outlines the broad philosophy of restorative justice, comments on

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the differences between restorative justice and other prevailing conceptions of justice, and identifies the constitutive elements necessary for a restorative justice practice. The paper then briefly considers contemporary restorative justice processes, presenting information on guiding principles, procedures and goals and identifying concerns that need to be addressed in the development and implementation of such processes.

## Defining Restorative Justice

A generally agreed definition of restorative justice has proven elusive. Some scholars have resorted to indicating what restorative justice is not (often by contrasting restorative justice with retributive justice), whilst others have drawn attention to a number of principles by which restorative justice is characterized. Nevertheless, we have gained enough experience and enough has been written to formulate at least a working definition of restorative justice:

*Restorative justice is a process whereby all parties who have a stake in a criminal offence (offenders, victims and the communities concerned) come together to resolve collectively and through dialogue how to deal with the aftermath of the criminal act with an emphasis on repairing the harm from that act – the harm to the victim, to the community and to the offender himself – and on putting things as right as possible.*

The growing interest in restorative justice around the world in recent years and the related movement for criminal justice reform

reflect a dissatisfaction with mainstream criminal justice processes and a reaction to what is perceived as a failure of these processes to significantly reduce crime and to meet the needs of the individuals and the communities affected by it. As critics point out, the mainstream system, with its emphasis on the prevailing norms of legal rationality and procedural formalism, leaves little room for victims, offenders and the communities concerned to actively participate in the justice process and the impersonality of the proceedings tends to dehumanise both the criminal act and its consequences. In this environment, the offender often fails to realise the real impact of his wrongful conduct, and the victim remains just that, a victim, knowing only that the offender, somewhere out of his sight and reach, serves whatever sentence was imposed on him. Moreover, the restoration of social equality, that is relationships of equal respect, dignity and concern, cannot be achieved when priority is given to stigmatic punishment, for such punishment is inherently isolating, removing the offender from the relationship and thereby precluding relationship altogether, let alone equality of relationship. The restoration of social equality, it is argued, can best be achieved by practices capable of promoting the reintegration of the offender into the community through a process to which the offender submits voluntarily as a result of negotiations with those affected by the offence, and as part of the offender's own efforts to restore equality to the relationship.

Restorative justice proceeds from the assumption that crime involves a violation of people and human relationships resulting in injuries to victims, communities, and the offenders themselves. Rather than establishing guilt and exacting punishment under a set of impersonal rules, it seeks to repair the damage caused by the offence and restore the relationships between the parties concerned by actively

involving all parties in a process of negotiation and reconciliation.<sup>1</sup> The hallmark of restorative justice is collaboration among all parties affected by criminal behaviour. The restorative justice approach is thus said to restore the deliberative control of justice by citizens by transforming those concerned from being passive participants in an impersonal process to being active players required to understand the nature and consequences of the crime and deliberate over how to deal with the problem and prevent its recurrence. It prevents the closed shop of the legal expert and, by infusing non-legal, ethical, values into the justice system, constitutes a constraint on legalism, arbitrariness and bureaucracy.<sup>2</sup>

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1 H. Zehr, *Changing Lenses: A New Focus for Crime and Justice*, Scottdale, Pa., Herald Press, 1990, 181. And As Kay Pranis points out, "Restorative justice has at its core the concept of mutual responsibility and interdependence. Individuals are responsible for their impact on others and on the larger whole of which they are a part...The importance of relationships is at the centre of restorative approaches – not just the relationship between a victim and an offender, but all the relationships connected to the victim and offender in the web of life." 'Restorative Values and Confronting Family Violence', in H. Strang and J. Braithwaite (eds) *Restorative Justice and Family Violence*, Cambridge, Cambridge University Press, 2002, 23-41 at 25.

2 Modern justice systems set a great premium on legal certainty, the knowledge that there is a fair procedure for applying a general rule to a particular case. The emphasis is on professionalism and the professional skills of a group of experts, who working in the system continually will be a guarantee of legal certainty. On this view lay participation is anomalous since it disturbs the basis for objectivity and predictability. Here we can see the contradiction in a liberal democratic society instantiated in the rule of law. For in order that the main moral imperative of that society, 'the government of laws and not men', flourish, another important value, that of participation, must, in part, be negated. One can see this in the tension

Restorative justice is concerned with restoring equality between the offender/wrongdoer and the victim/sufferer of the wrong. This is also the objective of retributive justice. Retributive justice, however, views the achievement of equality as hinging upon a particular set of punitive practices. It links the very idea of restoration of equality with retribution against the wrongdoer exercised through stigmatic punishment.<sup>3</sup> Restorative justice, on the other hand, gives priority to the

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between efficiency and democracy where efficiency, in the shape of reliability, constancy and predictability, is seen as continually subverted by the demands of democratic, and therefore inefficient participation. Practices based on the notion of restorative justice have the potential for managing this tension in society by providing participation within the framework of the 'rule of law' and thus not damaging the main moral imperative of the system.

- 3 Reference should be made here to the distinction between theories of punishment, which hold that the punishment of the wrongdoer is required for its own sake and theories offering instrumental justifications for punishment revolving around the notions of general and individual deterrence and rehabilitation. Critics recognise that deterrence and rehabilitation are desirable goals but maintain that these cannot be attained through punishment (or through punishment only). Being unable to justify the practice of punishment on these grounds, many criminal justice theorists have looked for ways of defending punishment by employing the idea of just deserts as a prerequisite of retribution. Retributivism serves supporters of punishment well for the community can be assured that it is morally right to punish wrongdoers because that is what they deserve, irrespective of whether acts of punishment protect people from criminal wrongdoing. The shift from instrumentalist justifications of punishment to retributive ones was motivated also by the desire to avoid the injustices happening in the name of deterrence and rehabilitation – e.g. wrongdoers being kept in prison indefinitely, or for extended periods of time, for relatively minor offences, contrary to the principle of proportionality. The latter principle, which is closely connected with the idea of just deserts,

question of what set of practices are most likely, in a given context, to undo or minimize the damage caused by the offence, thus achieving the goal of restoring social equality. It recognizes that the identification of these practices requires social dialogue that includes offenders, victims and the community to which they belong, and demands close consideration of the needs of each for restoration and healing. As John Braithwaite has remarked, “retributivists are obsessed with passive responsibility because their priority is to be just in the way they hurt wrongdoers. The shift in the balance towards active responsibility occurs because the priority of the restorativist is to be just in the way they heal.”<sup>4</sup> Retributive justice, by placing the emphasis on individual guilt as a prerequisite of punishment, is primarily backward looking, focusing on what happened, not what must be done to address it. Restorative justice, by contrast, is essentially forward looking, for it is concerned with what needs to be done to restore the relationship between offender and victim, and not only with establishing responsibility. Of course, the process of

