RESTORATIVE JUSTICE FOR JUVENILES

Restorative Justice for Juveniles

Conferencing, Mediation and Circles

Edited by
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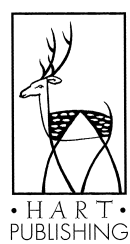

OXFORD – PORTLAND OREGON
2001

Hart Publishing
Oxford and Portland, Oregon

Published in North America (US and Canada) by
Hart Publishing c/o
International Specialized Book Services
5804 NE Hassalo Street
Portland, Oregon
97213-3644
USA

Distributed in the Netherlands, Belgium and Luxembourg by
Intersentia, Churchillaan 108
B2900 Schoten
Antwerpen
Belgium

Hart Publishing is a specialist legal publisher based in Oxford, England. To order further copies of this book or to request a list of other publications please write to:

Hart Publishing, Salter's Boatyard, Folly Bridge,
Abingdon Road, Oxford OX1 4LB
Telephone: +44 (0)1865 245533 or Fax: +44 (0)1865 794882
e-mail: mail@hartpub.co.uk
WEBSITE: http//www.hartpub.co.uk

British Library Cataloguing in Publication Data
Data Available
ISBN 1–84113–176–8 (cloth)

Typeset by Hope Services (Abingdon) Ltd.
Printed and bound in Great Britain on acid-free paper by
Biddles Ltd, www.biddles.co.uk

Foreword

All over the world, restorative justice processes and practices are now occurring. They operate in very many different shapes, under many different procedures and are supported by very many different systems. Nothing stays still about the way in which these processes enable families and young people to be involved in decisions about themselves and involve victims in contributing to decisions about how best to deal with the offending which has affected them. All confer and negotiate to achieve outcomes which aim to resolve the tensions arising from the offending.

I am a practitioner and not an academic. Everyday, I sit in a Court which now uses restorative justice processes and family group conferences to try and put right the wrong by healing breaches in relationships and making reparation rather than concentrating on punishment. Everyday, I am humbled by the generosity and kindness shown by many victims and by the spirit of generosity and sacrifice which is displayed when young people and their families meet with victims and their supporters and are properly supported by communities to act as human beings in contact with each other rather than as people apart.

Nothing ever stands still in this dynamic area. Constantly, we are treated to new insights, new enhancements, and new surprises. Those of us who find this exciting and stimulating need to be constantly open to new changes and new challenges. The authors of this superb collection of papers have captured the pioneering spirit of inquiry and of progress to push forward even further frontiers of a new and even more exciting and satisfying way of working across many boundaries. They are to be commended for this and for their energy and diligence in making sure that new discoveries are made available to a wide public.

DJ Carruthers
Principal Youth Court Judge
Wellington, New Zealand
2001

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List of Contributors

Harry Blagg has been a Research Fellow at the Crime Research Centre, University of Western Australia since 1990. Before then, he taught at Lancaster University in England. He has been involved in research projects on aspects of the involvement of indigenous people in the criminal justice system, policing and restorative justice and recently completed projects on crisis intervention in family violence amongst indigenous people; preventing domestic and family violence by young people; and young people's attitudes to violence. He is currently working on issues related to community based treatment for indigenous men involved in family violence.

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Jim Dignan is a Reader at the Centre for Criminological and Legal Research, University of Sheffield. He has written on a variety of theoretical, practical and policy-related issues raised by the development of restorative justice and was a member of the team commissioned by the Home Office to evaluate the pilot Youth Offending Teams and the youth justice reform programme introduced by the Crime and Disorder Act 1998.

Cheryl Frank worked for four years at the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), specialising in diversion work. She later joined the Institute of Criminology at the University of Cape Town, as Senior Researcher in Juvenile Justice and worked on a range of projects relating to both juvenile justice and crime prevention. Cheryl currently works at the Open Society Foundation of South Africa, managing the Criminal Justice Initiative.

Heino Lilles is the Chief Judge of the Territorial Court in the Yukon, Canada. For 15 years he was an Associate Professor at Queen's University, Kingston, Ontario with teaching and research responsibility in the areas of family law and children's law. He has written extensively on these topics.

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Peter Marsh is Professor of Child and Family Welfare in the Department of Sociological Studies at the University of Sheffield. He is co-ordinator of the Children and Families Research Group. His most recent research has been on young people leaving care, the development, use and outcome of family group conferences, and the evaluation of the pilot Youth Offending Teams.

Gabrielle Maxwell is a psychologist and criminologist. Currently, she is Senior Research Fellow at the Institute of Criminology at Victoria University of Wellington, Wellington, New Zealand. Previous posts have been with the Office of the Commissioner for Children, the Department for Justice and the University of Otago. Currently, much of her research has focussed on restorative justice and the New Zealand youth justice system in particular. Other recent work has focussed on family violence, crime prevention and children's rights.

Allison Morris is Professor in Criminology and was the Director of the Institute of Criminology, at Victoria University of Wellington, Wellington, New Zealand from 1993 to 2001. For 20 years before that, she was a lecturer in criminology at the Institute of Criminology, University of Cambridge. She has carried out research on women's prisons, youth justice systems, violence against women and restorative justice and her main teaching and research areas are youth justice, women and crime and victims.

Ann Skelton was employed by Lawyers for Human Rights for 11 years, where she specialised in the rights of children in the criminal justice system. Ann has been at the forefront of efforts to bring about changes to the system for children

charged with crimes in South Africa for many years, and in this role has promoted restorative justice solutions. She was appointed by the South African Minister of Justice in 1997 to lead a project of the South African Law Commission to develop a comprehensive new statute regarding children accused of crimes. She is currently the national co-ordinator of the Child Justice Project, a UN technical assistance project based in the Department of Justice in Pretoria.

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Dan Van Ness is vice president of Prison Fellowship International, an NGO in consultative status with the UN made up of 88 national Prison Fellowship affiliates. He has been involved in criminal justice issues for over 20 years, as a lawyer, restorative justice advocate, and teacher. He has practiced poverty law in Chicago, organised national justice reform efforts in the United States, lived in Malta where he assisted government officials in correctional reform efforts, and taught at both undergraduate and graduate levels. Dan's work at Prison Fellowship International includes helping affiliates promote and implement restorative justice programmes, including the Sycamore Tree Project—a victim offender panel programme in prisons—and APAC—a prison-based community.

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Part 1

Setting the Scene

1

Introducing Restorative Justice

DANIEL VAN NESS, ALLISON MORRIS and
GABRIELLE MAXWELL

RESTORATIVE JUSTICE: A NEW WAY OF THINKING

RESTORATIVE JUSTICE IS the name given to a movement within and outside of the criminal justice system. Some of its practitioners and proponents refer to it as a new paradigm or as a new pattern of thinking. It poses new questions for societies to ask and answer in responding to crime. These discussions about restorative justice often begin by comparing it to the current criminal justice system. Perhaps the classic example of this is Howard Zehr's (1990) contrast of retributive justice versus restorative justice. Retributive justice, he argues, begins with a particular understanding of crime: it "is a violation of the state, defined by lawbreaking and guilt. Justice determines blame and administers pain in a contest between the offender and the state directed by systematic rules" (1990: 181). He continues:

> "Restorative justice sees things differently. . . . Crime is a violation of people and relationships. . . . It creates obligations to make things right. Justice involves the victim, the offender and the community in a search for solutions which promote repair, reconciliation, and reassurance" (1990: 181).

He describes how these different understandings result in dissimilar emphases. Retributive justice focuses on the violation of law, whereas restorative justice focuses on the violation of people and relationships. Retributive justice seeks to vindicate law by determining blame and administering punishment, whereas restorative justice seeks to vindicate victims by acknowledging their injury and by creating obligations for those responsible to make things right. Retributive justice involves the state and the offender in a formal process of adjudication, whereas restorative justice involves victims, offenders and community members in a search for solutions (1990: 181).

Zehr's dichotomy demonstrates how looking at old problems in new ways makes it possible to arrive at new understandings and responses. We can respond to behaviour that breaks the law by focusing exclusively on the rule that was broken or by looking first at the harm it causes to people and relationships. How we look at crime will lead us to a response that seems logical and right. The restorative response is to focus on repairing harm.

Some commentators (for example, Daly 1999) have challenged such dichotomies as too simplistic because they imply that restorative justice is good and retributive justice is evil. Furthermore, many young people subjected to restorative justice processes and results view them as punishment (1999: 10). Those are good points. Dichotomies may be more useful for didactic purposes than as descriptions of the attitudes of persons involved in restorative processes. But they do serve to illustrate in broad strokes the ways in which restorative justice processes encourage new priorities, shifts in emphasis and the inclusion of new parties as decision-makers. Lode Walgrave teases out these problematic distinctions between punishment and restorative sanctions in his chapter.

THE HISTORY OF RESTORATIVE JUSTICE

In explaining what restorative justice is, it is important to remember that this is a theory of justice that has grown out of experience. It has been informed by indigenous and customary responses to crime, both those of the past and those used today. Its modern development probably began in response to the first victim offender mediation programmes developed in the mid-1970s in Canada. These programmes started as an alternative to probation for young offenders and expanded into pre-sentence programmes that allowed the victim and offender to construct a sentencing proposal for the judge's consideration. It was assumed that offenders would benefit from this exposure to the needs of the victim, and that this would reduce recidivism and increase the likelihood of restitution being completed. What was not expected was that crime victims would also benefit from this approach, reporting higher satisfaction levels than with traditional court processes (see Zehr 1990: 158–174).

As practitioners and observers reflected on why this might be, they concluded that it was because victims were essentially non-participants in traditional criminal justice processes. They might testify if called as witnesses, but in criminal proceedings they were not decision-makers or active participants. On the other hand, victims involved in victim–offender mediation liked being able to shape the outcome if they wanted to. For that matter, offenders were also non-participants in court proceedings. Although the criminal justice system revolves around them, or perhaps in some countries **because** it focuses on them, their role is essentially passive. In North America, Europe and other developed countries it is the defendants' lawyers who are active in legal proceedings.

In the past 20 years, restorative justice has become an influential movement in Australia, Canada, England and Wales, New Zealand and other countries. Even the United States, a country more often associated with the introduction of repressive penal measures, has not escaped its influence. Michael Tonry (1999) begins a survey of American sentencing policy by observing that there are now four competing conceptions of sentencing: indeterminate, structured sentencing (e.g., guidelines), risk-based sentencing and restorative/community justice. His

reason for including restorative justice in this group of four is relevant to our discussion:

> "A fully elaborated system exists nowhere, but there is considerable activity in many States, and programmes based on community/restorative principles are beginning to deal with more serious crimes and criminals and to operate at every stage of the justice system, including within prisons. [It is] spreading rapidly and into applications that a decade ago would have seemed visionary. These include various forms of community involvement and emphasise offender accountability, victim participation, reconciliation, restoration and healing as goals (though which goals are emphasised and with what respective weights vary widely)" (1999: 3–4).

In other words, restorative justice is having a significant influence because of its demonstrated ability to function within all phases of the justice process and to address serious offences and offenders. Restorative justice programmes and policies are proliferating at a remarkable speed around the world, as we will see shortly. The starting point for change in most countries has been their youth justice systems and it is for this reason that this book focuses on young offenders. The lessons learned there, however, are relevant for the transformation of all parts of criminal justice systems. But first, let us consider how we might define restorative justice.

A DEFINITION OF RESTORATIVE JUSTICE

British criminologist Tony Marshall (1996: 37) has proposed a definition of restorative justice that is increasingly used internationally:

> "Restorative justice is 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 the offence and its implications for the future."

This procedural definition is helpful. However, it raises a number of questions: Who are the "parties with a stake in the offence"? How do they come to a collective resolution? What does it mean to "deal with the aftermath of an offence"? What "implications for the future" should be considered? While answers to those questions must be worked out in specific contexts, Susan Sharpe (1998), a Canadian, has proposed five key principles of restorative justice that help round out Marshall's definition. The following is adapted from her work (1998: 7–12).

—First, *restorative justice invites full participation and consensus*. This means that victims and offenders are involved, but it also opens the door to others who feel that their interests have been affected (for example, neighbours who have been indirectly harmed by the crime). The invitation to participate underscores the benefits of voluntary involvement, although, of course, offenders may participate in order to avoid traditional criminal processes.

—Second, *restorative justice seeks to heal what is broken*. A central question asked in any restorative process is "What does the victim need to heal, to recover, to regain a sense of safety?" Victims may need information; they may need to express anger toward the person who has harmed them; they may need reparation. Offenders, too, may need healing; they may need release from guilt or fear; they may need resolution of underlying conflicts or problems that led to the crime; and they may need an opportunity to make things right.

—Third, *restorative justice seeks full and direct accountability*. Accountability does not simply mean that offenders must face the fact that they have broken the law; they must also face the people they have harmed and see how their actions have damaged others. They should expect to explain their behaviour so that the victim and community can make sense of it. They should also expect to take steps to repair that harm.

—Fourth, *restorative justice seeks to reunite what has been divided*. Crime causes divisions between people and within communities. That is one of the most profound harms that it causes. Restorative processes work toward reconciliation of the victim and offender, and reintegration of both into the community. A restorative perspective holds that the "victim" and "offender" roles should be temporary, not permanent. Each should be drawn toward a future in which they are free of their past, no longer defined primarily by the harm they may have caused or suffered.

—Finally, *restorative justice seeks to strengthen the community in order to prevent further harms*. Crime causes harm, but crime may also reveal pre-existing injustices. These can be as localised as a long-term dispute between the "offender" and the "victim" that erupted into criminal behaviour. It can be as systemic as racial and economic inequities that, while not excusing the offender's behaviour, must be addressed in order to strengthen the community and make it a just and safe place to live (Morris 1994).

HALLMARK PROGRAMMES OF RESTORATIVE JUSTICE

The processes that Tony Marshall describes, and the principles that Susan Sharpe outlines, have been demonstrated for thousands of years in informal, customary traditions. More recently they have been implemented in a variety of ways within and alongside the criminal justice system. However, three programmes have become hallmarks of restorative justice processes: victim offender mediation, conferencing, and circles. The chapters in this book cover aspects of each of these and we only mention them briefly here.[1]

[1] Two other programmes have been acknowledged as potentially restorative outcomes: restitution and community service. This book does not include a discussion of these.

Victim Offender Mediation

The first contemporary restorative process was victim offender mediation. In its prototypical form, this involves bringing together victims and their offenders along with a mediator who coordinates and facilitates the meeting. In the course of this meeting, victims describe their experiences with the crime and the effect it has had on them and offenders explain what they did and why, answering questions the victim may have. When both victim and offender have had their say, the mediator will help them consider ways to make things right. In some European countries, mediation does not necessarily involve a direct meeting between the two parties. Instead, the mediator conducts shuttle negotiation with each party until an agreement on restitution is reached. Such an approach satisfies some restorative principles, but not as many as a direct meeting. In other countries, particularly in North America, victim offender mediation increasingly involves others who have also been affected by the offence or who are present to provide support to the principal parties. Paul McCold in his chapter describes victim offender mediation in more detail (as well as other restorative justice processes) and Mark Umbreit, Robert Coates and Betty Vos review, from the victims' point of view, the research that has examined the extent to which victim offender mediation has met restorative justice goals and outcomes. They demonstrate that across a variety of sites and cultures, victims who choose to participate are satisfied with both the process and the outcomes reached. Elmar Weitekamp in his chapter offers a European perspective. Victim offender mediation (or offender victim mediation as it is in Germany) has a long history there as the preferred way of meeting victims' needs.

Conferencing

Conferencing was developed in New Zealand and was, in part, a reflection of aspects of the traditional processes of the Maori people, the indigenous population of New Zealand. Conferencing has been further adapted as it has been used in other countries, and there are now several versions of conferencing found in New Zealand, Australia, Asia, Southern Africa, North America and Europe. Conferencing involves not only the primary victim and offender, but also secondary victims (such as family members or friends of the victim) as well as supporters of the offender (such as family members and friends). These people are involved because they have also been affected in some way by the offence, and because they care about one of the primary participants. They may also participate in carrying out the final agreement. The conference facilitator arranges the meeting and makes sure that everyone present is able to participate fully, but does not play a role in the substantive discussions. Some forms of conferencing are "scripted", which means that the facilitator follows a prescribed pattern in guiding discussion by the participants. Other conferences work within a general

philosophy and guidelines that can allow for conferences to take a variety of forms depending on the culture and wishes of the participants. In addition, representatives of the criminal justice system may participate. Typically, offenders begin the discussion by explaining what happened and how they think others were affected by their actions. The victims then describe their experience and the harm that resulted. The victims' supporters may speak next, followed by the offenders' families and supporters. Together the group decides what the offender needs to do to repair the harm, and what assistance the offender will need in doing so. The agreement is put into writing, signed, and sent to the appropriate criminal justice officials.

The majority of the chapters in this book relate to conferencing. Kathleen Daly describes developments in Australasia with a particular emphasis on family group conferencing in New Zealand, South Australia and New South Wales. Since these examples of conferences have been established longer than others, they provide data that demonstrates both the potential and pitfalls of family group conferencing. Jim Dignan and Peter Marsh describe the development of conferencing in England and Wales and also other developments there that seek to introduce restorative processes. They too see these developments as capable of transforming youth justice in England by making restorative processes both integral and mainstream. Ann Skelton and Cheryl Frank describe the attempts in South Africa to introduce family group conferencing and draw connections between it and indigenous models of justice. They see conferencing, particularly when adapted to reflect South Africa's unique situation, as capable of transforming the previously repressive criminal justice system. Heather Strang focuses on what victims may gain from conferencing and presents data from the Reintegrative Shaming Experiment in Canberra, Australia. Conferences there are somewhat different from those described in the previous chapters: in particular, they are primarily facilitated by the police. Richard Young raises some critical questions about this on the basis of his evaluation of restorative conferencing within the Thames Valley police in England. Harry Blagg also raises some critical questions about the claims that conferencing can better serve the needs of Aboriginal peoples. He bases his comments on the experience of conferencing in Western Australia but draws from experience elsewhere in Australasia as well. Gabrielle Maxwell and Allison Morris discuss another critical issue: the extent to which restorative processes—in their example, conferencing—can impact on reconvictions. No matter how much victims feel better as a result of restorative processes, a key factor for governments in implementing restorative processes will be their likelihood to reduce re-offending.

Circles

Circles are similar to conferencing in that they expand participation beyond the primary victim and offender: their families and supporters may attend, as well

as criminal justice personnel. But, in addition, any member of the community who has an interest in the case may come and participate. So circles define "parties with a stake in the offence" most expansively. Circles were adapted from First Nations practices in Canada, and they retain some of that flavour. All the participants sit in a circle. Typically, the offender begins with an explanation of what happened, and then everyone around the circle is given the opportunity to talk. The discussion moves from person to person around the circle, with anyone saying whatever they wish. The conversation continues until everything that needs to be said has been said, and they come to resolution. There is a "keeper of the circle" whose role, like that of the mediator and facilitator in the other two processes, is to ensure that the process is protected. There is usually a "talking piece" as well, which may be a feather or some other object that has meaning to members of the circle. The talking piece is passed around the circle, and only the person holding it is permitted to speak. Paul McCold describes circles in more detail in his chapter and Heino Lilles reviews their practice in Canada, with particular reference to the Yukon.

EXPANSION OF RESTORATIVE JUSTICE

Restorative justice has become a worldwide movement. In many countries it is one of several competing approaches to crime and justice that are regularly considered in courts and legislatures. With this expansion has come adaptation and innovation. While any list is incomplete, we would like to highlight some illustrative developments.

—*Victim-offender encounters are taking place in prison* in the US, Canada, England, Belgium, the Netherlands and other countries. In some instances, this involves victims meeting with their offenders in a kind of "post sentencing mediation." In other instances, the meetings involve groups of unrelated victims and offenders. This is done with sexual assault victims and offenders in Canada and England; it is also done with offenders and victims whose crimes ranged from property offences to homicide in a programme Prison Fellowship International has tested in New Zealand, England and the US. The purpose of these meetings is to help each group in their healing process by giving them the opportunity to ask and answer questions they might never have been otherwise able to address. In some instances, this is necessary because the actual victim or offender is unknown or unavailable. In other instances, it may be a preparatory step towards a meeting of the person with their own victim or offender.

—*Circles of support* in Canada work with serious sexual offenders (often guilty of paedophilia) who are being released into fearful communities at the conclusion of their sentences. The circles are formed by members from faith communities who enter into a "covenant" with the released offender

relating to accountability and support. The programme increases public safety by holding the offender accountable to a reintegration plan through regular monitoring and notification of the police when necessary, and by ensuring that any community resources the offender needs are made available. It also works to secure the safety of the offender by offering a forum for community members to voice their concerns, by intervening with community members when necessary, and by working with the police and other authorities to provide protection and services as needed.

—*Restorative processes are being used to resolve conflict between citizens and their governments*. Fresno, California, has used a form of dispute resolution to deal with allegations of police brutality. Thames Valley police are developing a similar programme to deal with citizen complaints against the police. Helen Duffy (2000) and Herminio Pineda (2000) have described the truth commissions of South and Central America, which have been a way of dealing with the extensive conflicts throughout this region generated during the Cold War years. Their aims have included clarification of the past and acknowledgement of wrongs and atrocities, and solutions have included both amnesties and trials of those involved and compensation to the families of those who disappeared. Bishop Desmund Tutu has described the Truth and Reconciliation Commission in South Africa as an expression of restorative justice in dealing with the injustices of the apartheid years (Rwelamira 2000). New Zealand is engaged in a process of providing redress for violations of the 1840 Treaty of Waitangi between the Queen and the Maori chiefs. This process, which has resulted in several very large financial settlements from the government to particular tribes, has been characterised by steps which go beyond negotiation of restitution to including apologies and attempts at cultural reconciliation.

—*Legislative action* is being taken in a number of countries to expand the use of restorative programmes. A survey of these statutes (Van Ness and Nolan 1998) reveals several purposes for such legislation. One is to reduce legal or systemic barriers to the use of restorative programmes. Another is to create a legal inducement for using restorative programmes. A third is to guide and structure restorative programmes. A fourth purpose is to protect the rights of offenders and victims.

—*Funding and staff for programmes is expanding*. In most jurisdictions, restorative programmes start out as a model or pilot programme, usually funded on a short-term basis for purposes of testing the effectiveness of the programme. Although the programme may be successful, it will remain marginalized by inadequate funding unless it receives a steady and substantial infusion of funds. As the number of restorative programmes is increasing around the world, governments are providing more resources, either in the form of paid staff or by offering grants to local governments. Canada, the US and England are examples of countries that have put substantial resources into developing restorative programmes.

—*Intergovernmental bodies are taking note of restorative justice*. One result of the expanding acceptance of restorative justice is that it is increasingly appearing in debate and discussion at the international level. Last year, the Committee of Ministers of the Council of Europe adopted a recommendation on the use of mediation in penal matters. The European Union has funded the creation of the European Forum on Victim Offender Mediation and Restorative Justice, the purpose of which is to exchange knowledge and experience, to consider mutual co-operation, and to conduct international, comparative research in mediation. Even the Rome Statute for an International Criminal Court contains a number of arguably restorative provisions, including the creation of a victim and witness unit, authority for the Court to hear and consider the personal interests of victims when appropriate, a mandate to establish principles relating to restitution and other reparation to victims, and a mandate to establish a trust fund for the benefits of crime victims and their families.[2] The UN has had a long interest in restorative justice. Its Handbook on Justice for Victims (1999: 42–3) notes:

"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."

NEW INTERNATIONAL DEVELOPMENTS

In 1999, the United Nation's Economic and Social Council adopted a resolution encouraging member states to use mediation and restorative justice in appropriate cases, and called on the Commission on Crime Prevention and Criminal Justice to consider the development of guidelines on the use of those programmes. The Tenth UN Congress on the Prevention of Crime and Treatment of Offenders, held in Vienna in May 2000, included "fairness to victims and offenders" as one of its four substantive topics. The pre-Congress discussion guide and the debate at the Congress included lengthy and substantive treatment of restorative justice. The declaration adopted by the Congress called on governments to expand their use of restorative justice. The UN's Commission on Crime Prevention and Criminal Justice, which met immediately after the Congress, approved a resolution calling for comment from Member States on "Preliminary Draft Elements of Basic Principles on the Use of Restorative

[2] It should be noted that some explicitly restorative features were also considered and rejected, with the most troubling being the exclusion of restitution among the list of penalties that might be imposed by the ICC. It is unclear why the Court should establish principles relating to restitution and other reparation to victims when those are not available as sanctions.

Justice Programmes in Criminal Matters," and for review of those comments and further recommendations from an expert meeting. This proposal was endorsed by the Economic and Social Council later that year.

These basic principles can guide governments in the incorporation of restorative justice processes and outcomes in their criminal justice policies (the preliminary draft elements are set out in Appendix 1 to this chapter). So too can the various chapters in this book, and in the final chapter Allison Morris and Gabrielle Maxwell draw together the themes which have emerged from them.

Restorative justice is here to stay. It represents a return to concepts of justice that are ancient and deep-seated, but which have been overshadowed by other approaches. Its contemporary re-emergence, and the widespread interest it has provoked, offers hope for the future of justice. We hope that this book adds to these developments and provides not only optimism for the future but practical advice on achieving the objectives of restorative justice.

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Appendix 1

PRELIMINARY DRAFT ELEMENTS OF A DECLARATION OF BASIC PRINCIPLES ON THE USE OF RESTORATIVE JUSTICE PROGRAMMES IN CRIMINAL MATTERS

I. Definitions

1. "Restorative justice programme" means any programme that uses restorative processes or aims to achieve restorative outcomes.

2. "Restorative outcome" means an agreement reached as the result of a restorative process. Examples of restorative outcomes include restitution, community service, and any other programme or response designed to accomplish reparation of the victim and community, and reintegration of the victim and/or the offender.

3. "Restorative process" means any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative process include mediation, conferencing and sentencing circles.

4. "Parties" means the victim, the offender and any other individuals or community members affected by a crime who may be involved in a restorative justice programme.

5. "Facilitator" means a fair and impartial third party whose role is to facilitate the participation of victims and offenders in an encounter programme.

II. Use of restorative justice programmes

6. Restorative justice programmes should be generally available at all stages of the criminal justice process.

7. Restorative processes should be used only with the free and voluntary consent of the parties. The parties should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily by the parties and contain only reasonable and proportionate obligations.

8. All parties should normally acknowledge the basic facts of a case as a basis for participation in a restorative process. Participation should not be used as evidence of admission of guilt in subsequent legal proceedings.

9. Obvious disparities with respect to factors such as power imbalances and the parties' age, maturity or intellectual capacity should be taken into consideration in referring a case to and in conducting a restorative process. Similarly, obvious threats to any of the parties' safety should also be considered in referring any case to and in conducting a restorative process. The views of the parties themselves about the suitability of restorative processes or outcomes should be given great deference.

10. Where restorative processes and/or outcomes are not possible, criminal justice officials should do all they can to encourage the offender to take responsibility vis-à-vis the victim and affected communities, and reintegration of the victim and/or offender into the community.

III. Operation of restorative justice programmes

11. Guidelines and standards should be established, with legislative authority when necessary, that govern the use of restorative justice programmes. Such guidelines and standards should address:

(a) The conditions for the referral of cases to restorative justice programmes;
(b) The handling of cases following a restorative process;
(c) The qualifications, training and assessment of facilitators;
(d) The administration of restorative justice programmes;
(e) Standards of competence and ethical rules governing operation of restorative justice programmes.

12. Fundamental procedural safeguards should be applied to restorative justice programmes and in particular to restorative processes:

(a) The parties should have the right to legal advice before and after the restorative process and, where necessary, to translation and/or interpretation. Minors should, in addition, have the right to parental assistance;
(b) Before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process, and the possible consequences of their decision;
(c) Neither the victim nor the offender should be induced by unfair means to participate in restorative processes or outcomes.

13. Discussions in restorative processes should be confidential and should not be disclosed subsequently, except with the agreement of the parties.

14. Judicial discharges based on agreements arising out of restorative justice programmes should have the same status as judicial decisions or judgements and should preclude prosecution in respect of the same facts (*non bis in idem*).

15. Where no agreement can be made between the parties, the case should be referred back to the criminal justice authorities and a decision as to how to pro-

ceed should be taken without delay. Lack of agreement may not be used as justification for a more severe sentence in subsequent criminal justice proceedings.

16. Failure to implement an agreement made in the course of a restorative process should be referred back to the restorative programme or to the criminal justice authorities and a decision as to how to proceed should be taken without delay. Failure to implement the agreement may not be used as justification for a more severe sentence in subsequent criminal justice proceedings.

IV. Facilitators

17. Facilitators should be recruited from all sections of society and should generally possess good understanding of local cultures and communities. They should be able to demonstrate sound judgement and interpersonal skills necessary to conducting restorative processes.

18. Facilitators should perform their duties in an impartial manner, based on the facts of the case and on the needs and wishes of the parties. They should always respect the dignity of the parties and ensure that the parties act with respect towards each other.

19. Facilitators should be responsible for providing a safe and appropriate environment for the restorative process. They should be sensitive to any vulnerability of the parties.

20. Facilitators should receive initial training before taking up facilitation duties and should also receive in-service training. The training should aim at providing skills in conflict resolution, taking into account the particular needs of victims and offenders, at providing basic knowledge of the criminal justice system, and at providing a thorough knowledge of the operation of the restorative programme in which they will do their work.

V. Continuing development of restorative justice programmes

21. There should be regular consultation between criminal justice authorities and administrators of restorative justice programmes to develop a common understanding of restorative processes and outcomes, to increase the extent to which restorative programmes are used and to explore ways in which restorative approaches might be incorporated into criminal justice practices.

22. Member States should promote research on and evaluation of restorative justice programmes to assess the extent to which they result in restorative outcomes, serve as an alternative to the criminal justice process and provide positive outcomes for all parties.

23. Restorative justice processes may need to undergo change in concrete form over time. Member States should therefore encourage regular, rigorous evaluation and modification of such programmes in the light of the above definitions.

2

On Restoration and Punishment: Favourable Similarities and Fortunate Differences

LODE WALGRAVE

INTRODUCTION

Restorative justice is not a soft option. In the traditional criminal justice procedures, confrontation is indirect, impersonal and filtered through judicial rituals. Restorative processes, on the contrary, are personal, direct and, often, very emotional. For the offenders, being confronted directly with the suffering and harm they have caused and with the disapproval of their family is a deeply touching burden. Apologising in front of others may be experienced as very difficult and humiliating. Experiencing pressure to make up for the harm done may be hard to cope with. Through their personal relations with the participants and empathy with other persons, including the victim, offenders are brought to feel intensely a mixture of all kinds of unpleasant emotions like shame, guilt, remorse, embarassment, humiliation (Braithwaite and Mugford 1994; Maxwell and Morris 1999; Harris 2000; Walgrave and Braithwaite 1999; Morris 2000). These feelings are not just experienced in the restorative justice meeting, but may have an enduring impact on the offender's future life. According to Schiff (1999), some offenders even experience victim offender mediation, and compliance with the agreements reached there, as a kind of "double punishment". The agreements, indeed, often do require serious and unpleasant commitments and a very demanding investment of time. When imposed by a court order, community service is regarded as a serious sanction; this is so, too, when they are agreed to in a restorative process.

The obvious unpleasantness of being involved as an offender in a restorative settling of the aftermath of a crime has led several scholars to consider restorative justice as another version of punishment. For Duff (1992), for example, restorative justice interventions are not "alternatives to punishment", but "alternative punishments". He considers criminal mediation as a kind of punitive mediation: penal hard treatment which is not purely retributive, but which is also future oriented (Duff 2000). Daly (1999a) is also of the opinion that

restorative justice is a punishment, because it leads to obligations for the offender which are unpleasant. She finds support for this position in the results of systematic interviews with young offenders who went through a family group conference and who found it, including the compliance with the agreements made, very hard. They called what had happened a punishment (Daly 1999b). In Duff's and Daly's view, all hard burdens which are imposed or accepted under pressure are to be considered punishments. This is, for them, not a reason to reject restorative approaches to crime; on the contrary, they include restorative justice as part of what they consider to be essential in the reaction to crime: hard treatment.

From another point of view, McCold (1999) criticizes the maximalist version of restorative justice.[1] According to him, including some coercive judicial sanctions (such as community service) as potentially restorative would shift restorative justice back to being punitive. For McCold, all coercive interventions, all obligations to obedience, are equal to punishment. That is, for him, a reason to reject coerciveness in restorative justice.

Two elements are thus advanced as reasons for considering restorative interventions as punitive: the burden of the restorative action and its implicit or explicit coerciveness. There is, of course a third element to be added, namely the reason for the intervention—an offence has been committed. But the relative emphasis they give to these various components is very different: Duff and Daly are in favour of restorative justice being punitive, whereas McCold and others want to avoid punitiveness by all means.

My position is that these elements—the painfulness, the obligatory character and the link with earlier wrongdoing—are insufficient to call restorative actions punishments. I shall also argue that this discussion on the distinction between a painful restorative obligation and a punishment is more than just a quibbling over words. It is crucial in debates on the development of an adequate policy on how best to react to crime.

PUNISHMENT AND RESTORATION

Bazemore and I define restorative justice as "every action that is primarily oriented toward doing justice by repairing the harm that has been caused by a crime" (1999: 48). In our view, these actions include coercive sanctions as well as voluntary processes. In accordance with the general restorative justice principles, however, we recognize that "input from victims and communities affected by crime provided in face-to-face, non-adversarial, informal and

[1] The maximalist version of restorative justice, as presented in Bazemore and Walgrave (1999), aims at developing a fully fledged justice system that would be consequentionally oriented towards doing justice through restoration and would be an alternative to the existing punitive or rehabilitative justice systems. Such a maximalist system would include coercive judicial interventions aimed at restoration. This point is elaborated later in the discussion on restorative sanctions.

voluntary meetings with offenders in safe settings will almost always provide the best process to determine restorative obligations" (Bazemore and Walgrave 1999: 51–52). The restorative calibre of such processes is much higher than imposed sanctions involving reparation such as obligatory restitution or court ordered community service, for example.

However, voluntary processes are not always achievable and/or the impact of the crime may extend beyond the simple victim-offender setting.[2] Coercion must then be considered, and that can only be done through the criminal justice system. For several restorative justice scholars, this is the end of restorative justice and the line where the traditional criminal justice system should take over (Marshall 1996). Bazemore and I do not think so. We think that the coercive judicial intervention should also be "reasonable, restorative and respectful" (Claassen 1995, cit. in McCold 1999). We search for ways to enable judicial procedures and sanctions to have the maximum possible restorative impact on victims, communites and offenders. In our view, such judicial interventions are part of restorative justice, though their restorative calibre will be more limited than when the initiative is voluntary. In this chapter, I develop these arguments as to why Bazemore and I do not consider judicial procedures and sanctions to be punitive, despite the fact that they are coercive and unpleasant, and, of course, meant as a response to a crime committed.

Punishment

The Belgian *Cour de Cassation* (Supreme Court) defines a judicial punishment as "a hard treatment inflicted by criminal justice, based on the law to punish (or to sanction) a behaviour that is prohibited by law".[3] More generally, punishment is the intentional infliction of a deprivation (hard treatment or pain) on someone, because he or she supposedly has committed a wrong (von Hirsch, 1993: 9; Walker, 1991). Four elements are crucial: coerciveness, the hard treatment inflicted, the intention to cause suffering, and the link between the infliction of pain and the wrong committed. If one of these elements is lacking, there is no punishment.