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requires a correspondence between the relative seriousness of the offence and the relative severity of the punishment imposed on the offender. Regarding retributive justice as being concerned with nothing more than some abstract ‘evening of scores’ is too simplistic, however. At its basis, retributive justice is concerned with social equality – with making the offender and his victim equal by giving the offender his just deserts. The philosophical justification for retribution is essentially social and the state’s power to punish derives from the idea of the social contract to which citizens notionally subscribe (the so called ‘contractarian thesis’). For a critical look at contemporary retributivist theory see J. Braithwaite and P. Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice*, Oxford, Clarendon Press, 1990.

4 J. Braithwaite, *Restorative Justice and Responsive Regulation*, Oxford, Oxford University Press, 2002, 129.

restoration cannot begin unless the fact that a violation has occurred is fully acknowledged, for in order to repair the harm and restore the relationship one must know what happened. In this respect, restorative justice also looks back at the past, but it does so with a view to transforming the relationship for a better future. Finally, in contrast to retributive justice, which sets a great premium on process as a means of establishing culpability for punishable conduct, restorative justice is more concerned with the outcome of the process, rather than with the process itself. It is thus flexible with respect to what must be done in response to a wrongdoing, as long as the relevant action has the potential for achieving the ultimate goal of restoration.<sup>5</sup>

## Basic Elements of Restorative Justice

Willingness to participate and truth telling are essential elements of any restorative justice practice – participation cannot be the result of fear, coercion or manipulation brought to bear on either the offender or the victim. A successful outcome presupposes that the parties are allowed to relay the story of the incident and their experience of it fully and honestly. Of special importance is the offender's willingness to

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5 See R. Graef, *Why Restorative Justice?: Repairing the Harm Caused by Crime*, London: Calouste Gulbenkian Foundation, 2000. On the distinction between restoration and punishment consider L. Walgrave, 'On Restoration and Punishment: Favourable Similarities and Fortunate Differences', in A. Morris and G. Maxwell (eds) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles*, Oxford and Portland, Oregon, Hart Publishing, 2001, 17-37.

acknowledge what happened and assume responsibility for his wrongful acts or omissions. In addition to voluntary participation and truth telling, it is crucial that the parties are brought together to hear and challenge each other's stories of the incident directly and express their feelings. Bringing the parties face to face with one another makes it possible for the offender to hear the experience of his victim in the latter's own words and for the victim to see the offender as a person rather than as a faceless criminal, dispelling the myths and stereotypes each has of the other. The involvement of the victim, in particular, leads to a greater accountability from the offender, for it is difficult for offenders to make excuses and to retreat behind a shell in the face of victims recounting the often devastating impact of the offence. In this context offenders more often express real remorse, which is a key step in their own journey away from wrongdoing and to the healing of the wounds suffered by victims.

The disparity in terms of power between the state and the accused in the mainstream criminal justice process has justified the introduction of procedural protections intended to guard against abuse of rights by state organs. Although in a restorative justice process the offender is no longer pitted against the immense power of the state, the largely informal character of the process gives rise to rights concerns pertaining to possible power imbalances between the parties, as well as to the use of pressure tactics to make individuals participate in the process. In order to be able to address such concerns the process must embody mechanisms designed to protect the rights of the participants. The requirement of voluntariness with respect to participation has already been drawn attention to. Voluntary participation presupposes that the parties are informed about the nature and objectives of restorative



justice and are given the time and support they need in deciding whether to participate or not. Once willingness to participate has been assured, the problem of possible power imbalances within the process needs to be addressed. Such imbalances might be the result of a previous relationship between the parties, or differences as to their social status. One way of dealing with this problem is by ensuring that the parties are adequately supported by persons close to them throughout the process. As far as the conduct of the process is concerned, it is required that a balance is struck between the need for free expression of experiences on the one hand, and the need to protect the integrity and sense of security of the parties on the other. Allowing the parties to play a role in setting the ground rules governing the process is of particular importance here, as it offers the parties a feeling of empowerment and strengthens their commitment to the restorative justice process and its objectives. As has been pointed out by commentators, the process of setting ground rules is a vital 'part of establishing an atmosphere and state that will be conducive to open communication and reconciliation.'<sup>6</sup>

In a restorative justice process the role of the facilitator or coordinator is particularly important. Besides having a symbolic role of community involvement in the process, it lies with him to bring the parties together and direct the discussion so as to ensure that the needs of the parties are considered and integrated and their rights protected. It rests with the parties and not the facilitator, however, to determine the content of the process according to what they believe is important in the

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6 See M. Chupp, 'Reconciliation Procedures and Rationale', in M. Wright and B. Galaway (eds), *Mediation and Criminal Justice: Victims, Offenders and Community*, Newbury Park, Sage Publications, 1989, 63.

situation and to decide how to arrive at an outcome that would best meet their needs. Any agreement reached must be consistent with restorative justice principles – it must be a product of a genuine commitment to restore the relationship between the parties to one of equal dignity and respect and not simply an acceptance of the offender's offer by the victim.<sup>7</sup> Ultimately, justice is measured by the extent to which responsibilities are assumed, needs are met and healing is effected.