Different socio-ethical philosophies exist to justify the punishment of offenders (von Hirsch 1998). I will come back to these very briefly later, but the point I wish to make now is that they all accept these four elements as part of the concept of punishment. This is crucial. Neglecting one of them in the definition of punishment leads to a blurring of the concepts and to overlooking the essential characteristics of what punishment is. Obligations that are not linked with a wrong done are not punishments. I have to be in my classroom early in the

[2] A crime in fact always involves society as a whole, but in many cases societal interests are best preserved by just a constructive regulation between victims and offenders.

[3] "*Un mal infligé par la justice répressive, en vertu de la loi à titre de punition (ou de sanction) d'un acte que la loi défend*" (Cass, cited in van de Kerchove 1986: 167).

morning, and that may be a painful obligation, especially after a night out in Leuven, but it is not a punishment. Obligations that are not imposed intentionally to cause suffering are not punishments. I may consider my tax obligations to be unfair, but it is no punishment, because the obligation is not imposed with the intention to make me suffer, nor because I have done wrong. That is the key difference between a fine and taxes. To sum up this argument, "pain in punishment is inflicted for the sake of pain" (Fatic 1995: 197).

Punishment can occur in very different contexts, provided it happens in a situation where behaviour is judged according to normative standards by a powerful agent. Children are punished by their parents in the family and by their teachers in schools. Employees are punished by their employers and football players are punished by referees. Citizens are punished by judges who are given the legal power to decide whether a behaviour is legally wrong and to impose a corresponding hard treatment on the wrongdoer. The context of punishment is crucial in understanding its impact. The deepest differences in context may exist between informal punishing in families and formal punishing by the criminal justice system.

When children break a cup, parents may shout at them blaming them for being so careless in their gestures. The parent explicitly makes the link between the child breaking the cup and momentarily withdrawing love from the child, with the intention that the child will suffer from this withdrawal. Such a family punishment is a private affair: why punishment is imposed by parents and how it is experienced by children is primarily to be seen within the type of relationship of both of the actors involved.[4] Withdrawal of love as a punishment is only possible if love is originally present. Hard treatment in the family is mostly imposed in a context of affection and support. Children experience the daily commitment of their parents to their well-being, their love and careful concern. Children basically trust their parents and accept that, even if they impose hard treatment, this is done for their good. Parents are given moral authority to distinguish the good from the wrong and to attach the appropriate consequences to it, even if they are unpleasant. Even when children feel some punishments to be unfair, this will not lead them to reject their parents. Children know that the negative moment in the relationship with their parents is not a definitive split, but only a suspension of the loving relationship. It is a temporal withdrawal of love, not a definitive one. Punitive action by parents is clearly to communicate messages to their children: parents want to educate their children and to teach them what is right and wrong. This mostly adds up to a kind of reintegrative shaming, as described by Braithwaite (1989): the action is shamed, not the person and, after shaming, gestures of reintegration confirm the child as part of the parents' loved world.

[4] State institutions, like child welfare, keep a distant eye on family practices and intervene only in cases of manifest mistreatment or neglect.

Punishment by the judiciary is fundamentally different; it is now a public affair. It is not only a question of a relationship between the punisher and the punished. At least three parties are involved: the constitutional state (represented by the public prosecutor), the offender and the victim (Ashworth 1986; 2000). The judge, in fact, is not a party and is positioned above all three, to judge on a legally based balance of the interests. According to several theories on criminal justice, the punitive judgement is primarily addressed at the public, and not at the offender (von Hirsch 1993). It is meant to publicly confirm the norm and to censure the norm transgression. The offender is then only a "tool". Others, however, stress communication with the offender (Duff 1986): the punitive action is seen as an appeal to the offender to repent.

Imposing a judicial punishment is basically at odds with the principles of a democratic constitutional state, which guarantees rights and freedoms to its citizens. Imposing a punishment may, therefore, only happen in strictly defined cases, following defined procedures. In order to control these limitations, sentencing procedures and possible sentences are highly formalised. This brings us very far from the family conditions just described. Moreover, and contrary to the evidently experienced love and care in families, many offenders have already experienced a career of social exclusion and failure. Society and its (judicial) representatives very often are looked at as hostile and unjust. Unlike parents and their children, the judge has no moral authority in the eyes of the offender to decide about the wrong and to deduce punishing consequences from it. The judge is perceived as a professional who is paid to do his (further excluding) job. The possible moral message through the punishment does not reach the offender. The punishment is seen as the confirmation or reinforcement of the negative relationship that already existed. The shaming is now addressed at the person, and is mostly a kind of disintegrative shaming, or stigmatisation, with further excluding effects (Braithwaite 1989).

It appears, therefore, not right to compare punishment in penal law with punishment in the family. The context, the relationship between the punisher and the punished, the parties involved, the sanctioning procedures, the impact on the punished are all so completely different that they cannot be compared. The psychology of learning has disentangled the conditions required for making rewards and punishments effective, and the setting of the criminal justice system is almost the opposite of these (Van Doosselaere 1988). In punishing, the state does not and cannot act as a good parent towards offenders, but rather as a channel for revenge.

Restoration and Punishment are Different

It must be clear by now that I do not see the hard treatment of an obligation to be a sufficient reason for calling it punishment. The confusion here may be based on the psychological location of the painfulness. Punishment (legal or

informal) is always an intentional action. A definition must, therefore, include the intention of the punisher. It is the punisher who considers a certain action to be wrong and who wants the wrongdoer to suffer for it. However, defining every unpleasant obligation as a punishment, in fact, places the distinction between punishment and non-punishment on the experience and the interpretation of the person who is subjected to the treatment. Because the subjected person considers the treatment to be hard, and may call it punishment, the treatment is then categorized as punishment. But the key to punishment lies in the head of the punisher, not the punished. It is the punisher who chooses a conflictual, reproaching relationship with the wrongdoer. It is the punisher who (temporarily) suspends willingness to consider the wellbeing of the other. And it is the punisher who makes the opening move for another type of relationship.

In the example of the child breaking a cup, parents can respond in two ways. They can punish the child. By shouting at the child, the parent wilfully wants the child to experience an unpleasant moment. Though temporary and conditional only, the intentional opening of a negative relationship is essential in the behaviour of the punisher. But the parents may also not punish. They may just want the child to account for his or her actions by obliging them to repair the harm and to buy a new cup from their pocket money. The parents do not blame the child, nor do they intend the child to suffer. The relationship between the parents and the child remains essentially unchanged. No conflicting, rejecting or reproaching element is added, even if the obligation to pay the cup from the child's pocket money would be more unpleasant than undergoing being shouted at by the parent. The latter would be a punishment; the former would not.

I want to come back now to the restoration/punishment debate in responding to crime. In the maximalist version of restorative justice, it is accepted that courts can impose restorative sanctions, like formal restitution, doing work for the benefit of a victims' fund, or doing community service. Consider the following examples.

(1) Victims and/or local communities may not be prepared to agree to reasonable restorative settlements of the offence while offenders are willing to do so. It would not be fair to subject offenders to the traditional retributive system. They should be offered the opportunity to complete a restorative action. Mediation between victims and offenders cannot be forced so a judge will have to decide on the restorative action.
(2) Offenders may refuse to accept a reasonable restorative action. Because victims and communities are not able to coerce this, the only option may be for a judge to impose a sanction. Again, these sanctions can be restorative in content.
(3) Some offences are so serious that they go beyond the impact on local communities. A coercive public intervention and sanction by the criminal justice system may be considered necessary, possibly even in addition to a settlement with the victims and community concerned. Here, the restorative

> aspect of public judicial intervention is not lost. The content of the imposed sanction should first of all aim at restoration. If concerns for security necessitate it, however, the offender can be incapacitated through a custodial penalty, but restorative actions should also be tried from within that facility.

Why do we not call these restorative sanctions punishments? It is because there is no intention to make the offender suffer. The burden is not an a priori choice. The aim is restoration, and the burden is only a possible side-effect of the restorative action. Unpleasantness to the offender may be (and probably will be) a consequence of the restorative obligation, but it is not intentionally inflicted in order to harm. To put it bluntly, restorative justice in its purist form in fact does not care about what offenders feel, as long as their rights as citizens are respected and a reasonable contribution is made to the restoration of the harm, suffering and social unrest caused by the offence.[5]

Are the three examples still fully part of a restorative justice approach? Of course, such forced intervention does not utilise the full richness of the restorative paradigm; nor does it achieve its most constructive purposes. As stated earlier, voluntary processes resulting in freely accepted commitments for reparative actions by offenders have a far higher "restorative calibre" than judicially imposed restorative sanctions. However, several reasons make such sanctions still preferable to punitive or forced rehabilitative interventions.

There is, first of all, the simple material benefit. The mere fact that something is actually being done for victims and for the community is certainly more beneficial than the retributive response which is criticized by Martin Wright as ". . . balancing the harm done by the offender with further harm inflicted on the offender. That only adds to the total amount of harm in the world" (Wright 1992: 525). Secondly, there is a reintegrative advantage. Even if offenders do not originally freely accept a restorative action, they may in the longer term understand the sanctions in a constructive way. That will increase their chances of being reaccepted by the community more than a retributive action would. This seems even to be true also in comparison with rehabilitative measures (Schiff 1999). Moreover, the carrying out of restorative sanctions within the community is also educational for the community itself. It has the opportunity to observe young offenders doing constructive services, which may contribute to the deconstruction of stereotyped images. Finally, the option for restorative justice is extended consequentially. As I shall document briefly below, I do not believe in the moral or instrumental constructiveness of punitive responses to wrongdoing. Therefore, even if individual persons (victims or offenders) or communities do not adhere to the constructive character of the restorative response, the state should try to keep to its principles and to act as much as possible in accordance with them.

[5] We know that restoration of social peace will maximally be achieved where the offender understands and accepts the equity and the reasonableness of the process and the obligations (Tyler 1990).

WHY THE DEBATE MATTERS

After the examples just mentioned, it may seem to be no more than playing with words to discuss whether judicially imposed obligations or informally forced commitments to achieve restorative actions are punishments or "restorative sanctions" in their own right. For several reasons, it is, on the contrary, a crucial debate.

Rejecting the Justification of the Punishment Paradigm

The intentional infliction of pain in punishment poses a fundamental ethical problem (Fatic 1995: 1). Most ethical systems consider deliberately and coercively imposing suffering on another person to be unethical and socially destructive, unless it is visited with the consent of the sufferer (in medical interventions, for example). Punishment "involves actions that are generally considered to be morally wrong or evil were they not described and justified as punishments" (de Keijser 2000: 7).

Nevertheless, criminal punishment of offences[6] is institutionalised insofar as more justification is demanded for not punishing an offence than for punishing it (de Keijser, 2000: 6). Even abolitionists ultimately appear to formulate in their alternatives a kind of hidden penal law (Blad 1996). Nils Christie (1981), for whom the reduction of man-inflicted pain is the central value to strive for, and who therefore argues against punishment within the criminal justice system, finally accepts that absolute punishment may be needed in some cases to express the grief and mourning caused by certain crimes. But why this is so, and how that would work, remains unanswered. As Garland writes (1990: 3): "Punishing today is a deeply problematic and barely understood aspect of social life, the rationale for which is by no means clear."

One can distinguish three types of justifications for punishing wrongful behaviour. The first is based on moral emotions; the other two are more rational: criminal punishment as an expression of moral blame of the evil already committed or as a means for avoiding further wrongdoing in the future. Some scholars refer to moral emotions, and consider punishment as the normal human response to evil; the spontaneous indignation and anger provoked by evil proves human's attachment to good (Moore 1987/1995; Pollefeyt 1999). However, anger against evil is not simply inspired by attachment to good. Evil is not an abstract moral category, opposed to another abstract category—good: both are pragmatic. Evil is that which threatens me, or has already hurt me in

[6] As mentioned earlier, punishment in family situations is different, but I do not deal with that here.

my human dignity, my social and material territory and my physical integrity.[7] Anger then appears to be a more self interested emotion, rather than ethically motivated. Such emotions may be understandable among people who are victimised and/or threatened, but they are, in fact, sources of revenge rather than rational punishments. Whereas we can possibly understand emotional outbursts by persons victimised or threatened, this understanding is much less evident towards the well reflected, rational, systemic way of responding to crime which is organised by the state. Civilisation requires us to control spontaneous violence (Elias 1994) and to suppress many spontaneous human responses to several stimuli. Why could we not control this one? Understanding spontaneous reactions does not mean that we should promote them or still less that we should systematise them.[8]

In penal theory, two other more rationally based justifications for punishing criminal behaviour, are often advanced. Retributivism basically goes back to the Kantian principle that punishing the wrongdoing is a categorical imperative and it does not ask questions about the possible targets or effects of punishment. According to retributivists, the wrongdoing must be responded to by imposing hard treatment on the wrongdoer. The reasons for the infliction are sought in the rectification of an illegitimate advantage obtained by the crime or in the expression of blame; the amount of pain depends on the amount of illegitimate advantage or the degree of blameworthiness of the offender (von Hirsch 1998). By referring uniquely to the crime already committed, retributivists base the sanctioning on retrospective considerations and find therein the rationale for assuring legal safeguards.

Though moral rejection of a crime is necessary, the retributivist option has several problems. First, it is untenable in its pure form.[9] Retributivism mostly hides some consequentionalist presuppositions. After all, if the criminal justice system would not serve (at least implicitly) any purpose, what do we have to fear from abolishing this very expensive machine for causing pain? Secondly, retributivism does not question the moral quality of the value system behind the rejection of a particular behaviour (Fatic 1995). Why, for example, is penal law dominantly geared to public order, personal security and property and not, for example, to social peace, solidarity or social and economic justice? Thirdly, even if moral rejection is needed, it can also be expressed in a way other than through punishment (Braithwaite 1989). Because the deliberate infliction of pain is, in principle, a highly unethical behaviour, alternative ways of expressing

[7] "Le crime ne blesse les sentiments que d'une façon secondaire et dérivée; primitivement, ce sont les intérêts qu'il lèse" ("Crime hurts feelings only in a secondary and a derived way; originally it is the interests that it hurts") (Maxwell 1914, cited in Debuyst 1990: 357).

[8] Historical studies (Schafer 1977; Weitekamp 1999), as well as systematic surveys of public preferences for ways of reacting to crime (e.g. Sessar 1999), at least raise doubts on whether or not punishing crime would really be the most fundamental and spontaneous human response.

[9] As we shall see, purely instrumentalist theories are not tenable either. That is why so called hybrid theories mostly advance utility considerations within the limits of retributivist principles (see e.g. von Hirsch 1993).

moral rejection should be fully exploited. The unthinking acceptance of punishment as a means of expressing blame is, in itself, morally highly questionable. Its maintenance suggests that retributive theories are, in fact, a kind of rationalisation of emotions such as vengeance, as described above (Fatic 1995). To maintain punishment as a system, it should be underpinned by better reasons than pure retributivism.

Consequentionalists, therefore, reflect on why the criminal justice system exists, and they derive the parameters for that system from the objectives they have put forward. According to instrumentalist approaches, penal law is only acceptable if it serves higher social aims. "All punishment in itself is evil. . . if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil" (Bentham 1823/1995: 24). The approach is now basically prospective, in that punishment should be justified by its aims purchased in the future.

The tenability of instrumentalist theories can be tested empirically. It can be investigated whether or not the stated aims are achieved in reality. Whereas the good society should strive for the maximum of happiness for the maximum number of its citizens, the contribution of criminal justice to it consists in diminishing victimisation by crime. Roughly, this instrumentalist aim is achieved in two different ways: by general deterrence of those who are considering commiting a crime, and/or by individually deterring or resocialising those who have already committed one.[10]

First, deterrence research has demonstrated that the general preventive impact of penal law is limited and is linked to a number of conditions, which are far from being generally fulfilled (Lab 1992; Nagin 1998). The general proposition that penal law is needed in order to deter (potential) offenders appears, therefore, to be more a doctrine than an empirically sustainable theory. Secondly, it has never been clearly demonstrated that punishment as such would result in resocialising, rehabilitating or individually deterring offenders. The impact on offenders is hypothesized as occurring directly or indirectly. Direct effects are expected when punishment is advanced as a means of its own for moral education of the offender (Morris 1981, 1995), or as a form of communication, in order to put pressure on the offender for penance and reform (Duff 1986). It is very doubtful that offenders are open to this kind of communication. When confronted with the criminal justice system, the great majority of offenders simply want to receive the least possible deprivation of their liberty, and that's all.

Indirect influences on offenders could be exercised when punishment takes the form of supposedly rehabilitative programmes. The recent wave of "what

[10] Incapacitation is sometimes also considered a purpose of punishment. I am reluctant to do so. There seems to be a fundamental difference between the preventionist aims of punishment and the security concerns in incapacitation. In punishment, offenders are locked in because *they* have committed an offence. In incapacitation, offenders are locked in because *we* are afraid of them. This makes the punitive element less clear.

works" research, consisting mostly of meta-evaluations, does not show the rehabilitative benefits of punishment. On the contrary, one of the conclusions is that "punishment-based programmes . . . on average lead to a twenty-five per cent *increase* in reoffending rate as compared with control groups" (McGuire and Priestly 1995:10, my emphasis). Therefore, the paradigm that offences have to be punished appears to be a handicap to rehabilitating offenders, rather than an opportunity or a direct means to rehabilitate them.

Finally, the instrumentalist approach may lead to undesirable practices, if it is advanced in a too systematic way. A purely instrumental approach is, in fact, insatiable (Braithwaite and Pettit 1990). With the argument of serving higher social targets, not guilty persons can be subjected to hard treatment and guilty persons can have draconian punishments inflicted on them.

All in all, criminal punishment is a well-considered negative act that does not consider the context and causes of the offence. For society at large, penal criminal justice intervention offers strong confirmation of the legal order and of legal safeguards for those involved, but public safety is badly served by it. Punitive justice stigmatises, excludes, responds to violence with counter violence and does not contribute to reconciliation or to peace. Pure punishment carries the seeds of more discord and disaffection, and thus of more crime and criminalisation.

For the victim also, penal criminal justice does not offer any comfort (Dignan and Cavadino 1998). Victims mostly are used or abused as witnesses, but then left alone with their losses and grievances. Moreover, the priority given to penal procedures and penal sanctions mostly hinders the opportunities for victims to be compensated and/or restored. Penal law does recognize the offender as the bearer of rights, but the sanction itself is a senseless infliction of suffering that neither contributes to public safety, nor to the victim's interests. It is a needless intrusion in offenders' dominion (Braithwaite and Pettit 1990), adding an additional threat to their social future.

There are, in fact, no rational reasons left for maintaining the a priori position that those who committed a crime must be subjected to hard treatment. Nevertheless, despite socio-ethical, theoretical and empirical counter indications, punishment is still advanced as the dominant paradigm for responding to crime. This may indicate that retributivist as well as the instrumentalist theories (and the hybrid theories) on penal justice are, in fact, a kind of rationalisation of the more vengeance-oriented emotions.

Toward Restoration as a More Ethical and Socially Constructive Response

The punishment paradigm poses two basic problems: (1) the wilful infliction of pain is not justified ethically, and (2) the a priori position that offenders must suffer is destructive of social life. Restorative justice is proposed as another paradigm, because the pain caused by a restorative sanction is not intentional, but

a possible side-effect, and because the obligation is meant to be socially constructive, namely to contribute reasonably to the repair of the harm, suffering and social unrest caused by the crime. That is also why the intention to inflict pain is so crucial in the distinction between punishment and restoration. Furthermore, not opting a priori for imposing suffering on offenders is ethically superior to punishing them if it serves equally well the social goals purchased by criminal justice: confirmation of the social norm by censuring their trangression and/or positively influencing the offender.

Essentially, censuring the criminal act does not need punishment. The relationship between disapproval and punishment exists in two directions. First, not all punishments express censure. Many professional and white collar criminals do not consider their crimes as blame-worthy, but as rationally balanced risks they take when they seek benefits from criminal actions. For juveniles involved in criminal subcultures, being arrested and condemned is often a reason for pride amongst their peers. It is even argued that a decrease in censure by the community can result in an increased need for penal punishment (Boutellier 1996): because people do not feel blamed anymore, the objective risks for potentially criminal behaviour must be augmented.

Conversely, hard treatment is also not the only way to express censure (Braithwaite and Pettit 1990; von Hirsch 1993). In victim offender mediation or in family group conferences, for example, the act is strongly condemned. While this causes a very unpleasant feeling within the offender, it is not a punishment in the sense described earlier. Blaming the act, and expressing moral disapproval of the conduct, is possible without additionally imposing hard treatment on the person who has committed the rejected act. Further, it is essential that the disapproval is communicated in such a way that it is understood and accepted by those concerned—offenders (who should be convinced not to repeat the wrongful behaviour), victims (who may feel assured in their citizenship by the formal rejection of their victimisation), and the broader society (which should see the social norm being re-confirmed).

The communicative aspect of the social response to crime is, indeed, crucial. However, if communication is limited to the punitive option, it will be poor in content and difficult to achieve (Duff 1986; Weijers 2000). The communication after the offence can and should be much richer and more complete than is possible simply through punishment. Disapproval expressed through traditional sentences imposed in criminal courts may communicate to the community, as a whole, confirmation of the norm and the authorities' determination to enforce the norm and to protect citizens from victimisation. However, it fails to communicate adequately and appropriately to the key actors in the crime. Victims need to be reassured about their rights to protection and support by the community; offenders need to be reminded that their behaviour is unacceptable and socially destructive. But further exclusion of both victims and offenders needs to be avoided by offering them the opportunity to reintegrate as responsible members of society. The communication should also position the victim centrally,

because the victimisation is the primary rationale for defining the behaviour as criminal.

Pursuing such communication means that the setting for good communication is critical. Offenders may be open to communication and appeals to them, if they experience respect and an understanding of their needs and interests. Most offenders cannot be affected by distant moralising speeches, but may be sensitive to accounts of the concrete suffering of their victims. These conditions are very difficult, if not impossible, to achieve in court in confrontation with the judge who will, at the end of the day, decide upon the kind and the degree of hard treatment. In court, offenders often do not listen but try to get away as soon as possible. They do not hear the invitation, but experience the threat. Therefore, the concern to inflict hard treatment is frequently the major obstruction to good communication.

Strategic Reasons for a Clear Distinction between Punishment and Restoration

For scientific reasons, different realities require different concepts with different labels. Notions that cover too many realities lose their meaning. Paradoxically, so many different ideas have been put under the label punishment that it becomes meaningless. Keeping the conceptual difference between restoration and punishment clear is, therefore, crucial. Merging both restoration and punishment into one general "punishment" concept would make the notion too fluid. Because of its problematic nature, we need to be very clear about what punishment is and what it is not.

This is also true for practical reasons. The blurring of punishment/restoration concepts makes it possible, as Duff, for example, does, to speak of "criminal" mediation, arguing that such processes are intended to be painful and burdensome for the offender (Duff 2000). That would certainly not be the opinion of most restorative justice theorists and practitioners. Indeed, painfulness is not an a priori aim of mediation; moreover, the mediation process does not focus primarily on the offender, but on the victim and the harm caused. Further, the blurring of the concept also leads to misguided legislation, as in Belgium, where so called penal mediation expresses a complete misconception of the core of mediation and the context that it requires (Aertsen 2000). Despite the use of the word mediation, the procedures mostly end up in punitive mini-trials, and rarely leave space for real mediation with the victim (Aertsen and Peters 1998; Walgrave 2000a).

Finally, presenting restorative justice as a version of the traditional criminal justice system is a dangerous option from a macro-social strategical standpoint. The specific restorative approach in the social response to crime would risk being absorbed into the traditional punitive approach, and would be lost conceptually. In the punitive climate of today, restorative ethics and practices would gradually fade away and the punitive core of the traditional approach

would increasingly be re-accentuated. If we accept so-called restorative punishments, the restorative element would soon be forgotten or distorted, and punishment would remain.

To conclude, preserving a clear cut difference between punishment and restoration in theory and in practice is of crucial importance, even when both may consist of painful obligations, imposed because of a wrong already committed. The essential difference lies in the essential painfulness of punishment, whereas painfulness in restorative sanctions is only a possible side-effect. This crucial difference constitutes the positive socio-ethical value of restorative justice. At the same time, it opens greater opportunities for more socially constructive responses to crime, leading to more restoration for the victim, more social peace and safety for the community, and more reintegrative opportunities for the offender. Preserving a clear-cut difference is also a safeguard against possible misuses or misunderstandings of what restorative justice is and can be. The difference between restorative obligations and punishments is a key feature in the development of a core theory of restorative justice.

ON SIMILARITIES AND DIFFERENCES IN LEGAL THEORISING

As indicated earlier in this chapter, restorative justice first of all aims at settling the aftermath of a crime through voluntary processes, because it is believed that such processes will achieve the restorative goals to a much larger extent than coercive interventions can. The maximalist version of restorative justice, however, does accept coercive restorative obligations, if voluntary settlements cannot be reached for one reason or another. The comparisons between restoration and punishment, described above, have dealt with restorative obligations and much less with freely accepted restorative actions. The distinction between restorative obligations and punishments will, indeed, apply *a fortiori* to the freely accepted restorative processes and agreements. This section of the chapter is more oriented toward judicially imposed restorative sanctions, where legal safeguards are explicitly needed. In a constitutional democratic state, imposing the deprivation of liberty through (restorative or punitive) sanctions or through rehabilitative measures is only admissible by a judicial authority, or at least under the control of such an authority, which is itself bound by legal rules. In that respect, some similarity in the process requiring restorative obligations and penalties is desirable.

Favourable Similarities

Superficially, both retributive and coercive restorative responses provide clear limits to social tolerance, base the intervention on the accountibility of offenders, use force upon them, and may be painful. It is these similarities that cause

confusion about restorative and punitive justice. However, the crucial similarities reflected in both the retributive and the restorative approaches are retrospective, and both base their intervention on the principle of the accountability of the offender. Being retrospective means that the retributive, and the restorative intervention as well, refer in their sanctioning practice to an element that is already present at the moment when the sanctioning takes place. The crime has already been committed and its seriousness can be defined; the harm caused is already being suffered, and its amount can be estimated. This retrospectiveness is crucial and forms the basis on which to construct legal safeguards in judicial interventions (Feld 1993). In the criminal justice system, the criminal act must be proved; in restorative justice, the harm should be demonstrated. They both provide crucial benchmarks in determining the amount of the deprivation of liberty which is permissible.

Moreover, the accountability principle in both approaches allows the sanction to be related to the degree of culpability, which may vary according to the characteristics of individual offenders (for example, their degree of understanding or competency) and the (mitigating) circumstances of the offence. A person who committed the crime or caused the harm by neglect will undergo a lesser degree of punishment or restorative sanction than one who consciously intended to commit or cause the harm. An insolvent juvenile who crashed a stolen car will have to contribute less to the material reparation of a victim than a wealthy adult who committed such an act in a drunken state.

The answers to the questions "is the crime/harm committed?", "how serious is it?" and "how accountable is the person for it?" provide a basis for deciding if, and how much, deprivation of liberty through punishment/restorative obligation can be imposed. Both these principles give the restorative approach a decisive legalistic advantage in comparison with rehabilitative responses to crime, such as in welfare-oriented juvenile justice systems, and also in comparison with purely instrumentalist visions of penal justice.

This legalistic basis has been, until now, only poorly elaborated in the restorative justice perspective. However, as in retributive justice, retrospectiveness and the accountability principle are intrinsic parts of restorative justice and they allow for the development of a legally safeguarded system of restorative justice sanctioning (Walgrave and Geudens 1996). Their concrete elaboration is one that challenges the further development of restorative justice into a fully-fledged system. Legality and proportionality in criminal justice are not natural givens, but are socio-legal "conventions" (von Hirsch 1993: 19), constructed over a long period of time, based on experience and tradition, while restorative justice in its modern version emerged only recently. After all, punitive justice in its retributive version has existed for many centuries, supported by the state by a very considerable amount of means. The least we can say is that it is not without legal problems.

Fortunate Differences

Besides the questions mentioned above, restorative justice adds a third question. For sentencing in restorative justice, it is not sufficient to simply consider the degree of harm caused in order to decide upon the accountability of the offender.[11] Another crucial question is about the potential benefits of the restorative sanction. Contrary to punitive justice, the content of the sanction is not pre-determined but is dependent on the needs and rights for restoration within the victim, the community and society. The third question is thus "how and whom the sanction will benefit?"

Restorative justice sanctions are thus, by definition, also target-oriented. They are retrospective, as demonstrated in the former section, but are at the same time prospective (see also Duff 2000). They are retrospective in defining the amount of the deprivation of liberty, and they are prospective in defining the content of the obligation. This merger of retrospectiveness with prospectiveness is expressed very well through the dominion concept proposed by Braithwaite and Pettit (1990). Dominion refers to a set of assured rights and freedoms. In the assurance lies the reference to the community. Rights and freedoms have to be assured by the community. Community is necessary to have dominion. Assurance also refers to a subjective element in dominion: I know that I have these rights and freedoms, I know that others know it, and I am confident that my dominion will be defended by my fellows, if it should be threatened or intruded upon. Fellow citizens are companions in the promotion and protection of the common dominion. In the liberal concept of freedom, on the contrary, the other is a rival in the struggle for expanding maximally the scope of my personal freedom.

Based on the republican theory of criminal justice (Braithwaite and Pettit 1990), one could say that the target of the criminal justice system is to preserve or to restore dominion, intruded or threatened by the occurrence of a crime.[12] The target of restoring dominion implies that the criminal justice system will be limited by the criteria of "satiability" and "parsimony". If not, state power would indeed coerce unnecessarily a citizen (the offender) and thus intrude itself upon dominion. That would be contrary to the objective, which is to respect and

[11] As noted earlier, restorative justice consequently thought through is not primarily oriented to the offender. Contrary to punitive or rehabilitative justice, restorative justice can operate without an offender being known or arrested. When the harm is known, victim support and other restorative actions can be undertaken in order to compensate and restore. However, if the offender is arrested, he or she should be obliged to do his or her reasonable part in the restoration. This is not only so for reasons of intrinsic "justice", but also because one can expect that the restorative action by the offender will have a much larger restorative impact than actions by more neutral community agencies. The offender is then not an object of restorative justice intervention, but a tool in it.

[12] Braithwaite and Pettit state that the aim of criminal justice should be to promote dominion. I find this too difficult an objective to achieve and propose therefore that the aim should be restricted to restoring dominion. If it is included, the task of promoting dominion should be left to other social institutions (Walgrave 2000b).

restore dominion. The objective of restoring dominion thus, instrinsically, contains limiting and controlling constraints. This objective of restoring dominion is the key distinction between restorative justice and punitive approaches. It is, therefore, not only more constructive for all parties with a stake in the offence; it offers at the same time the grounds for delimiting coercive judicial interventions and safeguarding citizens' legal rights.

Regarding the criminal justice system as acting to restore dominion allows a number of other differences with the traditional penal and criminal justice systems to be identified.

—Because coercive intervention has to be used parsimoniously, restorative justice procedures must allow easy exits from the system towards the opportunities for voluntary, informal crime regulation within the community. The so-called subsidiarity principle[13] must be taken very seriously: first, in order to intrude on dominion minimally; and secondly, because the restorative calibre of voluntary processes is much greater than coercive restorative sanctions.

—Restorative justice procedures must allow increased opportunities for the input of victims and local communities. This input can be crucial in defining the kind and amount of the harm and in finding the best restorative outcome possible. However, because of legal rights, victims and local communities may not be given any decisive power in the decision making process.

—The criminal investigation is not only focused on assessing the facts and guilt, but also on defining the harm, suffering and social unrest caused by the offence. It will also have to seek possible ways for negotiating a solution to them.

—The kind of proportionality in restorative sanctions links elements which are different from traditional notions of proportionality in retributive justice. Restorative justice imposes an obligation to repair because of the harm caused; it is not an infliction of pain because of the wrong done (Walgrave and Geudens 1996).

CONCLUSION

Restorative justice offers the promise of a better way of dealing with the aftermath of offences. It focuses on the core problem of an offence, namely the harm caused by it, and offers socially constructive solutions for the problem. At the same time, it seems to offer sufficient opportunity for constructing the legal safeguards, which are necessary in a democratic constitutional state.

[13] According to this legal principle, coercion should only be used as a last resort when informal methods of resolution do not succeed.

But restorative justice is not a finished project. To actualize its potential fully, a maximalist version of restorative justice must be developed with the aim of providing restorative outcomes to a maximum number of crimes in a maximum number of possible situations and contexts, including those where voluntary agreements are not possible and coercion is needed. However, restorative justice must predominantly remain a model in which voluntary settlements between victims, offenders and communities are based on free agreements between the parties concerned. But if restorative justice was limited to such processes, it would be condemned to stay at the margins of the criminal justice system, probably leaving the majority of offenders to this very problematic punitive system and denying the victims of the most serious offences the benefits of restoration.

The major challenge in developing restorative justice is to find a way to integrate it into the principles of a democratic constitutional state, while preserving to the greatest extent possible the human profundity and richness of the individual, emotionally-based exchanges and commitments that restorative justice appears to make possible. In fact, the challenge is in changing the formal criminal justice system into being, as much as possible, a restorative justice system.

In this undertaking, restorative responses come to resemble traditional judicial penalties, and the question arises as to how far restorative sanctions really are different from punishments. I have tried to make clear that, despite some similarities, there are still crucial differences between them. Such comparisons are very useful. They confront the maximalist version of restorative justice with its punitive rival and increase awareness of possible misunderstandings and distortions. They oblige us to explain more of the underlying values and beliefs of restorative justice and to go deeper into their presuppositions and consequences. Such steps are essential in developing further a core normative theory of restorative justice, in which the possibility of coercive sanctions are included which remain fundamentally restorative rather than punitive. Such a core theory is needed for restorative justice to resist absorption into traditional modes of punishment.

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Part 2

Describing Restorative Practices

3

Primary Restorative Justice Practices

PAUL McCOLD

INTRODUCTION

RESTORATIVE JUSTICE PROCESSES, in their purest form, involve victims and their offenders in face-to-face meetings and it is these participants (along with their respective communities of care) who determine how best to deal with the offence. Only three practices—mediation, conferencing and circles—currently fully meet these requirements. Each of these emerged independently, but all have influenced each other. The specific practices of some key examples are described in this chapter. More detail is provided in the chapters by Kathleen Daly, by Richard Young, by Mark Umbreit, Robert Coates and Betty Vos, and by Heino Lilles.

MEDIATION

Mediation generally involves a neutral third party (usually a trained community volunteer or social work specialist) mediating a dialogue between the victim and the offender who talk about how the crime has affected them, share information and develop a mutually satisfactory written restitution agreement and follow-up plan. In the case of juvenile offenders, the parents are also usually present. Generally also, only the amount of restitution is determined in mediation; the case is not disposed of. Restitution agreements may be enforceable by the courts and the courts indirectly influence the process by retaining jurisdiction over the offender. The Institute for Mediation and Conflict Resolution in Manhattan (IMCR) established the standard for criminal mediation practice in 1971, well before any theoretical work on restorative justice (McGillis 1997).[1] Mediators are trained to use listening skills, such as maintaining eye contact, summarizing what participants say, identifying points of agreements and encouraging further discussion. Ideally, mediators follow up after about two months to check whether the agreement is holding. This section describes three examples of mediation—community mediation, victim offender reconciliation programmes

[1] There was theoretical work on restitution which may have encouraged the use of mediation in criminal cases (Laster 1970; Korn 1971; Barnett 1977; Galaway 1977, 1988; Evarts 1990).

and victim offender mediation (although nowadays the conceptual difference between these last two is not particularly clear cut). These examples all follow similar processes. However, they differ in who runs the programmes, how cases are referred, who conducts the mediation, how much pre-mediation counselling is involved, the length of the process, the types of offences addressed, and the primary goal of the process.[2] Both victim offender reconciliation programmes and victim offender mediation are discussed further in the chapter by Mark Umbreit, Robert Coates and Betty Vos.