One of the main criticisms which proponents of restorative justice level against the mainstream criminal justice system is that it often ignores the needs of the victims of crime.<sup>8</sup> It is argued that victims need to be restored to a sense of control and safety in their lives based on a feeling that their rights have been vindicated. This presupposes that their injuries, both material and psychological, are identified and repaired as far as possible. Reference should be made here to the central role which apology plays in the relevant process. The goal of apology is the granting of forgiveness and, when both occur, victim and offender join in a ritual of reconciliation through which social harmony is restored. Apology is here seen as a goal to be sought, and as an expression of the

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7 Although arguably punishment has no place in a restorative justice system, such an agreement might involve some form of suffering for the wrongdoer - e.g. he might be required to work off the damage he caused, to give up certain activities or to compensate the victim for the injury he suffered. Such suffering, however, is directly linked with the harm caused by the offence – not an intentional infliction of pain on the offender – and the result of a negotiated settlement between the parties concerned.

8 As David Cayley puts it, 'modern criminal justice has stressed the aggrandizement and edification of the state, rather than the satisfaction of victims'. *The Expanding Prison: The Crisis in Crime and Punishment and the Search for Alternatives*, Cleveland, OH, Pilgrim Press, 1998, 217.

victim's satisfaction and a sign of reconciliation when it is given.<sup>9</sup> An important need of many victims of crime is reintegration into the community, as often the very fact of being a victim can lead to further victimization by society. Indeed victims often share the offenders' experience of being stigmatized and isolated. This can happen when a victim or his experience is disregarded or explained away as being the result of the victim's own acts or omissions.<sup>10</sup>

The injuries of offenders are usually a complex mix of those preceding and directly or indirectly contributing to the commission of the offence and those resulting from it. Of the latter probably the most serious is their stigmatization as deviant and dangerous individuals cut off from the rest of society. The reintegration of offenders is necessary if

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9 According to Retzinger and Scheff, apology and forgiveness pertain to "symbolic reparation", a vital element of the restorative process. As they point out "Without [apology and forgiveness] the path towards settlement is strewn with impediments, whatever settlement is reached does not decrease the tension level... and leaves the participants with a feeling of arbitrariness and dissatisfaction. Thus, it is crucially important to give symbolic reparation at least parity with material settlement... Symbolic reparation is the vital element that differentiates [restorative justice] conferences from all other forms of crime control." "Strategy for Community Conferences: Emotions and the Social Bonds", in B. Galaway and J. Hudson (eds) *Restorative Justice: International Perspectives*, Monsey NY, Criminal Justice Press, 1996, 317.

10 According to Van Ness, this so called 'blame the victim' response is often prompted by our own fears. As he explains, 'because we are afraid of crime, we sometimes have trouble dealing with victims. They remind us of our own vulnerability, in the same way that someone with a terminal disease reminds us of our mortality. So we ignore them, we shun them, we blame them. The victim becomes invisible.' D. Van Ness, *Crime and its Victims*, Downers Grove, Ill., InterVarsity Press, 1986, 28.

they are to be reconciled with the community to which they belong so that they may participate on equal footing in relationships with their fellow citizens. Moreover, reintegration is crucial if reparation is to be achieved, for in order for offenders to be able to make amends for the damage they caused, access to the means to do so must not be impeded. Reintegration as a condition of restoration is facilitated by the participation of the community in the restorative justice process and the removal of barriers to active involvement of offenders in the community life. It presupposes, further, that offenders are given an active role in the restorative justice process, being encouraged to confront the shame that crime entails and to help decide what is to be done to reverse or minimize the harm they caused.

A few things need to be said in this connection about reintegrative shaming, an idea that has played an important part in the designing and implementation of restorative justice programs. The incorrect use of shaming, it is argued, has been one of the main reasons behind the failure of mainstream criminal justice systems to deal effectively with the problem of crime, especially with juvenile offending. The type of social shaming generated and perpetuated by traditional systems through their formal processes and punitive measures is said to create outcasts, for it entails the stigmatisation of the offender. Once a person has been singled out as a deviant and dangerous individual, the label attached may become the dominant label, or 'master status', which is seen as more important than all the other aspects of the person. As his role in society is undermined by his stigmatisation, deviance for him then 'becomes a way of life that is difficult to change and is rationalized as a defensive

lifestyle within the deviant subculture.<sup>11</sup> In the words of Gerry Johnstone, “by segregating and ostracising offenders we render them more rather than less of a threat to us. We drive them into criminal subcultures where they become more and more like alien enemies of the community. We lose whatever chance we have of influencing them to behave better and to subject themselves to various forms of supervision and control.”<sup>12</sup> The challenge for a new approach to crime is to develop ways of responding to offenders that would counter the naturally occurring stigmatising processes and provide mechanisms for the reintegration of offenders into community life. Reintegration presupposes that the shaming of an offender takes place within his circle of acquaintances or his own community, and that the disapproval of the offending behaviour is not accompanied by the stigmatization or ‘labelling’ of the offender but, rather, by the re-affirmation of his value as a person and of his role as a

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11 J. Braithwaite, *Crime, Shame and Reintegration*, Cambridge: Cambridge University Press, 1989, 18. Much of the so called ‘labelling theory’ comes from the general sociological perspective known as symbolic interaction theory. The latter theory states that reality is to a large degree defined by shared social symbols. When enough people agree that a certain idea is true then it ‘becomes’ true and is understood as real. If one person commits a crime and is defined a criminal then society may react to that person as a criminal. This will in turn require him to act as a criminal. The claims of the labelling theory have only in part been supported by empirical studies and the theory has been criticized by scholars on various grounds. Nevertheless, the theory has played a part in the introduction of programs which offer ‘diversion’ from the criminal justice system on the grounds that diversion prevents labelling and social stigma and hence facilitates rehabilitation and reintegration.