Community Mediation

Community mediation programmes are operated by community dispute resolution centers, often as adjuncts to law schools or court services, and may be publicly funded. They receive cases from the police, prosecutors and probation, or as walk-ins, and offer a range of dispute resolution services.[3] Many criminal cases are referred to them because they involve parties with an ongoing relationship. Community mediation programme providers assume mediators can contribute substantially to dispute settlement by clarifying issues, defining and containing areas of disagreement, offering suggestions and serving as intermediaries. The mediator cannot impose a decision but helps keep negotiations from breaking down by seeking multiple paths to an agreement (Rush 1994: 214); often this leads to accusations of being "settlement-driven." Pre-mediation contact is generally limited to explaining the process and eliciting participation. The issue in the mediation is viewed as a dispute between parties with relatively equal standing, and the mediator must be impartial for the process to be successful. Community mediation has been largely professionalised in the United States—only half of the mediators and arbitrators are volunteers and lay people, according to the American Bar Association (1990). With professionalisation has come a growing concern for quality control and establishing qualifications for mediators (Bonafé-Schmitt 1992; Filner, Ostermeyer and Bethel 1995), with some bar associations seeking to reserve certain classes of cases solely for mediators who are lawyers (McGillis 1997). Many programmes also have begun to assist various types of institutions to develop in-house dispute resolution mechanisms and have increasingly provided training in conflict resolution skills and strategies for developing mediation programmes (McGillis 1997:14). While

[2] Bush and Folger (1994) use "stories" to account for variations in the mediation movement—the satisfaction story, the social justice story and the transformation story. Each leads to a different mediation style. Satisfaction proponents emphasise achieving settlements, social justice proponents emphasize self-empowerment and transformation advocates focus on the personal growth of disputants.

[3] These include family mediation, divorce mediation, custody mediation, landlord/tenant mediation, consumer mediation, court-annexed arbitration, labour mediation, school-based dispute resolution, intergroup dispute resolution, public policy dispute resolution mechanisms, peer mediation and other specialised efforts as well as victim-offender mediation (American Bar Association 1990).

community mediation is a secular model in theory, it has not been secular in practice. Frances Wright Henderson, Director of the Orange County NC Dispute Settlement Center, noted that "what our mediators often observe during a mediation . . . is a transformative moment" (quoted in McGillis 1997:14). It was also this non-secular characteristic of the victim offender encounter which attracted the attention of a faith-based effort that was developing a paradigm of justice that could explain these transformations.

Victim Offender Reconciliation Programmes

The victim offender reconciliation movement began in Kitchener, Ontario in 1974 in what has been called the "Kitchener experiment" (Peachey 1989).[4] The transformative results of having two teenagers meet directly with their victims following a vandalism spree and agree to restitution became the impetus for the Kitchener Victim Offender Reconciliation Program. The Community Justice Initiatives Association began the first victim offender reconciliation programme in 1975 with support and encouragement from the Mennonite Central Committee and in collaboration with the local probation department (Peachey 1989; Victim Offender Reconciliation Resource Center 1984). Victim offender reconciliation programmes are rooted in the experience of Mennonite communities (Cordella 1991; Merry and Milner 1995: Part III), culminating in Howard Zehr's (1990) seminal book *Changing Lenses*. Their understanding of mediation dynamics is faith centered (Claassen and Zehr 1989) and language such as shalom (right relationships), atonement, reconciliation, obligation, responsibility, accountability, forgiveness and justification is used to describe and understand the restorative justice process (Northey 1989; Zehr 1980), rather than the language of conflict resolution or civil dispute litigation. Reconciliation—involving healing of injuries and restoring right relationships—is the purpose and direct mediation between victim and offender is the process wherever relationships have been broken by the criminal act. In victim offender reconciliation programmes, the mediator motivates the parties to participate and regulates their interactions by helping them communicate and by monitoring their safety (Peachey, Snyder and Teichroeb 1983). Advocates of victim offender reconciliation programmes believe that church-based restorative justice programmes—operating from a Christian peacemaking perspective—are the best guard against programme co-option (Ruth-Heffelbower 1996).

[4] There had, however, been considerable experimentation with direct victim offender mediation prior to the "Kitchener Experiment" (e.g., Hudson & Galaway 1974; Fogel, Galaway & Hudson 1972; Anderson 1982).

Victim Offender Mediation

Victim offender mediation distinguishes itself from community mediation, which it sees as too settlement driven. It primarily de-emphasises reconciliation[5] and emphasises victims' healing, offenders' accountability and the restoration of losses. Most victim offender mediation programmes are distinct from other types of mediation because of their pre-mediation in-person preparation of the parties and a very non-directive "dialogue-driven" style of mediation which many have termed a humanistic model of mediation (Umbreit 1994, 1996, 1997a, 1997b, 1998; c/f Umbreit 1978).

Thus the mediator facilitates dialogue and mutual aid; schedules separate pre-mediation sessions with each party; builds rapport and trust while not taking sides; identifies the strengths of each party; uses a non-directive style of mediation that creates a safe space for dialogue and accesses the strengths of participants; and recognises and uses the power of silence. Most sessions result in a signed restitution agreement. However, this agreement is secondary to the initial dialogue between the parties (Umbreit 1998). Victim offender mediation emphasises building relationships between parties and establishing trust with the mediator and also seeks to enhance the problem-solving skills of the parties so that they can resolve future disputes through direct negotiations, if possible (McGillis 1997: 21).

CONFERENCING

Conferencing is a process in which any group of individuals connected and affected by some past action come together to discuss any issues that have arisen (Warner-Roberts and Masters 1999). It also directly includes those community members most affected by the offence,[6] personalises the consequences of the misbehaviour, and allows for the harm suffered to be expressed in very personalised terms with little guidance from the facilitator. Thus, facilitators generally encourage participants to speak for themselves and are trained to stay out of the interaction while guarding the process.

Different examples of conferencing vary in the extent of the involvement of victims, victims' supporters and offenders' supporters, including family members and significant others. They also vary in who facilitates, whether all the participants or the family suggest outcomes, and who approves the agreements.

[5] Some victim advocates have raised concerns about crime victims participating in a process to reconcile with offenders and do not support any programme advocating forgiveness of offenders (Young 1995; Van Ness and Heetderks 1997:70). They believe a "satisfactory mutual agreement rather than a complete reconciliation" is a better option (Kerner, Marks and Schreckling 1992:30).

[6] Since the offender's behaviour has affected his or her family group as much as it has the victim and the victim's family group, it is they who are the "community".

Generally, professionals (for example, a police officer, school counsellor or social worker) facilitate conferences, either as part of a full-time position or as a consultant (Marsh and Crow 1998; Warner-Roberts and Masters 1999). This chapter describes three examples of conferencing: youth justice family group conferences in New Zealand, the first example of conferencing in Australia, and community group conferencing which derived from this Australian example (Warner-Roberts and Masters 1999). Kathleen Daly describes the Australasian experience further.

Youth Justice Family Group Conferences in New Zealand

The Children, Young Persons and their Families Act 1989 revolutionized how New Zealand manages youth justice proceedings. Under political pressure to indigenize the legal system (Olsen, Maxwell and Morris 1995; Hassall 1996; Pratt 1996), family group conferences were introduced as both an alternative to court proceedings and as a guide for sentencers. They provide a means of "involving families in deciding what would be the most appropriate response to their young people's offending" (Maxwell and Morris 1993: v) and are used for serious and persistent young offenders (that is, for about twenty per cent of young offenders).

Youth justice family group conferences are facilitated by youth justice coordinators, employees of the Department of Child, Youth and Family Services. In order to safeguard young offenders' rights, young people are provided with a lawyer (youth advocate) when they have been arrested, and judicial oversight is retained over conference agreements in these cases (McElrea 1996). Youth justice family group conferences are convened at a time and place determined by the youth justice coordinator after consultation with the family and the victim, and are attended by the young offender, the family (including the extended family), the victim, the victim's supporters, the police youth aid officer, the youth advocate, and others whom the family wishes to be present. The youth justice coordinator acts as the facilitator, although others may act as the facilitator if it is culturally appropriate.

The procedure will vary from conference to conference as the parties determine. However, commonly, after introductions and greetings, the youth aid officer describes the offence and the young person admits or denies his or her involvement. If there is no denial, the conference proceeds with the victim describing the impact of the offence. The conference participants then share views about how to set matters right. After this, the family usually deliberates privately to develop a proposed plan. When the family finishes, the meeting reconvenes with the professionals and the victim, who can agree or object to the family's recommendations and plans (Hudson, et al 1996; Consedine and Bowen 1999). Agreements often include reparative sanctions such as apologies, restitution and community service.

Through legislative enactment, New Zealand launched a nation-wide experiment in conferencing. The research by Maxwell and Morris (1993) found that conferencing was able to hold offenders accountable in meaningful ways and to be responsive to victims: it could provide victims with both a presence and a voice and with the opportunity for some healing, for some understanding of what happened and why, and for some closure. However, the research by Maxwell and Morris (1993) also found that, at that time, youth justice family group conferences tended to be over-controlled by the professionals and were noticeably offender-focused. Crime victims were sometimes treated as little more than information providers and were not encouraged to bring supporters. This research found a wide variation in practice, with victims attending only about half the conferences and, when they did attend, about a quarter of the victims said they felt re-victimized by the process. As a result of this early research, New Zealand's youth justice family group conferences have now been modified to support victims' participation more explicitly. Maxwell and Morris's chapter shows how important victims' attendance is to the prevention of reoffending.

Conferencing in Wagga Wagga

A centrepiece of New Zealand conferencing continues to be the "family caucus": encouraging the family to deliberate privately about how best to deal with the offending. Some Australians questioned the appropriateness of this and developed a very different approach. In 1991, conferencing was pioneered in Wagga Wagga, New South Wales, by Terry O'Connell as a community policing technique (Moore and McDonald 1995). This was loosely based on New Zealand's family group conferences (O'Connell 1998; O'Connell, Wachtel and Wachtel 1999), but was an extension of formal police cautioning and had a different theoretical rationale. Braithwaite's (1989) theory of reintegrative shaming influenced O'Connell's understanding of conferencing, and the conferencing model later developed in Canberra by the police was specifically based upon Braithwaite's theory.[7] O'Connell (1998:8) describes the Wagga Wagga approach as follows:

> "The conference protocols were basic: have the offenders talk about what happened, what they were thinking and who was affected; followed by the victims and supporters; and finally, the offenders' family and supporters. Discussion then focused on what needed to happen to make things right. Refreshments are provided immediately after the conference to provide an informal opportunity for participants to talk while the

[7] Braithwaite (1989) asserts that societies that use "reintegrative shaming" have lower levels of crime and violence. Reintegrative shaming involves encouraging wrongdoers to experience shame for their offending behaviour while allowing them to maintain their dignity. This is accomplished by holding wrongdoers accountable for their actions and providing them with an opportunity to make things right.

> facilitator prepared the written agreement. This sequence appeared to work. . . Ultimately the conference protocols were converted into a script, with the key statements and questions written out for the convenience of the facilitator."

The conference is facilitated by a police officer, whose role is to encourage participants to reach some collective agreement about how best to minimize the ongoing harm resulting from the offending behaviour. Agreements usually involve some arrangements for appropriate restitution and reparation. The programme has several inter-related aims: to give victims an opportunity to participate in the official response to that behaviour, to provide offenders with an opportunity to understand the consequences of their actions and to involve the broader community of people who have been adversely affected by those actions.[8] Richard Young's chapter examines further police-led conferencing.

Community Group Conferencing

Community group conferencing (also known as Real Justice[9] conferencing and community accountability conferencing) are forums for people to deal with wrongdoing throughout society by providing peacemaking possibilities in a wide range of circumstances, including schools, workplaces, communities, youth organisations and college campuses. This refined Wagga Wagga model explicitly includes principles of restorative justice and incorporates Braithwaite's (1989) reintegration shaming theory and Silvan Tomkin's affect theory (Nathanson 1996; Retzinger and Scheff 1996) to explain and understand the conference dynamics.

Community group conferences are incident-focused, limited to repairing the damage caused by a specific offence, are not a mechanism for uncovering all of the needs for rehabilitative and other social services (Moore 1995), and they are not intended to provide counselling to the affected parties or to develop the social competencies of offenders per se (O'Connell, Wachtel and Wachtel 1999). In community group conferencing, it is assumed that the social bonds that develop through a conference will have positive effects in this regard without external efforts by the facilitator.[10]

[8] Police conferences have spread around the world, especially in the USA and Canada. The Thames Valley Police in England began experimenting with Wagga Wagga-style conferences as a form of formal police cautioning in 1996. The "Wagga Wagga" model was also the source of script-based conferences now being conducted in schools (Hyndman, Moore and Thorsborne 1995, Cameron and Thorsborne 1999) and for a series of non-police conferencing models (Moore 1996a, 1996b, 1996c, 1996d, 1997).

[9] Real Justice is a private not-for-profit training and technical assistance programme dedicated to the spread of community conferences and related restorative practices. It was founded by Ted Wachtel and the Community Service Foundation in 1994 in Pennsylvania. Real Justice had trained more than 4,000 conference facilitators and nearly a hundred trainers in North America by the end of 1999.

[10] Community group conferences are not necessarily police-based and may be facilitated by any official with the authority to divert the case from formal processing (e.g., probation officers, teachers or workplace supervisors) or by trained community volunteers.

Initial contact is by phone, or in-person where appropriate, and focuses on explaining the process and eliciting participation. Offenders are encouraged to take clear responsibility for their behaviour. Victims are encouraged to think about what they would like to say to the offender and what they would like to get out of the conference. Both are expected to nominate personal supporters to attend the conference, who are also contacted by the facilitator. The facilitator then schedules the conference, giving priority to victims' preferences.

The hallmark of community group conferences are that they are scripted; facilitators follow a simple written script during the conference. The conference begins with the facilitator reading a preamble that sets the focus of the conference—to understand how everyone has been affected by the specific incident of wrongdoing and agree on how best to repair the harm. Facilitators explain the consequences of failing to satisfy the agreement to be reached, and remind participants that their participation is voluntary. Normally, the criminal justice system remains an option should the offender fail to comply with the agreement.

The conference has three parts. First, participants answer a specific series of open-ended questions. The offender must describe how she/he became involved in the incident, who she/he thinks was affected, and how they were affected. Victims are then asked to express their reaction to the incident and describe how they have been affected. Next, the victim's supporters and then the offender's supporters discuss their reactions and are asked what the main issues are. The offender is then asked if she/he has anything to say to anyone—providing the opportunity for, but not requiring, an apology. The second part of the conference involves negotiating a reparation agreement. Facilitators ask the victim "What do you want from today's conference?" which provides an open-ended consideration of possibilities; they are not limited to restitution or compensatory action. Every suggestion made during this agreement phase must be agreed to by both the victim and the offender. The third part of the conference, beginning when the agreement is reached, is an informal social period when refreshments are served. This informal reintegration period is an important part of the conference and is a distinguishing feature of community group conferences.

CIRCLES

The circle is central to traditional aboriginal cultures and social processes. As Yazzie (1998:129) notes, indigenous cultures around the world have developed a variety of similar processes for responding to wrongdoing:

> "I think that when I describe what we call 'peacemaking' in English, I am describing the traditional justice of many aboriginal groups of people. I have been to the South Pacific, Norway and across the U.S. and Canada to talk with aboriginal leaders. Others of the Navajo Nation court system have visited Australia, New Zealand, Bolivia, and South Africa to do the same. Often, when we describe peacemaking, other

> aboriginal leaders nod their heads with approval and tell us that it is the same as their traditional justice methods."

There has always been much about ancient intra-tribal practice that is restorative of community (La Prairie and Diamond 1992; Consedine 1995; La Prairie 1995; Zion 1998). The recent re-emergence of tribal sovereignty on North American reservations has spawned a series of circle models of restorative practice (Dickson-Gilmore 1992). These have evolved along two general paths: a healing paradigm (healing circles) to dispose of situations and a co-judging paradigm (sentencing circles) limited to making recommendations to judicial authority for actual case disposition (Ross 1994).

Whether used as a pre-adjudicatory alternative or for determining post-adjudicatory disposition, the circle models tend to follow similar structural processes (Van Ness and Heetderks 1997; Cutshall and McCold 1983). There are many circle processes, differing in the purpose of the circle, who participates and the role of participants. Healing and talking circles focus on a particular concern common to all parties (for example, men or women's healing circles or substance abuse groups) or are constituted to help someone with their healing journey (for example, support groups for victims or for offenders). Such circles rarely involve justice professionals but may include professional counsellors. This chapter describes three North American circle processes: the peacemaking courts of the Navajo of Arizona (Yazzie and Zion 1996; Yazzie 1994), the sentencing circles in native communities in the Yukon (Stuart 1996), and the elaborate circle model developed in the aboriginal community of Hollow Water, Manitoba, Canada (Bushie 1997). Heino Lilles in his chapter provides more information on circle sentencing in the Canadian context.

Navajo Justice

Traditional Navajo custom to resolve conflict involves the idea of *Hozhooji* (living in "right relationship"). If one person believes that they have been wronged by another they first make a demand for the perpetrator to put things right. The term for it is *nalyeeh*, which is a demand for compensation. It is also a demand to readjust the relationship so that the proper thing is done (Yazzie & Zion 1996). If this is unsuccessful, the wronged person may turn to a respected community leader to facilitate and organise a peacemaking process. The process is not confrontational but involves family and clan members of both victims and offenders talking through matters to arrive at a solution. Yazzie (1998:123–4) distinguishes this process from mediation:

> "Navajo peacemaking is not 'mediation.' In general American practice, 'mediation' is a process where a person called a 'neutral' works with parties to get them to reach an agreement. In our system a naat'aanil or peacemaker is not 'neutral.' That is, a peacemaker is a community leader who has very definite points of view about problems.

> Peacemakers use traditional teachings to clarify false values and correct untrue assumptions about behaviour."

The process opens with a prayer to seek divine assistance. Following the prayer, the parties have an opportunity to lay out their grievances. Feelings are vented, the victim has an opportunity to disclose not only the facts, but also their impact. People are given an opportunity to say how they feel about the event and make a strong demand that something be done about it. Relatives also have an opportunity to express their feelings and opinions about the dispute. The person who is the focus of the discussion is provided an opportunity to explain his or her behavior in full. The people who know the wrongdoer best—his or her spouse, parents, siblings, other relatives and neighbours—expose denial and excuses. The process is designed to clarify the situation and get to the root of the problem. The peacemaker will then talk to the parties in a way designed to guide them. This talk focuses on the nature of the problem and uses traditional precedent to guide the decision. The peacemaker has persuasive authority and draws on the traditions and stories of the culture to offer practical advice. The parties then return to a discussion of the nature of the problem and what needs to be done to resolve it. Often, the action taken is in the form of *nalyeeh*. Payments can be in the form of money, horses, jewellery, or other goods. The payment can be symbolic only. The focus is not upon adequate compensation, but upon a holistic kind of remedy. It is the feelings and relationships of the parties that are most important. The process ends in an action plan to solve the problem. A person who agrees to pay *nalyeeh* may not have the personal means, and so it is traditional for family and clan members to help make payments on their relative's behalf. The tradition is not simply that relatives assume obligations for others, but, when an individual commits a wrong against another, it shames the person's relatives. The family agrees to keep an eye on the offender to ensure that there will be no future transgressions. No offences are excluded and offences such as murder and domestic violence can be dealt with through these processes (Yazzie 1998:112).

Sentencing Circles

A sentencing circle is a community directed process, in partnership with the criminal justice system, for developing consensus on an appropriate sentencing plan which addresses the concerns of all interested parties. Sentencing circles use traditional circle ritual and structure to create a respectful space in which all interested community members—the victim, the victim's supporters, the offender, the offender's supporters, the judge, the prosecutor, the defence counsel, the police and court workers—can speak from the heart in a shared search for understanding of the event and to identify the steps necessary to assist in healing all affected parties and prevent future occurrences (Pranis 1997).

Sentencing circles not only involve all the players found in a traditional court, but are often held in a courtroom. They may also be organised in one large circle or split into an inner and outer circle. The inner circle is composed of the victim, the offender, supporters or members of their respective families, and justice professionals normally involved in the court. The outer circle includes professionals who may be called upon for specific information and interested members of the community. Pre-requisites for offenders include an acceptance of responsibility, a plea of guilty, a connection to the community, a desire for rehabilitation, concrete steps toward rehabilitation, support within the community for the offender, and the input of the victim. Acceptance into the circle is decided by a community justice committee or circle support group. Work undertaken in preparation for a sentencing circle is believed to be critical to the success of the hearing. Communities are increasingly investing more time and effort into pre-hearing work with the offender, the victim and families and support groups. Pre-hearing work includes exchanging information, developing plans and preparing all parties to participate. With proper pre-hearing preparation, a circle sentence hearing will take from one to two hours; without this, the case may require two hearings (Stuart 1996).

In the early use of sentencing circles, the judge tended to facilitate. Now some communities select one or two local people to act as "keepers of the circle". They act as facilitators, ensuring respect for the teachings of the circle, mediating differences and guiding the circle towards a consensus. Opening the circle with a prayer, the keepers of the circle welcome everyone to the circle and then introduce themselves by explaining who they are, what they do, where they are from and why they are in the circle today. The keeper then asks others to similarly introduce themselves, as an eagle feather or other sacred object used as a "talking token" is passed around the circle. During the first round many express concern for the victims, the offenders and their families, and speak of their hope for the circle to find a way to heal all who share in the circle. Introductions help set the tone for the circle and begin to identify the pain, anger and hope of different participants. Keepers discuss the teachings of the circle and explain the guidelines extracted from the teachings. Guidelines common to most sentencing circles include speaking from the heart, remaining until the end in the circle, allowing others to speak by speaking briefly, respecting others by not interrupting and by recognising the value of their contribution. The closing rituals include summarising what has or has not been agreed, outlining the next steps, thanking everyone for their participation, passing the feather for closing comments by all participants, and a closing prayer.

The sentencing circle process is inclusive. Everyone in the community has a stake in the outcome, and thereby may participate. The value of sentencing circles derives less from their impact on the offender or the victim than their impact on the community. Being acknowledged and respected engenders respect and acknowledgment from others. Contributions to the circle are respected, built upon by others, and quickly become not the idea of the contributor but of the

circle. Above all, sentencing circles are about community building (Stuart 1996; Pranis 1997).

Healing Circles

One of the most important of the circle models of restorative justice is the Community Holistic Circle Healing developed in Hollow Water, Manitoba, by the Ojibwa tribe of the Anishnaabe people (Sivell-Ferri 1997). It began as a programme to respond to incest and sexual assault by seeking to heal not only the intimate connections and the human dignity that was destroyed but also by addressing the social arrangements that enabled this violence to flourish (Bushie 1997; Taraschi 1998:117). Like many aboriginal communities, Hollow Water had fallen into deep patterns of alcoholism and a culture of violence and was in danger of losing its culture entirely. The complete Community Holistic Circle Healing process involves thirteen phases:

—Disclosure
—Establishing safety for the victim
—Confronting the offender
—Supporting the spouse/parent/child
—Supporting the family(ies)/community
—Arranging a meeting of the assessment team with the police
—Holding circles with the offender (one to two hours at least two times a week)
—Holding circles with the victim separately (one to two hours at least two times a week)
—Holding circles with the offender's family (gradually bringing in the family, until all join)
—Holding circles with the victim's family (gradually bringing in the family, until all join)
—Holding the sentencing circle with all present to recommend disposition (with judge)
—Holding the sentencing review circle with community (without the judge every six months for 5 years)
—Holding the cleansing circle.

According to Bushie (1997), following disclosure, the assessment team arranges for the safety of the victim and confronts the offender. Offenders are encouraged to admit responsibility and seek support in changing their behaviour. They are then brought into the first circle (offender circle) with the team, which may be joined by recovered offenders. This first circle is not to judge the person, but to affirm the community wants the crimes to stop and to help the offender become a productive balanced person. The offender circle continues until the offender can disclose all the details. The second circle for offenders is

with their nuclear family—they have to bring their partners and their children to a healing circle. It is their responsibility to tell their families what they have done. This circle is then widened to include their families of origin—their mothers and fathers, their sisters and brothers. Simultaneously, the assessment team begins healing circles with the victim and gradually brings in the victim's family. Finally the two healing circles come together. In this circle (the truth circle), the offender does not speak. The victim speaks to the offender, saying "this is what you did to me, and this how it affected me", and the offender sits in silence and listens. The next circle (the sentencing circle) involves the court officials and the judge. Here the offender must tell the whole community what they are being charged with and what they have done so far. The community makes its recommendation and the judge passes sentence. It is felt that if a person can go through these four circles, they have demonstrated a commitment to their own healing, and the community should support them. If that person is not able to complete the circles, then the responsibility to deal with the offender is left to the courts. The offender is called to a further circle (the community circle) every six months following the sentence without the court officials being present. The whole community gets a report on the offender's and victim's progress. What was said in the sentencing circle is reviewed and a progress report as to healing work in the past six months is given. The offender is required to answer back to his or her community because that community has spoken on his or her behalf. This Aboriginal form of community supervision is believed to keep people on track. In the sixth circle (the bonding circle), both victim and offender meet weekly; often for the whole day. The seventh circle (the cleansing circle) is where the victim, the offender and both families get together. The victim and offender usually arrange this circle so everyone can see how much both have dealt with their pain together. The cleansing circle is a community event for both families: a celebration of their growth and a beginning of their new journey of peace.

CONCLUSIONS

This review has demonstrated how all of the restorative justice models discussed accomplish core restorative processes between victims and offenders. The fact that restorative programmes often continue to operate, some for as long as thirty years, is a testament to the deep need in society for respectful and healing approaches to wrongdoing. The spread of these models in countries around the world assures us that a great many will still be operating thirty years from now. An overall review of the development of the three principal branches of restorative justice demonstrates some consistent trends in the evolution of restorative practice. These trends are related to the role of the community, the role of the facilitator, and the types of human conflicts restorative justice is intended to address.

The concept of "community" has evolved in the practice of restorative justice. Early examples included only the victim and the offender, with the community represented by the volunteer mediator. Conferences, circles and some victim offender mediation programmes distinguish the role of the facilitator from the representation of community and explicitly recognise the families and personal supporters of victims and offenders as an important micro-community of concern. Circles and some examples of conferencing also encourage the participation of individuals specifically as representatives of the wider community.

The role of the facilitator is evolving in two distinct directions. Some restorative justice programmes, especially those with a humanistic social work perspective, expect the facilitator to provide counselling and place great emphasis on the interpersonal skills and training of the facilitator. Thus these examples are increasingly moving toward establishing standards and minimum training requirements, thereby creating an "expert" approach. Conferencing and circles rely more on the micro-communities of care and existing local social programmes to provide social work services for individual victims, offenders and their families. In these restorative processes, the role of the facilitator is limited to determining who should participate, preparing the parties for their participation and organising the restorative process. Facilitators are expected to facilitate, not run the encounter, and therefore do not require special expertise beyond a clear understanding of the purpose of the process.

Because core restorative processes have broad implications for resolving conflicts and restoring relationships, restorative processes and principles are now being applied to internal organisational relations and to integrating ongoing formal and informal restorative practices in everyday relationships. Restorative practices have evolved from a narrow focus on the amount of restitution in juvenile property cases to broadly applied practices that continuously engage affected micro-communities. The exploration of the potential of these practices has only just begun. From negotiating restitution agreements to transforming conflict into cooperation (McDonald and Moore 1999), restorative justice practice has moved into its adolescence at the beginning of the 21st century.

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4

Conferencing in Australia and New Zealand: Variations, Research Findings, and Prospects

KATHLEEN DALY

INTRODUCTION

Australia and new Zealand are laboratories of experimentation in one form of restorative justice: conferencing. No other countries in the world have moved as quickly and as completely in embracing the conference idea. Large variation exists between the countries and among the Australian states and territories in how conferences are organised, the theory(ies) animating practices, and the stated aims and purposes of conferences. A growing body of research exists on how well conferences meet the expectations of participants, how they compare with court, and the degree to which they may succeed in reducing the likelihood of re-offending and in assisting victims' recovery from the disabling effects of crime.

In this article, I first consider how and why Australia and New Zealand differ from other world jurisdictions in embracing conferencing, and I examine common misconceptions about conferencing in the region. I then describe the major sources of jurisdictional variation in both legislation and practice. I highlight findings from research studies in the region, and then turn to an extended discussion of my research: the South Australia Juvenile Justice (SAJJ) Research on Conferencing Project. I conclude by noting the limits of jurisdiction-specific thinking and the potential for innovative research.

HOW AND WHY AUSTRALIA AND NEW ZEALAND DIFFER

Australia and New Zealand differ from other world jurisdictions in the following ways:

—With the exception of two jurisdictions in Australia, all jurisdictions have statutory-based schemes, with conferences typically used as one component in a hierarchy of responses to youth crime.

—The overarching goal in legislative frameworks is to keep juveniles out of the formal system as much as possible.
—In addition to statutory-based schemes for juvenile offenders, conferencing is used in a variety of other contexts, including school and workplace disputes, family and child welfare (or care and protection matters), and as pre-sentencing advice to magistrates and judges.

The typical candidate for youth justice conferencing in the two countries is an offender under the age of 17 or 18 (depending on the jurisdiction),[1] but there is increasing interest in both countries to use the conference process as a diversion from court for adults.[2] Despite critical analyses suggesting that conferencing has been imposed on indigenous people (see Blagg 1997; Cunneen 1997), at a Canberra conference in July 2000, Australian indigenous conference convenors were generally optimistic about the benefits of youth justice conferencing. However, in addition to conferencing, there are other justice forms in Australia that may prove to be as consequential (if not more so) in changing indigenous-white justice practices. Among them are consultation by magistrates and judges with indigenous justice groups on the disposition of particular cases, and special sentencing days convened by individual magistrates for indigenous cases. The point to underscore is that conferencing is one of several innovations on the justice landscape.

While other countries have introduced legislation that attempts to make restorative justice an explicit feature of juvenile and criminal justice systems (for Canada, see LaPrairie 1999; for England and Wales, see Dignan 1999 and chapter by Dignan and Marsh in this book) and while other countries are experimenting with forms of restorative justice such as victim offender mediation in the United States and some European countries (see chapters in this book by Umbreit et al and by Walgrave) and sentencing circles and other types of circles in the United States and Canada (see chapter by Lilles in this book), there has been an extraordinary degree of sustained, legislated activity in Australia and New Zealand that is not evinced in any other jurisdiction. What explains the force and speed with which these developments have taken hold in Australia and New Zealand compared to other parts of the world?

A satisfactory answer would call for a more sophisticated political analysis than I shall give here, but I offer some brief comments. Compared to the United States, Canada, and England and Wales, Australia and New Zealand continue

[1] The minimum age of criminal responsibility is 10 years in Australia and New Zealand. However, there can be differences in the minimum age a person can be prosecuted in court: in South Australia, the age is 10, but in New Zealand, it is 14 (except if the offence is murder or manslaughter).

[2] In New Zealand, conferences have been used to provide pre-sentencing advice to magistrates or judges in sentencing adults since 1995. In 1996, in New Zealand, three pilot schemes of "Community Panel Diversion" for adults were put in operation (Maxwell et al 1999). In the Australian Capital Territory, diversionary conferences have been used in adult cases (besides drink driving), but the number of cases is unknown. There is discussion in other jurisdictions about using conferences in adult cases, but no legislation has yet been passed or proclaimed.

to be more ideologically committed to policies that emphasise social welfare and crime prevention. And, compared to those European countries with a similar degree of welfare orientation and interest in victim offender mediation schemes (such as Belgium, Germany, and Austria), the common law tradition in Australia and New Zealand permits a greater degree of experimentation with new justice forms than is possible in civil law jurisdictions. Despite the fact that some elements of United States criminal justice policies have been incorporated into Australian jurisdictions (such as "three strikes" in Western Australia and the Northern Territory or the idea of "zero tolerance policing"), Australia and New Zealand pride themselves in actively not following "the lead" of the United States, and perhaps even of England. One clear example for Australia is its policy of harm reduction in controlling illegal drugs as compared to an explicit criminalisation policy in the United States.

Thus, we can read developments in Australia and New Zealand as reflecting something positive about the conditions of life and modes of governance in these countries, where there is an openness to addressing social problems and to redressing inequalities. At the same time, and as importantly, the neo-liberal turn in political life is as keenly felt in Australia and New Zealand as in other countries. For criminal justice policy, this means that services and programmes that might have been supported by the government in the past are now being returned to communities and volunteers (Crawford 1997). Conferencing as one kind of restorative justice may be viewed as a less costly method of disposing of cases; it can rely on the labour and good will of citizens, especially with its rhetoric of decentring professional authority. In the past decade in New Zealand, it has become apparent that while there is general consensus in the goals and aspirations for juvenile justice (and for child and family welfare) set out in the historic *Children, Young Persons and Their Families Act 1989*, a lack of government provision of the necessary resources has made it difficult to carry out the goals in a meaningful way.

The histories of the emergence of conferencing in Australia and New Zealand are quite different. In New Zealand, the conference idea emerged from a political process that involved both "top down" and "bottom up" activism: top down from state officials and professional workers (who were subsequently supported by members of the judiciary) and "bottom up" by Maori groups (Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare 1988). Also, in New Zealand, the 1989 Act arose from concerns with how decisions were made in child and family welfare cases; the application of conferencing to juvenile justice has been described as an "after thought" (Maxwell, personal communication). In Australia, by comparison, the idea of conferencing moved into the policy and legislative process almost entirely via mid-level administrators and professionals (including the police), exhibiting comparatively less of the constructive race politics evident in New Zealand.[3]

[3] I am not suggesting that racial engagement was absent in Australia; rather, I am saying that the country-wide discussion that took place in New Zealand during the 1980s, centring on the Treaty

Also in Australia, conferencing has mainly been applied to juvenile justice, not to child and family welfare.[4] My discussion here will focus on conferencing in juvenile justice cases.

CLEARING THE GROUND: REDRESSING MISCONCEPTIONS

There are several misconceptions about conferencing in Australia and New Zealand. They are derived from (1) incorrect characterisations of the "number of victim-offender programmes" existing in Australia; (2) the assumption that "Wagga model" (or police-run) conferencing is the norm in Australia; and (3) the claim that conferencing reflects the ways that justice used to be done (or is done) by indigenous people.

Misconception 1: "The number of programmes in existence"

Mark Umbreit's chart of "victim offender mediation programmes" in 16 countries (most recently published in an edited collection by Bazemore and Walgrave 1999: 216) reports that these programmes are "available in all jurisdictions" in New Zealand, but that Australia has "five" such programmes. It is not clear from which source Umbreit gleaned this figure (other figures are reported in his book *Victim Meets Offender* 1994: 5), but it is not accurate in characterising conferencing in Australia today.

The more accurate claim is that six out of eight Australian states and territories have legislated conferencing schemes; they are New South Wales, the Northern Territory, Queensland, South Australia, Tasmania and Western Australia. Two other jurisdictions use conferencing, but it is not statutory-based: the Australian Capital Territory (ACT) and Victoria. For the jurisdictions with statutory schemes, conferencing is available state wide in all except one (Queensland). Moreover, conferencing is not just an idea on the books: it is a high-volume activity in three jurisdictions (South Australia, New South Wales, Western Australia), which together run 4,500 to 4,800 youth justice conferences per year. In other jurisdictions (the ACT and Queensland), about 180 to 250 conferences are run in each jurisdiction per year. For the three remaining jurisdictions (the Northern Territory, Tasmania, and Victoria), conferencing has just recently been established or the numbers are considerably smaller.

of Waitangi, had the effect of framing juvenile justice (and welfare) reform within the terms of racial (indigenous) social justice.