12 G. Johnstone, *Restorative Justice: Ideas, Values Debates*, Devon, Willan Publishing 2002, 13.

community member. Thus the door is left open for the offender to re-enter the community after he has assumed responsibility for the harm he caused, apologized to the victim and made some kind of reparation. Clearly, a successful outcome depends on whether the procedure adopted succeeds in invoking feelings of genuine shame and remorse in the offender. In this respect, choosing the right participants to be present in supporting roles is of paramount importance. If shaming is to have a reintegrative effect, an offender must be made powerfully aware of the disapproval of his wrongful conduct by persons for whom he maintains maximum respect.<sup>13</sup>

As has already been noted, the notion of community is central to the restorative justice philosophy. A definition of community may be based on geography, relationship, interest, or it may refer to society as a whole. As Paul McCold explains, “there are many different levels of

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13 In the words of John Braithwaite, “the discussion of the consequences of the crime for victims (or consequences for the offender’s family) structures shame into the [restorative justice] conference; the support of those who enjoy the strongest relationships of love or respect with the offender structures reintegration into the ritual. It is not the shame of police or judges or newspapers that is most able to get through to us; it is shame in the eyes of those we respect and trust.” *Restorative Justice and Responsive Regulation*, Oxford, Oxford University Press, 2002, 74. For a closer look on the role of reintegrative shaming in the restorative justice process see J. Braithwaite, *Crime, Shaming and Reintegration*, Cambridge, Cambridge University Press, 1989. And see J. Braithwaite, “Juvenile Offending: New Theory and Practice”, in *National Conference on Juvenile Justice, Conference Proceedings No. 22*, edited by L. Atkinson and S. Gerull, Canberra, Australian Institute of Criminology, 1993, 35-42; G. Masters and A. Roberts, ‘Family Group Conferencing for Victims, Offenders and Communities’ in M. Liebmann (ed), *Mediation in Context*, London, Jessica Kingsley Publishers, 2000, 145.

community, as there are different levels of disputes. Each offender and each victim are members of several communities and informal organizations – personal communities – family, friends, neighbourhood and school organizations, churches and community organizations. We are all members of our local community, municipal subdivision, metropolitan area, state, federal and societal level “communities”. Ultimately we are all members of the human community.”<sup>14</sup> Each of these types of community is affected by crime in different ways and it is possible for each to play a part in a restorative justice process, depending on what is required in the specific context at issue. While the nature of restorative justice and the different ways in which communities may be affected by criminal wrongdoing leave room for various forms of community involvement, one can make the generalization that communities are harmed when the safety of their members is threatened.<sup>15</sup> As it is concerned with social equality, restorative justice is realized in the community. In this respect, the resolution and prevention of crime requires a positive effort and assumption of responsibility by the community. At the same time restorative justice is transformative of that very community for, besides addressing a specific situation of conflict, it offers communities the chance to heal themselves from the harmful effects of crime and to create conditions that would prevent various criminogenic factors from operating in the future.

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14 P. McCold, ‘Restorative Justice: The Role of the Community’, paper presented to the Academy of Criminal Justice Sciences annual Conference, Boston, in March 1995, 7.

15 See D. Van Ness and K. Strong, *Restoring Justice*, Cincinnati, Anderson Publishing Co., 1997, 120.

## Restorative Justice in Practice

### *Victim-Offender Mediation*

Although practices associated with the idea of restorative justice can be found in many indigenous as well as pre-industrial Western justice traditions,<sup>16</sup> the term 'restorative justice' is currently understood as referring to programs implemented since the mid-1970s, based on mediated meetings between victims and offenders and aiming at reparation and reconciliation. Reference should be made in this connection to the victim-offender reconciliation programs – also referred to in some communities as 'victim-offender mediation programs' or 'victim-offender dialog programs'.<sup>17</sup> These programs seek to mediate

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16 As H. Zehr remarks, 'It is difficult to realize that the paradigm which we consider so natural, so logical (i.e. the one pertaining to the traditional criminal justice system), has in fact governed our understanding of crime and justice for only a few centuries. We have not always done it like this. ...Instead, community justice has governed understandings throughout most of our history. ...For most of our history in the West, non-judicial, non-legal dispute resolution techniques have dominated. People traditionally have been very reluctant to call in the state, even when the state claimed a role. In fact, a great deal of stigma was attached to going to the state and asking it to prosecute. For centuries the state's role in prosecution was quite minimal. Instead it was considered the business of the community to solve its own disputes.' H. Zehr, 'Retributive Justice, Restorative Justice', *New Perspectives on Crime and Justice – Occasional Papers Series*, Kitchener, Mennonite Central Committee, Canada Victim Offender Ministries, 1985, 6-7. And see G. M. Weitekamp, 'The History of Restorative Justice', in G. Bazemore and L. Walgrave (eds), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime*, Monsey, New York, Criminal Justice Press, 1999; G. Johnstone, *Restorative Justice: Ideas, Values, Debates*, Devon, Willan Publishing, 2002, 36 ff.

17 These were first introduced in Kitchener, Ontario, in 1974. See D.



between victims and offenders with a view to providing an opportunity for the offender and the victim to develop a mutually acceptable plan on how to deal with the harm caused by the offence.<sup>18</sup> During the relevant process victims and offenders come together in a safe, controlled setting and engage in a mediated discussion of the crime and the circumstances in which it was committed. With the assistance of the mediator the victim describes the physical, emotional and financial impact of the crime, asks questions about the crime and the offender and helps develop a plan for restoring losses.<sup>19</sup> The offender is given the opportunity to learn about the impact of the crime on the victim, describe what happened from his point of view and take direct responsibility for his conduct. Paying close attention to the needs of the victim is of vital importance here, and the mediator is expected to do everything possible to ensure that the victim will not be harmed in any way during the

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Peachey, 'The Kitchener Experiment', in M. Wright and B. Galaway (eds), *Mediation and Criminal Justice: Victims, Offenders and Community*, London, Newbury Park, Sage Publications, 1989. The first victim-offender mediation program in the United States was introduced in Elkhart, Indiana, in 1978, and was modelled on the program developed in Kitchener.

18 For a closer look see M. Umbreit et al, *Victim Meets Offender: The Impact of Restorative Justice and Mediation*, Monsey, N.Y., Criminal Justice Press, 1994; on the development and effectiveness of victim-offender mediation programs see M. Umbreit, R. Coates and B. Vos, 'Victim Impact of Meeting with Young Offenders: Two Decades of Victim Offender Mediation Practice and Research', in A. Morris and G. Maxwell, *Restorative Justice for Juveniles: Conferencing, Mediation and Circles*, Oxford and Portland, Oregon, Hart Publishing, 2001, 121-143.

19 The role of the mediator is not to impose his interpretation or solution upon the parties, but to encourage them to tell their stories, express their feelings and work together towards an agreement about what the offender can do to address the harm he caused.

process. Moreover, both the victim's and the offender's participation must be voluntary – the parties should never be coerced into taking part in the process – and cases should be carefully screened regarding the readiness of the parties to participate. Furthermore, it is important that the parties are given choices, whenever possible, about procedural matters, such as when and where the mediation session will take place, who will be present and who will speak first.