[4] As reported in Strang (2000: 28–31), conferencing was introduced in child and family welfare (or child protection) cases in Victoria in 1992 on a limited basis; it has statutory authority in South Australia (*Children's Protection Act 1993*), in the ACT (*Children and Young People Act 1999*), and to a limited degree, in New South Wales (*Children and Young Persons Care and Protection Act 1998*, not proclaimed as of October 2000).

Counts of conferences are always smaller than the number of offenders (and victims) affected. If we wanted to estimate the annual number of offenders who have participated in a conference across the five jurisdictions where conferencing is underway (South Australia, Western Australia, New South Wales, Queensland and the ACT), the annual number is about 5,300 to 5,800 young people. There is, in short, a lot more going on in Australia than "five programmes". Here, I would want to reinforce a point made by Allison Morris that "conferences are not programmes, interventions or treatment. Rather they are a process of decision making about how best to respond to . . . offending" (Morris 1999: 181).

Misconception 2: Wagga model conferencing is the norm in Australia.

Commentators, especially those not from the region, are unaware of the chronology of events that moved conferencing into Australia and how the conferencing idea evolved over time.[5] In 1990, John MacDonald travelled to New Zealand with a colleague from the Policy and Planning Branch of the New South Wales Police Service to learn about family group conferencing. When he returned, he and his colleague (Steve Ireland) proposed that New South Wales adopt features of the "New Zealand model" of conferencing, but that it be located within the Police Service. A pilot scheme of police-run conferencing was introduced in Wagga Wagga, New South Wales in 1991 to provide an "effective cautioning scheme" (Moore and O'Connell 1994: 46). It was also MacDonald who initially told Braithwaite of the link between his theory of reintegrative shaming and the family group conferences that MacDonald saw in New Zealand. Braithwaite published *Crime, Shame and Reintegration* (1989) unaware of developments in New Zealand during the 1980s, which subsequently led to New Zealand's historic *Children, Young Persons and Their Families Act 1989*.

The theory of reintegrative shaming was connected to police-run (or "Wagga model") conferencing in 1991 and, in December 1993, at a meeting of Australian Police Commissioners, police services Australia wide were encouraged to trial Wagga model conferencing. Trials continued or were proposed in New South Wales, the ACT, Queensland, the Northern Territory, and Tasmania. Intense debate arose during the first part of the 1990s about the merits of Wagga and New Zealand models of conferencing.[6] Also during this period, parliamentary inquiries were established in Western Australia, Queensland, New South Wales

[5] The story of conferencing in Australia is more complex than what I sketch here. Each jurisdiction has a set of politics, personalities, and legislative precedents that call for a more detailed analysis.

[6] There are some features of the New Zealand model, as practiced in New Zealand, such as a break for private family decision-making, which are not typical in Australian conferencing. It is also my understanding (from published reports and discussions with others) that Wagga model conferencing is more incident-focused with less time spent in pre-conference preparation.

and South Australia to address the perceived problem of increased juvenile offending and to consider more effective approaches to juvenile justice (Alder and Wundersitz 1994: 1). Legislated approaches, which incorporated conferencing as one component in a hierarchy of responses to youth crime, emerged first in South Australia in 1993. Since then, all other Australian jurisdictions, except the ACT and Victoria, have introduced legislation, with all but one of the six statutory schemes *rejecting the Wagga model* in favour of the New Zealand model of non-police run conferences.

In other parts of the world where conferencing has been introduced (e.g., the United States, Canada, England and Wales), an opposite trend is occurring: in general, these jurisdictions use the Wagga model and, depending on the jurisdiction, conferences are used as a "caution plus" or as a diversion from court.[7] The Wagga model differs from the New Zealand model in two fundamental ways (see also footnote 6): it is facilitated by a police officer, and it draws heavily on the theory of reintegrative shaming. Practitioners in jurisdictions with the New Zealand model are more likely to say that reintegrative shaming is one of several theories structuring their practice, or that restorative justice, not reintegrative shaming, is the theory structuring their practice.

Today in Australia, the Wagga model is used in three jurisdictions, in none of them in large numbers. In the ACT, conferencing was introduced in 1995 and was sustained because of the Re-Integrative Shaming Experiments (RISE). In Tasmania, which proclaimed legislation in 2000 to establish New Zealand model conferencing, there is currently (as of December 2000) a parallel practice of both police-run diversionary conferences and facilitator-run community conferences, the latter being used in those cases that the police believe require a "more serious format". In the Northern Territory, police diversionary conferences were introduced in September 2000 for 10 to 17 year olds; these conferences are in addition to "post court" conferences, which judges or magistrates can order for 15 to 17 year olds as a diversion from mandatory sentencing.[8] Two key articles in the field (Braithwaite and Mugford 1994; Blagg 1997) draw on

[7] In England and Wales, Wagga model conferencing is used in the Thames Valley Police's restorative cautioning programme, applied to all cautions as of April 1998 (Young and Goold 1999). At the same time, other forms of legislated conferencing have since been introduced. The *Crime and Disorder Act 1998* creates a hierarchy of escalated responses to juvenile offending, first "reprimands", then "final warnings", and if a subsequent offence comes to the attention of the police, then the offender is likely to be charged in court. "Final warnings" and court "reparation orders" use some elements of non police-run conferencing. The *Youth Justice and Criminal Evidence Act 1999* provides for automatic court referral of an offender to a "youth offender panel", if the offender meets certain conditions (first appearance in court, guilty plea entered). The panels differ in composition from those in Australia and New Zealand, in particular, two out of three panel members are lay community representatives, in addition to the offender, victim, and their supporters.

[8] The initial legislation establishing "post court" conferences (*Juvenile Justice Act 1997*, amended 1999), targeted 15 to 16 year olds; it was again amended in June 2000, when the age of juveniles was raised from 16 to 17. "Post court" conferences are described as one of "several programmes" in lieu of a mandatory 28-day detention sentence for juveniles 15–17 years who are convicted of a second property offence. Police-run diversionary conferences were established by another legislative mechanism, by changes to the *Police Administration Act*, assented November 2000.

examples of the Wagga model conferencing for Australia and, unless readers know otherwise, they may believe that this model remains the norm in Australia when it is not. Despite considerable debate concerning police-run conferencing (Alder and Wundersitz 1994) and police presence in conferences more generally (Bargen 1996, 1998), there is no research on the comparative merits of police-run and nonpolice-run conferences, on the effects of any police presence at a conference, or on the strengths and drawbacks of conferences lodged within police organisations (but see the chapter by Young in this book).

Misconception 3: Conferences reflect or are based on indigenous justice practices.

The claim that conferences reflect or are based on indigenous justice practices (or on premodern forms of justice) is ubiquitous; among the more prominent examples are Braithwaite (1999: 1), Consedine (1995: 12), and Weitekamp (1999). Efforts to write histories of restorative justice, where a pre-modern past is romantically (and selectively) invoked to justify a current justice practice, are not only in error, but also unwittingly reinscribe an ethnocentrism they wish to avoid. The point I shall develop is straightforward: people should be honest about what conferencing is and what it is not.

In New Zealand, conferencing emerges as a story of Maori political challenge to white New Zealanders and to their welfare and criminal justice system. Investing decision-making practices with Maori cultural values means that family groups (whanau) should have a greater say in what happens, that venues should be culturally appropriate and that processes should accommodate a mix of culturally appropriate practices. New Zealand's minority group population includes not only the Maori but also Pacific Island Polynesians. Therefore, with the introduction of conferencing, came awareness of the need to incorporate different elements of "cultural appropriateness" into the conference process. But the devising of a justice practice that is *flexible and accommodating* toward cultural differences does not mean that conferencing *is* an indigenous justice practice. Maxwell and Morris (1993: 4) are clear on this point:

> "A distinction must be drawn between a system which attempts to re-establish the indigenous model of pre-European times and a system of justice which is culturally appropriate. The New Zealand system is an attempt to establish the latter, not to replicate the former. As such, it seeks to incorporate many of the features apparent in whanau decision-making processes and seen in meetings on marae today, but it also contains elements quite alien to indigenous models."

Conferencing is better understood as a fragmented justice form: it splices white, bureaucratic forms of justice with elements of informal justice that may include non-white (or non-Western) values or methods of judgment (Daly 1998; see also Pavlich 1996). With the flexibility that informal justice offers, practitioners,

advocates and members of minority groups may see the potential for introducing culturally sensible and responsive forms of justice. In this way, conferencing has the potential to be open to different cultural sensibilities. But to say that conferences are "like" indigenous justice practices is to re-engage a white-centred view of the world. It erases the many histories of indigenous justice practices, some of which would not be comprehensible or acceptable in the modern worldview. And, as Blagg (1997) suggests, it may lead to a "double failure" for indigenous groups: not only will they appear to have "failed" to act in a law-abiding fashion, and but also they will appear to have "failed" to act appropriately as indigenous people according to a white-centred justice script (see Daly 2000 for evidence of this problem).

A great deal was learned in the 1970s and 1980s from socio-legal analyses of justice practices in pre-capitalist tribal societies. In Abel's two-volume treatise (1982), he and his colleagues are clear that "the characteristics of informal justice in pre-capitalist societies . . . cannot be re-created under Western capitalism" (Abel, vol 2, 1982: 2). To this point, it should be added that modern indigenous justice forms have been affected by centuries of colonialism and by having to adopt "both ways" of thinking to crime and to legal or political authority in response to crime (Williams 1987).

JURISDICTIONAL VARIATION

In Australia and New Zealand, there is considerable variation in where conferences are located on a flow chart of discretionary decision-making, and where they are housed organisationally.[9] Each jurisdiction has a different history and politics of what preceded conferencing and this affects how the idea has taken hold and evolved. My discussion here focuses on Australia.

Although conferences vary, they take the following form when used as a diversion from court prosecution. A young offender (who has admitted to the offence), his or her supporters (often, a parent or guardian), the victim, his or her supporters, a police officer, and conference convenor (or coordinator) come together to discuss the offence and its impact. Ideally, the discussion takes place in a context of compassion and understanding, as opposed to the more adversarial and stigmatising environment associated with the youth court. Young people are given the opportunity to talk about the circumstances associated with the offence and why they became involved in it. The young person's parents or supporters discuss how the offence has affected them, as does the victim, who may want to ask the offender "why me?" and who may seek reassurances that the behaviour will not happen again. The police officer may provide details of the offence and discuss the consequences of future offending.

[9] Portions of the discussion on jurisdictional variation and research draw from Daly and Hayes (2001).

After a discussion of the offence and its impact, the conference moves to a discussion of the outcome (or agreement or undertaking) that the young offender will complete. Jurisdictions vary in the length of time to complete an outcome: this ranges from six weeks in Western Australia (in practice, although not stipulated in the legislation), to six months in New South Wales (which can be extended) and twelve months in South Australia. The sanctions or reparations that are part of agreements include verbal and written apologies, paying some form of money compensation, working for the victim or doing other community work, attending counselling sessions, among others. While all jurisdictions prefer that the outcome be reached by consensus, they vary on which people, at a minimum, must agree to it (or have a "veto"). For example, in South Australia, the young person and the police officer must, at a minimum, agree to the undertaking; in New South Wales (a jurisdiction where a police officer need not be present), the young person and victim (if present) must agree to the outcome plan; and, in Queensland, the young person, victim, and police officer must approve the outcome. In all jurisdictions, the outcome is a legally binding document.

Among the major dimensions of variation in diversionary conferences are the kinds of offences that can be conferenced, the amount of time to complete outcomes and upper limits on outcomes, and the degree to which a jurisdiction is engaged in high-volume activity. At one end of a continuum is Western Australia, which has a list of offence types that may not be conferenced ("scheduled offences"); it tends to conference a high volume of less serious cases (including traffic offences) with relatively short lengths of time to complete the outcome of a family meeting. At the other end is South Australia, which has no specifically prohibited offences (although the *Act* states that conference offences are those that "can be dealt with as a minor offence" because of the "limited extent of the harm", among other reasons). While South Australia conferences a high volume of cases, it uses conferences in serious offences (including sexual assault), and has the highest maximum of community service hours (300) and the longest period of time to complete an undertaking.

Some people may desire greater uniformity in legislation and practices, but there may be strengths to experimenting with a variety of practices during this early phase. For example, New South Wales has introduced an innovative method for providing legal advice to young people: a free telephone hotline. In light of the critiques of conferencing for promoting coerced admissions, coupled with concerns by the defence bar (especially in Queensland) for the disclosure of pleas to some offences in any future court sentencing, the hotline is an effective means of legal access. In Queensland, which currently convenes conferences only in the state's southeast and has a relatively small number of conferences per year (about 180 for 1999–2000), more resources can be put into preparation for each conference, including pre-conference face-to-face interviews with the victim and young offender. And, in the ACT, contrary to the usual focus on juvenile offending, adults were conferenced for drink driving offences during 1995–97 as part of the Re-Integrative Shaming Experiments.

LEGISLATION AND PRACTICE IN CONTEXT

In the early 1990s, during the initial phases of legislative development in Australian jurisdictions, delegations of state parliamentary committees travelled to New Zealand to learn what was happening there. New Zealanders played key roles in laying the legislative foundations for Australian statutory schemes and in demonstrating to a world audience that it was possible to make a different kind of justice work. A history has yet to be written of that early period of the transmission of and receptivity toward a new justice idea. It is likely, however, that without the goodwill and generosity of key New Zealanders, developments would have been slower.

The story behind the emergence of conferencing, both its politics and the legislation preceding it, is unique to each jurisdiction. However, several broad characterisations can be made. First, some jurisdictions (New South Wales, Queensland, and Tasmania) began by experimenting with police-run conferences, and then moved to statutory-based schemes. Others (South Australia and Western Australia) never used police-run conferences; instead, they moved more rapidly into drafting legislation. Second, there are common elements to the legislation. In all the legislated schemes, there is a central role for police formal cautions (or police diversion) for first- or second-time offenders. In general, conferences are viewed as appropriate for relatively more serious offences or for young people who have been in trouble before. Another common element is an effort to fuse "welfare" and "justice" concerns, that is, to see the conference process as both assisting young people as well as holding them accountable for crime. New Zealand legislation differs markedly from that in Australia in that the "welfare" and "justice" responses are incorporated in a legislative framework that includes both youth justice and child welfare. In Australia, the legislative focus is almost entirely on youth justice. However, the point that Maxwell and Morris (1993: 188–90) make for the New Zealand legislation applies with equal force to that in Australia: without an "explicit or implicit ordering of the objectives of the *Act*", there remain "inherent contradictions" in what justice system decisions ought to be focused upon. It appears as though legislators put incommensurates together, expecting that justice system workers would sort them out. The politics underlying the legislation is that consensus could be achieved by appearing to be "tough" with a diversion scheme that retained elements of rehabilitation.

The only two Australian jurisdictions having Children's Panels[10] in the 1960s through the 1980s—South Australia and Western Australia—were the

[10] Children's Panels were introduced in 1964 (Western Australia) and 1972 (South Australia) as a diversion from court for admitted offenders. These panels were normally composed of a police officer and social welfare worker, along with the child and his/her parents (see Wundersitz 1997). South Australia's and Western Australia's experiences with panels may have facilitated legislative interest in conferences (and restorative justice, more generally), although panels and conferences differ in scope and aim.

earliest to proclaim legislation to establish conferencing. However, as discussed in Wundersitz (1992; as cited in the South Australian Parliamentary Select Committee Report 1992: 25), the two states utilised panels quite differently: a substantially higher share of juvenile cases were disposed of "informally" (that is, diverted from court) in South Australia (about 62 per cent between 1979–91) than in Western Australia (30 per cent in the early 1980s, dropping to 20 per cent or less by 1991). One reason for the difference is that referral procedures in the states differed: South Australia had Screening Panels, composed of a social worker and police officer, but Western Australia did not (South Australian Parliamentary Select Committee Report 1992: 167–68). More of a "social worker perspective" was therefore present in South Australian court diversion.

The introduction of conferencing in South Australia follows a century-long tradition of being a "social laboratory" and "trend setter" in legal reform (South Australian Parliamentary Select Committee Report 1992: 7). It was among the first jurisdictions in the world (arguably the first) to establish a separate court for juveniles (*State Children's Act 1895*), the first Australian jurisdiction to introduce children's aid panels (*Juvenile Courts Act 1971*), and then the first Australian jurisdiction to emphasise elements of a "justice model" in juvenile justice decision-making with the *Children's Protection and Young Offenders Act 1979*. It was the first jurisdiction off the block in establishing a statutory-based conferencing scheme (*Young Offenders Act 1993*) with its legislation and principles largely based on the New Zealand model. However, its legislation is less detailed than that subsequently put forth in Queensland and, especially, in New South Wales. For example, whereas the South Australian legislation devotes three pages to rules and principles governing conferencing, that for New South Wales (*Young Offenders Act 1997*) is four times longer.

Compared to South Australia and Western Australia, New South Wales took longer to introduce a statutory-based conferencing scheme, despite the proliferation of a variety of conferencing approaches in the first half of the 1990s. Drawing on Jenny Bargen's detailed summary (1996: 10–19), police-run conferencing was in place in Wagga from 1991 to 1994, when it was replaced by a pilot of Community Youth Conferencing (CYC), under the aegis of the Attorney-General's Department and run by local justice centres. Since 1987 and prior to the introduction of a "more effective cautioning scheme" in Wagga Wagga, Community Aid Panels (CAPs) had been operating for adults and juveniles as a kind of pre-sentence mitigation. CAPs were phased out by the mid 1990s, and a pilot CYC scheme was introduced in a small number of New South Wales districts. The CYC's had some elements in common with South Australian conferencing; however, Bargen (1996) says that there were few legal protections for young people and, without a legislative framework, police discretion was not sufficiently regulated, especially when giving a formal caution. Upon evaluating the CYCs in 1995, the New South Wales government established a Working Party to consider the recommendations that came from it, to write a discussion

paper and to draft legislation. In June 1997, the *Young Offenders Act* was passed in the New South Wales Parliament, and it was proclaimed in April 1998. Unlike legislation in other Australian jurisdictions, the New South Wales *Act* explicitly draws on the United Nations Convention of the Rights of the Child (CROC), which was ratified by Australia in December 1990 (for text, see Alston and Brennan 1991; for background, see Dolgopol 1993). With over fifty articles and sub-sections, the CROC lists a variety of children's rights, including the right "to be heard, to be protected from abuse, to participate in all decisions concerning their lives, . . . to have equitable access to justice through the legal system and be able to choose an advocate to assist them . . ." (Bargen 1996: 16).