Cases may be referred to victim-offender mediation programs by judges, probation officers, prosecutors, victim or defence lawyers and law enforcement agents. In some programs cases are referred as a diversion from prosecution, on the understanding that any agreement reached during the mediation process is to be successfully implemented; in other programs, cases are referred after the offender has been found guilty by the court, with the mediation being a condition of probation or other disposition, if the victim has agreed to participate. Mediation can take place at any time during the criminal justice process, or outside the system altogether, but only after the offender's guilt has been established as a result of a conviction or an admission of responsibility by the offender. In many countries, such as the US, Canada, England, Belgium and the Netherlands, victim-offender meetings are held in prison, usually after sentencing (even when mediation will have no effect on the sentence imposed). In some countries, moreover, meetings are organized which involve groups of unrelated victims and offenders.<sup>20</sup> The great majority of cases involve offences of a less serious nature, such as property offences committed by young people, although the number of

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20 This is done, for example, with sexual assault victims and offenders in Canada and England.

cases involving serious and violent crimes committed by both juveniles and adults is increasing. It should be noted here that in some European countries the mediation process does not always involve a direct meeting between the victim and the offender. Instead, the mediator meets separately with each party, conducting shuttle negotiation, until an agreement on the appropriate form of restitution is reached. Although this form of mediation satisfies some restorative principles, it usually achieves less than a direct meeting between the parties can accomplish.

### *Conferencing*

A restorative justice practice that has attracted much attention in recent years is conferencing. Conferencing is essentially an extension of the victim-offender mediation process involving not only offenders and victims but also their wider 'communities of care', such as their respective families and other community members who may be able to contribute to the reconciliation process. It aims to involve the young offender, the victim and their families in a decision-making process with the objective of reaching a group-consensus on a 'just' outcome. At the same time it seeks to increase the offender's awareness of the human impact of his behaviour and to allow both offender and victim to reconnect to key community support systems. The way in which conferencing operates in different countries varies considerably.<sup>21</sup> The relevant process has been implemented in schools, police departments,

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21 Conferences are referred to by a number of different names, such as Family Group Conferences, Community Action Conferences and Community Accountability Conferences.

probation agencies, community mediation programs, residential programs and neighbourhood groups. In general, however, conferencing is most often relied upon as a diversion from the court process for juvenile offenders or used after adjudication to address unresolved matters or to determine appropriate forms of restitution. Cases dealt with through conferencing involve a variety of offences, including property and drug offences, minor assaults, vandalism and, in a number of countries, domestic violence. A brief overview of the practice of conferencing in New Zealand, which provided a useful model for many countries around the world, would be instructive at this point.

The turning-point in the recognition of restorative justice in New Zealand was the enactment of the Children, Young Persons and their Families Act 1989 (CYPFA), which established the use of Family Group conferences when dealing with young offenders. Family Group Conferencing incorporates many restorative justice principles. The restorative justice philosophy is reflected, in particular, in the inclusion of all those affected by the offending in the Family Group Conference process; the emphasis on collective decision-making in addressing the problems caused by the crime; the objective of ensuring that the offender is held accountable for his or her wrongdoing; and the recognition of the need that the offender is reintegrated into his or her community. Moreover, in line with the restorative justice approach, the CYPFA recognizes the community, rather than criminal justice agencies, as the prime site of youth crime control. In general, Family Group Conferences are said to: (a) increase the range of diversionary options through which young offenders can be made accountable for their offending; (b) ensure a shift in philosophy from one of unilateral state intervention in the lives of young people and their families to one based on partnership between

family and the state; (c) enable culturally diverse processes and values to be recognized and affirmed; and (d) involve victims in decisions about outcomes for young people who have offended against them.<sup>22</sup>

A Family Group Conference may be convened by a youth justice coordinator following a referral by the police or the Youth Court in three situations: (a) where a young person is not arrested but the police are contemplating criminal proceedings (this is the most common trigger for a Family Group Conference); (b) where a young person has been arrested and charged in the Youth Court and there has been no denial of guilt by the young person; and (c) where there has been an initial finding of guilt by the court.<sup>23</sup> The CYPFA sets out the categories of persons who are entitled to attend a youth justice Family Group Conference.

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22 Since the enactment of the CYPFA New Zealand has seen the introduction of several restorative justice programmes throughout the country, including programmes for adult offenders. There are independent community groups providing restorative justice services following referrals from the courts, community-managed restorative justice programmes funded by the Crime Prevention Unit, as well as a number of marae-based programmes. Although courts in New Zealand have considered restorative justice on an ad-hoc basis since the early 1990s, it was not until the introduction of the Sentencing Act 2002, the Parole Act 2002 and the Victims' Rights Act 2002 that there was any clear statutory recognition of restorative justice in relation to the formal criminal justice system. Together these three Acts give greater recognition and legitimacy to restorative justice processes, encourage the use of restorative justice processes wherever appropriate and allow or require restorative justice processes to be taken into consideration in the sentencing and parole of offenders where such processes have taken place.

23 It should be noted that a Court may direct that a conference be convened at any stage of hearing a proceeding if it appears that such a conference is necessary or desirable.

These include: (a) the child or young person in respect of whom the conference is held; (b) every person who is a parent or guardian of, or a person having the care of, that child or young person, or a member of the family, whanau or family group of that child or young person; (c) the youth justice coordinator; (d) the informant in the proceedings for the offence or alleged offence to which the conference relates (usually a representative of the Police Youth Aid section or some other law enforcement agency); (e) any victim of the offence or alleged offence to which the conference relates, or a representative of that victim; (f) the victim's support group (members of his or her family, whanau or family group, or any other persons); (g) any barrister or solicitor or advocate representing the child or young person; (h) a social worker; and (i) a probation officer, if the young person is subject to a community-based sentence.

Proceedings are sometimes, if appropriate, opened by an elder or pastor with a greeting or prayer. The youth justice coordinator will then introduce those present or ask them to introduce themselves. Following this, the youth justice coordinator will inform the participants of the matters that have brought the young person to the attention of the law enforcement authorities, explain the purpose of the conference and advise the participants on what decisions and recommendations can be made and on how these can be implemented. The law enforcement officer will then supply the conference with detailed information regarding the alleged offending. The Family Group Conference must ascertain whether the young person admits the offence, unless the conference has been convened after the charge has been proved at Court. Following the young person's admission that he or she committed the offence, the victim or his or her representative will be asked to speak about the effect that the

offending has had on him or her personally. Next all the participants discuss the young person's behaviour and share their views about how to set matters right. At this stage the procedures that will apply if the young person's family makes a recommendation that the conference as a whole accepts and the consequences that will follow if an agreed decision proves impossible are explained by the coordinator. The young offender and his or her family and other support persons will then deliberate privately with a view to developing a plan. When the family has finished its deliberations, the young person and family members rejoin the full conference and indicate their recommendations. These recommendations are then put to the victim and the law enforcement or youth aid officer. The consensus of opinion is that any decisions made at a Family Group Conference, to be binding, must be unanimous and supported by all those participants who are entitled to attend and do attend. It is open to the conference to make any decision or recommendation it chooses but, in particular, it can recommend that: (a) any proceedings commenced against the young person should proceed or be discontinued; (b) a formal police caution should be given; (c) an application for a declaration that the young person is in need of care or protection be made; (d) appropriate penalties should be imposed on the young person; and (e) the young person make reparation to any victim. Although the above five recommendations are explicitly referred to in the Act, they are not intended to limit the discretion of the conference. The conference could, for instance, recommend that the young offender should write a letter of apology to the victim;<sup>24</sup> should do community service; or should be placed

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24 It is important that any apology be personal, sincere and express the true feelings of the person making the apology. A guide to preparation of

under appropriate supervision.

By blending restorative justice principles with clearly defined statutory objectives, Family Group Conferencing in New Zealand offers an example of how it is possible to have a legal system that incorporates welfare objectives alongside traditional justice and due process values. The Family Group Conference process has the potential to hold young offenders truly accountable for their actions, a key trigger for an attitude change. Victims have benefited from the restorative focus of the Family Group Conference process and in many cases have experienced emotional healing. And the wider community can be strengthened by a process that recognizes the importance of the family for the future well-being of young persons. These consequences impart a sense of confidence in the dynamics of the Family Group Conference as a crime control mechanism.

### *Circle Sentencing*

Circle sentencing has its roots in the traditional sanctioning and healing practices of aboriginal peoples in Canada and American Indians in the United States. The first sentencing circles were set up by supportive judges and community justice committees in the early 1990s in the Yukon Territory, Canada, and other northern Canadian

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an apology letter is helpful but it is important that apology letters do not become formalized. The aim is to elicit a sincere expression of regret for the young person's behaviour and to demonstrate an understanding of the effect of the offending on the victim or victims. The Youth Court Judge may ask a young person to read out the apology letter and, if the letter is inadequate, the Judge may direct that it be rewritten.



communities.<sup>25</sup> In the mid-1990s the use of sentencing circles spread to the United States with the introduction of a pilot project in Minnesota. Circle sentencing is a community-based process conducted in partnership with the criminal justice system. Its aim is to develop an appropriate sentencing plan by taking into account the needs of all the parties involved in or affected by a crime, as well as those of the broader community. The focus of the process is again on reconciliation and the restoration of peace, rather than on retribution and deterrence, although sanctions can play a part if they are deemed necessary for achieving the goal of restoration. Circle sentencing has been used in cases involving a variety of crimes committed by both juvenile and adult offenders. Of course not all cases can be dealt with through circle sentencing. Community concerns, the expectations of the victim and his family, the victim's and the offender's willingness to participate and the dedication of the parties' support groups are all key factors in determining whether a case is suitable for the circle process.<sup>26</sup>

A sentencing circle is constructed as an open court. Within the 'circle', crime victims, offenders, family and friends of both, justice and social service personnel, and interested community members talk about

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25 See D. Cayley, *The Expanding Prison: The Crisis in Crime and Punishment and the Search for Alternatives*, Cleveland, OH, Pilgrim Press, 1998, 182.

26 See B. Stuart, 'Sentencing circles: purpose and impact', *National*, Canadian Bar Association, 1994; C. LaPrairie, 'Altering course: new directions in criminal justice and corrections: sentencing circles and family group conferences', *Australian and New Zealand Journal of Criminology, Special Issue: Crime, Criminology and Public Policy*, December 1995, 78 ff; H. Lilles, 'Circle Sentencing: Part of the Restorative Justice Continuum', in A. Morris and G. Maxwell, *Restorative Justice for Juveniles: Conferencing, Mediation and Circles*, Oxford and Portland, Oregon, Hart Publishing, 2001, 161-179.

the crime and assess its impact freely and openly with a view to arriving at a consensus for a sentencing plan that would address the concerns of all interested parties. The objective, in other words, is to allow the best information to emerge from all the participants in the process so that a solution can be identified that would assist in healing all affected parties and prevent future crimes. In addition to offender's undertaking to make amends, the relevant plan may incorporate commitments by the justice system, the community and the families concerned. It is important to note here that circle sentencing usually involves a procedure that includes more than one step (application by the offender to participate in the circle process, a healing circle for the victim, a healing circle for the offender, a sentencing circle to reach an agreement on a sentencing plan and subsequent circles to monitor and assess the progress of the offender). The elements of the circle process vary from one community to another depending upon local needs and culture. They also evolve over time based on the community's changing needs, knowledge and experience. The successful implementation of a circle sentencing process presupposes adequate cooperation between the formal criminal justice system and the broader community – between criminal justice professionals and community members. Moreover, participants must be skilful in applying consensus-building techniques and implementation procedures must be flexible and adaptable to the requirements of the individual case.

### *Other Applications of Restorative Justice*

Besides offering an alternative to ordinary criminal justice processing, restorative justice practices are also being relied upon in

dealing with a variety of social problems, such as domestic violence, child neglect and school bullying. Evidence suggests that restorative justice programs designed to confront problems of this nature can produce a multiplicity of beneficial outcomes, including enhanced family unity, better parenting, reduced drinking problems and decreased family violence. Moreover, programs combining mediation between victim and offender with meetings of students, teachers and parents to discuss the prevention of violent behaviour in schools are producing promising results.<sup>27</sup> These programs have proven more effective than simple mediation (through which children resolve individual disputes as they arise) for they view bullying incidents as providing an opportunity for the whole school community to express its disapproval of the offending behaviour.<sup>28</sup> The knowledge acquired from the application of restorative justice techniques in the fields of justice and education has facilitated the adaptation of restorative interventions in conflicts arising in the workplace as well.<sup>29</sup>

Furthermore, restorative justice methods have been used in a

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27 Consider on this K. Rigby, *Bullying in Schools and What to Do About it*, Australian Council for Educational Research, Melbourne, 1996.

28 See D. Gottfredson, "School-Based Crime Prevention", in L. Sherman, D. Gottfredson, D. MacKenzie, J. Eck, P. Reuter and S. Bushway (eds), *Preventing Crime: What Works, What Doesn't Work and What's Promising*, National Institute of Justice, Washington DC, 1997.

29 Restorative justice techniques have adopted as a means of resolving often complex conflicts inside corporations, factories and other work settings. See on this J. McDonald and D. Moore, "Community Conferencing as a Special Case of Conflict Transformation", paper presented at the Restorative Justice and Civil Society Conference, Canberra, Australia, 16-18 February 1999.

number of countries as a means of resolving conflicts between citizens and their governments.<sup>30</sup> Reference should be made in this connection to the truth and reconciliation commissions of South and Central America, which have contributed greatly to the resolution of conflicts generated by civil war and government abuses. Another example is offered by the South African Truth and Reconciliation Commission, which has been described as an expression of restorative justice in addressing the injustices committed during the apartheid period. The Commission adopted the view that while the testimonies of the perpetrators of human rights abuses were central to the proceedings, more important was the fact that victims were given the opportunity to speak openly about their loss and suffering and to ask questions of offenders. The public hearings of the Commission exposed the South African public to this different approach to the nature and function of justice. Besides serving political needs, this type of justice returned power to victims and their families, demanded accountability from offenders and sought to provide some level of reparation to those who had suffered.

### *International Recognition of Restorative Justice*

As a result of the growing interest in restorative justice around the world, restorative justice has in recent years attracted a great deal of attention at an international level. Indeed the UN has long emphasised

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30 For example, Fresno, California has employed dispute resolution techniques to deal with allegations of abuse of power by police. A similar program is being developed by Thames Valley police to deal with citizen complaints against the police misconduct.

the increasingly important role of the restorative justice approach in addressing the problems associated with crime. As noted in its Handbook on Justice for Victims, “the framework for restorative justice involves the offender, the victim, and the entire community in efforts to create a balanced approach that is offender-directed and, at the same time, victim-centred. Victim compensation has become a key feature of restorative justice in many developed countries but could well be revived in developing countries, where it has largely been abandoned with the introduction of alien justice systems”.<sup>31</sup> In 1999 a resolution was adopted by the United Nation’s Economic and Social Council encouraging member states to make use of the restorative justice approach in appropriate cases. The same resolution invited the Commission on Crime Prevention and Criminal Justice to consider formulating a set of guidelines on the development and implementation of restorative justice programs. Moreover, at the Tenth UN Congress on the Prevention of Crime and Treatment of Offenders, which took place in Vienna in May 2000, restorative justice and the issue of fairness to both victims and offenders were discussed at great length. The Congress endorsed a declaration encouraging governments to develop and expand restorative justice programs. Following the conclusion of the Congress proceedings, the UN’s Commission on Crime Prevention and Criminal Justice adopted a resolution inviting Member States to comment on “Preliminary Draft Elements of Basic Principles on the Use of Restorative Justice

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31 United Nations Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims: On the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Centre for International Crime Prevention, New York, 1999, 42-3.

Programmes in Criminal Matters". The relevant proposal was subsequently approved by the UN Economic and Social Council.

At a European level, the increasing impact of the restorative justice approach is reflected in a number of recent developments, such as the recommendation on the use of mediation in criminal matters adopted by the Committee of Ministers of the Council of Europe in 2000. In the same year, the European Forum for Victim-Offender Mediation and Restorative Justice was created with the support of the European Union for the purpose of facilitating cooperation between restorative justice experts – scholars, practitioners and policy makers – throughout Europe and promoting international and comparative research in restorative justice. In April 2003 the European Parliament endorsed a proposed European Network of National Contact Points for Restorative Justice. To be developed in consultation with the European Forum for Victim-Offender Mediation and Restorative Justice, the network is intended to improve the flow of information and exchange of knowledge about restorative justice throughout Europe, promote research on the topic of restorative justice, identify and develop areas for training and evaluation and organize conferences, seminars and other activities to promote restorative justice.

Finally, reference should also be made here to the Rome Statute for an International Criminal Court, which contains a number of provisions arguably based on restorative justice principles. Thus to help victims and witnesses deal with the judicial process the Statute provides for the creation of a victim and witness unit which will provide counseling and other assistance to victims and witnesses and advise the prosecutor and the Court on matters relating to the protection of their rights. It is stated, also, that the Court should take appropriate measures to protect

the privacy, dignity and physical and psychological well-being and the security of victims and witnesses. Moreover, the Statute includes a mandate to establish principles relating to restitution, compensation and other reparation to victims, and a mandate to establish a trust fund for the benefit of victims of crime and their families.<sup>32</sup>

## Criticisms and Potential Dangers of Restorative Justice Processes

In recent years restorative justice has been embraced as a remedy for the shortcomings of the mainstream criminal justice system. The benefits which the restorative justice approach entails for victims, offenders and the communities affected by crime may be sufficient in their own right to justify program development on this basis. One should not lose sight of the fact, however, that restorative justice is in many respects an incomplete model of justice and that important issues remain, which are not addressed, or satisfactorily dealt with, by current restorative justice practices.

A frequently noted concern about restorative justice is that it may lead to outcome disparity, that is, offenders involved in like offending end up being treated differently. As commentators have pointed out, fundamental fairness requires that persons who have engaged in the

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<sup>32</sup> It should be noted here, however, that certain measures of a restorative nature were considered and ruled out, such as the recognition of restitution as a form of sanction that might be imposed by the Court in appropriate cases.

same kind of criminal conduct should receive roughly the same criminal justice sanction, for without such consistency corrosive unfairness can result. In response to the concerns about inconsistency from restorative justice processes some scholars have argued that there has always been a degree of inconsistency in sentencing also in the mainstream criminal justice processes and that consistency is not a paramount criminal justice requirement. This kind of response appears to ignore, however, the common-sense notion that offenders who commit similar offences ought to be treated similarly, as well as the fact that justice schemes have been introduced (including sentencing guidelines) which have achieved high levels of consistency in sentencing. A better way of dealing with the problem of inconsistency of outcomes is to endeavour to achieve as much consistency as possible and then to justify adequately any remaining inconsistency by reference to the circumstances of the individual case. Another way of addressing the inconsistency problem is to give the courts a supervisory role over the outcomes decided upon through restorative justice practices. In fulfilment of this role the courts can safeguard against discriminatory outcomes.

A further concern often raised is that in a restorative justice process offenders may be deprived of important rights of due process, because lawyers are not always present managing the process. In response, one may argue that, while it is desirable that offenders speak for themselves, lawyers are not necessarily excluded from restorative justice processes. Commentators agree that lawyers participating, for example, in family group conferences protect well the due process rights of their clients while at the same time play a constructive role in the restorative justice process.

Some commentators have remarked that as restorative justice



processes become more complex through the introduction of 'due process' requirements and those involved in them become increasingly specialised, they run the risk of giving rise to a new justice 'industry' which could be as rule-bound and bureaucratic as the mainstream system.<sup>33</sup> It has been argued, moreover, that restorative justice processes tend to expand the types and numbers of offenders who are involved in the justice process, thereby expanding the intrusion of state authority (net-widening). A common response to this criticism is to cite recent studies showing that restorative justice does not result in net-widening. For instance, according to Maxwell and Morris, there is no evidence that the use of family group conferencing has resulted in any form of net-widening in New Zealand.<sup>34</sup> Other scholars have responded to the net-widening concern by pointing out that restorative justice processes, by empowering victims, families and community members, in fact reduce state power and control. From a different point of view it has been argued that, given the positive effects of restorative justice processes, some form of net-widening should be seen as an improvement rather than an unwelcome by-product of restorative justice. The argument here is that, by dealing with offenders earlier and with less serious offences, we have a better chance to reintegrate them into the community and

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33 See C. LaPrairie, "Altering course: new directions in criminal justice and corrections: sentencing circles and family group conferences", *Australian and New Zealand Journal of Criminology, Special Issue: Crime, Criminology and Public Policy*, December 1995, 78-99.

34 G. Maxwell and A. Morris, "Research on Family Group Conferences with Young Offenders in New Zealand", in Hudson, Morris, Maxwell and Galaway (eds) *Family Group Conferences: Perspectives on Policy and Practice*, Monsey, New York, Willow Tree Press, 1996, 94.

with less cost to society. The alternative is to wait until persons have committed more serious crimes and caused greater harm to victims, the community and to themselves.<sup>35</sup>

Critics of restorative justice often complain that in many cases there is a marked disparity between the gravity of the offence and the obligation imposed on the offender as a result of a restorative justice agreement. They argue, moreover, that many offenders who go through a restorative justice programme do not feel genuine remorse for their wrongful actions, but seek only to avoid the heavier penalties the court is expected to impose. In general, there has been an impression that restorative justice processes are too lenient or 'soft' on criminal offenders. As researchers have found, however, restorative justice processes and outcomes are not easy or 'soft'. Facing a victim is most often a difficult and emotional experience for offenders who, when confronted with real suffering by real victims, are less able to rely on excuses to explain away or rationalize their wrongful conduct. But it is not only the personal meeting with victims that is difficult for offenders. Restorative justice is tougher on offenders because active acceptance of responsibility for the criminal wrongdoing and for putting things right for the victim and others affected by the crime is expected of offenders.

Given the central role played by victims in a restorative justice process commentators have expressed the concern that victims may be harmed further by participating in such a process. This is not a concern that can be dismissed lightly, especially in light of evidence from a

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35 See J. Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts', in M. Tonry (ed), *Crime and Justice, A Review of Research*, vol. 25, Chicago, University of Chicago Press, 1999.

number of studies suggesting that many victims who have gone through conferencing have left the meeting feeling emotionally worse off or re-victimised. A number of steps can be taken to reduce the possibility of the restorative justice process further injuring victims. These include: a. screening cases for suitability for the restorative justice process; b. verifying that the offender wants to participate before contacting the victim; c. conducting careful victim preparation prior to the restorative justice conference and assessing the victim's needs and expectations; d. allowing the victim to play an active role in the organization and conduct of the restorative justice process; e. using victim-sensitive language that avoids pressuring the victim in any way; f. training facilitators in victim sensitivity; and g. ensuring that the victim is adequately supported by persons close to him throughout the process.

Concerns have also been raised concerning the formulation of clear criteria for determining which cases should be dealt with through restorative justice conferencing, the range and effectiveness of 'shame and reintegration' strategies, the protection of privacy in conferencing and the status of the information provided by the participants. Many of the problems reported are attributed to inadequate preparation prior to the conference, resulting in poor rapport between the participants, and the lack of sufficient training of conference facilitators. In general, most of the problems identified may be imputed to a defective practice or differences in the circumstances or dispositions of particular individuals rather than to some inherent defect in the restorative justice philosophy itself.

## Concluding Note

Restorative justice supplies an alternative framework for thinking about crime, which, along with the values and principles underpinning this framework, suggests new ways of responding to offending and victimisation. The essence of restorative justice is not the adoption of one form or process rather than another; it is the adoption of any form or process which reflects restorative values and which aims to achieve restorative objectives and outcomes. Restorative justice is gaining increased attention and acceptance around the world. It is gaining acceptance because scholars and the people who are involved with restorative justice programmes have been successful in showing its effectiveness and transformative potential. These encouraging results and the fact that restorative justice processes are already being used in several countries around the world suggest that a general improvement to the justice system through the employment of restorative justice practices is not an over-optimistic expectation.