The New South Wales *Act*, which also drew a good deal from New Zealand's *Children, Young Persons and Their Families Act 1989*, is a model for legislation concerned with offenders and their rights in the criminal process; however, it is less adequate in contemplating the role and "rights" of victims. Indeed, in all legislation to date, the place of victims in the conferencing process is generally secondary to offenders. In light of the history of criminal law jurisprudence and safeguards of the accused against abuses of state power, it may be difficult to know where victims should belong in criminal law and procedure. However, it is worth noting that the potential of conferencing to bring victims effectively into the criminal process is far less regulated and more uncertain than it is for offenders.

RESEARCH ON CONFERENCING

Knowing how conferences vary in process and organisation is crucial to comparing results from research in different jurisdictions. For example, in New Zealand where, in the past decade, 70 to 80 per cent of youth justice cases were disposed of by police diversion, with the remaining 20 to 30 per cent referred to a conference (10 to 12 per cent as pre-sentencing advice to the court and the remainder as diversion from court) and where less attention was given to ensuring that victims attended the conference (at least in the first several years of conferences), we should expect to see lower levels of victim satisfaction than in a jurisdiction like Queensland, where more time is spent on case preparation, relatively less serious cases are conferenced (even though some serious cases are conferenced), and victims have greater power. In Queensland, a victim's consent is required for the police *to refer a case* to conference, and victims can veto the conference outcome. What follows is a necessarily selective review of research. In particular, I do not review evidence on conferencing and re-offending because that would require a close examination of the different methods and definitions used from study to study, which is itself the grist for another piece.

Conferencing was first researched in New Zealand (Maxwell and Morris 1993, 1996). Interviews with 157 young offenders and 176 of their parents

attending family group conferences between August 1990 and May 1991 show that 84 and 85 per cent, respectively, were satisfied with the outcome of the family group conference (satisfaction decreased to 70 per cent for young offenders receiving the most severe penalties) (Maxwell and Morris 1993: 115). By comparison, just half of victims reported being satisfied with the outcome (the level of satisfaction was even lower for sentencing advice to courts) (Maxwell and Morris 1993: 120).[11] When examining the sources of dissatisfaction in the open-ended portions of the interview (Maxwell and Morris 1993: 121), one sees that victims were critical of too lenient outcomes. Moreover, some were "simply never informed about the outcome" (Maxwell and Morris 1996: 100). A quarter of victims said "they felt worse as a result of attending" the conference. While many reasons were given for this, Maxwell and Morris suggest that the most frequent was the victim's sense that the young person and his/her family did not feel "truly sorry" (1996: 100).

Studies of conferences in Queensland, New South Wales and Western Australia, focused mainly on participants' perceptions of fairness of the process and on their satisfaction with the process and outcome.[12] Collectively these studies show that conferences receive high marks on the fairness and satisfaction variables. In Queensland, Palk et al (1998) analysed survey data collected by the Department of Justice over a thirteen-month period. Of the 351 offenders, parents (or carers), and victims interviewed, 98 to 100 per cent said the process was fair, and 97 to 99 per cent said they were satisfied with the agreement made in the conference (1998: 145). To statements such as "I was treated with respect", "I got to have my say", and "The conference was just what I needed to sort things out", 96 to 99 per cent of participants agreed (Palk et al 1998: 146).

In New South Wales, Trimboli (2000) gathered data from 969 victims, offenders, and offenders' supporters across all state regions during 1999. Overall, 92 to 98 per cent of the groups said that the conference was "somewhat" or "very fair" to victims and to offenders, with more detailed procedural justice variables (such as "You were treated with respect" and the "Conference respected your rights") showing similar results (Trimboli 2000: 36–40). Across the three groups, 80 to 97 per cent agreed that they were "satisfied with the conference outcome plan" (Trimboli 2000: 45). The study goes beyond the fairness and satisfaction variables in asking questions about the degree of information participants had about the conference and what they expected would happen,

[11] It is, of course, not clear what it means to be "satisfied" with the conference process and outcome. Maxwell and Morris (1993: 116) note that "researchers have uniformly failed to identify what it actually means when parents and young people say they are 'satisfied' . . . This [may] mean nothing more than relief that 'nothing worse' happened". "Satisfaction" with *an outcome* is partly a function of what people expect and partly a function of the outcome itself. Likewise, the meaning of being dissatisfied is varied and has multiple sources.

[12] These studies, provide some evidence of participants' views on the conference process, but they are constrained by government demands on researchers for a quick evaluation of conferencing and insufficient resources to conduct more in-depth research.

and what they viewed as the best and worst features of the conference process and outcome.

In Western Australia, following passage of the *Young Offenders Act 1994*, Cant and Downie (1998) conducted an evaluation of family meetings and the *Act*. In the Perth portion of the study, they interviewed 265 offenders, their parents, and victims who had participated in family meetings during 1996–97. For fairness of the process, 90 to 95 per cent felt that they (or their child) were treated fairly (Cant and Downie 1998: 45, 51, 58). For the global satisfaction item on "how the Juvenile Justice Team dealt with" the case, 90 to 92 per cent of offenders and their parents were satisfied (Cant and Downie 1998: 47, 52), but fewer victims (83 per cent) were (1998: 58).

In Tasmania and the Northern Territory, conferencing has only just begun under statutory-based schemes. Tasmanian police have been running conferences since 1994, but there is no research on those conferences. With the proclamation of the *Youth Justice Act 1997* in 2000, a research study of conferencing is now underway. Except for a study of Wagga model conferencing in Alice Springs (Fry 1997), there is no research on conferencing in the Northern Territory. The Territory's 1999 legislation includes conferencing as one of several court-ordered diversion programmes as alternatives to a 28-day minimum period of detention; unlike other statutory schemes, what is termed "post court" conferencing in the Territory is used as a diversion from incarceration, not court. However, since September 2000 and owing to pressure caused by the mandatory detention of juveniles for a second property offence conviction, the Territory has shifted to a policy of diverting juvenile cases from court with a variety of mechanisms, including police diversionary conferences for 10 to 17 year olds. The Territory is the first jurisdiction to have introduced a legislative basis for police-run conferencing, with changes made to the *Police Administration Act* (Part VII Police Powers, Division 2b, assented on 14 November 2000). Thus, in the Territory today, both the New Zealand and Wagga models are operating.

During a small pilot project in 1995–97, Victoria used court-referred conferencing. The project (which is still running) targets young people who have appeared in court previously, but who are deemed eligible for an alternative to probation. Markiewicz (1997: vii) reports that "victims found the process helpful and healing" and "young people [said] that the conference had a beneficial impact on them" and that it was "preferable to probation".

The Re-Integrative Shaming Experiments (RISE) Project (Canberra, ACT) is important for its research design of randomly assigning RISE-eligible cases to court or conference. Assuming there are an adequate number of cases, random assignment ensures that the two groups are equivalent on both known and unknown variables. When using this design, any post-treatment differences between the court and conference groups can be attributed to the "treatment" rather than to general characteristics of the individuals making up each group. There is no other project with a randomised design in the

region, and just one other in the world (McCold and Wachtel 1998). RISE began in 1995 and set out to measure the impact of "restorative policing" on offenders' and victims' perceptions of procedural justice and on offenders' post-conference offending. Researchers also plan to compare the monetary costs associated with court and conference. The RISE project will test Braithwaite's (1989) theory of reintegrative shaming which, in a nutshell, argues that individuals will be most effectively "shamed" for their behaviour by those close to them and that the *act* not the actor should be the target of shame. Reintegrative shaming presumes elements of Tyler's (1990) theory of procedural justice, which emphasises respect, decision-makers' neutrality, being treated fairly and having a say.

RISE gathered data on these offences: drink driving, juvenile property (personal and organisational victims) and juvenile violent crime (including adult offenders up to 29 years old). Highlights include the following (Strang et al 1999; Strang 1999: 194–95):

—Offenders report greater procedural justice (defined as being treated fairly and with respect) in conferences than in court.
—Offenders report higher levels of restorative justice (defined as the opportunity to repair the harm they had caused) in conferences than in court.
—Conferences more than court increased offenders' respect for the police and law.
—Victims' sense of restorative justice is higher for those who went to conferences rather than to court (defined as, for example, recovery from anger and embarrassment).

The results from RISE suggest that conferences deliver a better kind of justice than do courts. There remains a mass of data to be analysed and reported, including similarities and differences in court and conference experiences, offence-based variation in procedural and restorative justice, the comparative effects of court and conference on re-offending, and the costs associated with courts and conferences.

SAJJ RESEARCH PROJECT

In planning SAJJ, I wanted to build upon, but depart from RISE. Both projects are similar in that they are assessing whether conference participants experience elements of procedural and restorative justice. SAJJ differs from RISE in these ways:

—SAJJ does not use a randomised experimental design to compare outcomes of court and conference cases.
—SAJJ is studying non-police facilitated conferences.

—SAJJ focuses on whether (or how) participants' roles and social locations affect judgments of restorative and procedural justice.
—SAJJ examines specific movements between an offender and victim during and after a conference, whereas RISE centres on an offender's behaviour, recording relatively less about the victim's behaviour or the relationship between an offender and victim.
—SAJJ is not testing a theory of reintegrative shaming or restorative community policing.

For the last item, the SAJJ project takes an *iterative* view of restorative justice, that is, one that emerges from moving between actual practices and ideal theoretical principles. RISE addresses questions on the impact and the costs of court and conference, using a research design that can test for the different effects of each. SAJJ addresses questions of variability in the conference process (along dimensions of procedural and restorative justice), variability in participants' judgments of the "success" of the conference process and the variable effect of conferences for different groups and in different areas.

SAJJ Data Collection

SAJJ had two waves of data collection in 1998 and 1999 (Daly et al 1998). In 1998, SAJJ researchers observed a total of 89 conferences that were held during a twelve week period in the metropolitan Adelaide area and in two large-sized country towns (Port Augusta and Whyalla). The observed conferences were selected on the basis of the offence category. SAJJ-eligible offences were personal crimes of violence and property offences that involved personal victims or "community victims" (such as schools, churches or housing trusts). Excluded were shoplifting cases, drug cases and public order offences.

Here are some features of the conference sample:

—Forty-four percent of conferences dealt with personal crimes of violence (serious and simple assault, but including robbery and sexual assault), and 56 per cent with property offences (breaking and entering a residence, school, or community building; property damage, including arson; illegal use [or theft] of a motor vehicle; and embezzlement).
—In 68 per cent of the conferences, the victim was a personal victim of crime; 20 per cent were organisational victims, and the remaining 12 per cent were a combination of the two (either personal-occupational or personal-organisational victims).
—In 28 per cent of conferences, the victims were under 18 years of age.
—Of the personal victims of violence, close to half required medical attention and 35 per cent needed to see a doctor.
—Of the property offence victims, the total amount of out-of-pocket expenses (that is, after insurance) ranged from no expenses to 6,000 dollars; the mean was over 900 dollars and the median was 400 dollars.

—In 74 per cent of the conferences, the victim was present and, in an additional 6 per cent, a victim representative was present.
—In 15 per cent of the conferences there was more than one offender in the conference.
—The number of conference participants (*excluding* the coordinator and the police officer) ranged from 1 to 12, with a median of 5 participants.
—Excluding the coordinator and the police officer, 53 per cent of the participants were male and 66 per cent were adult (18 years and over).
—Including the coordinator and the police officer, 61 per cent of the participants were male and 71 per cent were adult.
—12 per cent of conferences had Aboriginal offenders and seven per cent had offenders of other racial or ethnic minority groups.
—79 per cent of conference offenders were male and 49 per cent of conference victims were male.
—Half of the conferences involved offences between people who did not know each other at all.

For each conference, the police officer and the coordinator completed a self-administered survey,[13] and a SAJJ researcher completed a detailed observational instrument. The project aimed to interview all the young offenders (N = 107) and the primary victim associated with each offence (N = 89) in 1998 and a year later, in 1999. Out of a total of 196 offenders and victims, SAJJ researchers interviewed 172 (or 88 per cent) in Year One; of that group, 94 per cent were again interviewed in Year Two. Therefore, the overall response rate (that is, completed interviews for victims and offenders in Years One and Two) is 82 per cent.[14]

The interview schedules in 1998 and 1999 had open- and close-ended items. All the interviews were conducted face to face, except those with victims who did not attend the conference, which were conducted by phone. For the offenders, the length of the interview was 35 to 40 minutes; for the conference victims, the interview length was typically longer, about 45 to 60 minutes. The interviews were tape-recorded and the open-ended questions were transcribed.

In Year One, the focus of the interviews was on the offenders' and victims' judgments of whether elements of procedural and restorative justice were present in the conference. In Year Two, we were interested in how the passage of time affected offenders' and victims' judgments of the process and of promises

[13] The police and coordinator surveys have items about perceived procedural and restorative justice, about the judgements of the other's behaviour and professionalism in the conference, and about their "justice aims" for that particular conference. See Daly et al (1998: 31–45) for discussion of the police and coordinator surveys and their links to the SAJJ researcher's observational protocol. Where appropriate, the same items were used in the instruments for the five groups (police officer, coordinator, SAJJ observer, offender, and victim), especially those tapping procedural and restorative justice.

[14] Disaggregated response rates are as follows. Offenders: 93/107 = 87 % in Year 1; 88/93 = 95 % in Year 2. Victims: 79/89 = 89 % in Year 1; 73/79 = 92 % in Year 2. Overall, interviewed in both years: 161/196 = 82 %.

made; whether victims and offenders changed their attitudes toward the other; whether or not the conference had an impact on "staying out of trouble" (for offenders) or on "getting the offence behind them" (for victims); and for victims, how their experience in the conference process affected (or not) their views of young people and the politics of crime control. Here I shall report selected findings from the quantitative items. I see the project's strength, however, in providing a rich and detailed blend of quantitative and qualitative data on the conference process and its effects on participants.

Procedural and Restorative Justice

Like previous studies, the SAJJ project finds very high levels of procedural justice registered by offenders and victims at conferences. To items such as, "were you treated fairly", "were you treated with respect", "did you have a say in the agreement", among others, 80 to 95 per cent of victims and offenders said that they were treated fairly and had a say. Victims' responses were even higher on the procedural justice items than offenders'.

Compared to the high levels of perceived procedural justice, there is *relatively* less evidence of restorativeness. The measures of restorativeness tapped the degree to which offenders and victims recognised the other and were affected by the other; they focused on the degree to which there was positive movement between the offender and victim and their supporters during the conference. Whereas procedural justice was present in 80 to 95 per cent of conferences, restorativeness was present in about 30 to 50 per cent (depending on the item), and perhaps most solidly in about one-third of conferences. These findings suggest that although it is possible to have a process perceived as fair, it can be harder for victims and offenders to resolve their conflict completely or to find common ground, at least at the conference itself.

Limits on Repairing the Harm

It is often remarked that, if conference processes do not go well, this may be overcome by "better practices" and appropriate resources (see discussion in Maxwell and Morris 1996: 108). While improvements may help, other constraints are operative. In particular, I suspect that there are *limits* on offenders' interest in repairing the harm and that there are *limits* on victims' capacity to see offenders in a positive light. Indicative of these limits is a sampling of responses by offenders and victims to interview questions asked in 1998.

The young people (offenders) were asked to recall their feelings before the conference: 31 per cent said that the conference was not important to them, and 53 per cent replied that they had not thought about what they would want to do or to say to the victim. For what occurred in the conference, only half said that

the victim's or the victim representative's story had an effect on them. Over 40 per cent said that they were still not sorry or they were less sorry for the victim after the conference.

For the victims' feelings before the conference, 34 per cent said they had not thought about what they wanted to do or to say to the offender. For what occurred in the conference, just 38 per cent said that the offender's story had an effect on them, and just 53 per cent said they had a better understanding of why the offender committed the offence. When interviewed a year later, in 1999, only 28 per cent of victims believed that the main reason the offender apologised was because she/he "was really sorry". The rest thought that the offender wasn't sorry, but thought she/he would get off easier if she/he said sorry (31 per cent), the offender was pushed into saying sorry (26 per cent), and that the offender said sorry to make his/her family feel better (15 per cent). When asked if they would say that the young person did a bad thing because of who they *were* or that the young person was not bad but what they did was bad, one third of victims elected the first option, seeing the young person as intrinsically a bad person. Therefore, for a significant minority of victims—one-third—it was not possible to separate the "badness" of the act from the person, suggesting little capacity or desire to reintegrate the offender into the community.

Conference Dynamics and Emotions

On the whole, conferences are calm events, and participants are civil towards each other. In 10 per cent of conferences, there were angry or aggressive remarks aimed at the young person, and these were made mainly by victims or their supporters. In 9 per cent of conferences there was arguing between participants, with varied combinations of protagonists; however, in half the cases, it was the young person and his/her parent or guardian who argued. Compared to angry remarks and arguments, there was more crying: 25 per cent of the conferences had crying participants, most of whom were young people and their parents and supporters. Based on what they could observe in conferences, SAJJ researchers thought that 11 per cent of victims were revictimised in some way by the young person or their supporters. Interviews with the victims revealed that a somewhat higher percent (18 per cent) said they left the conference upset by what the offender or their supporters said. Again, based on what they could observe, SAJJ researchers found that, in 9 per cent of conferences (or eight conferences), people intimidated others. In five of these eight conferences, the target of the intimidation was the offender; the people intimidating the offender were the offender's supporters, the victim or victim's supporters, and in one instance, the apprehending police officer. In another item asking the SAJJ observer if the young person appeared to be "a powerless youth in a roomful of adults" (adapted from the evocative comment by Haines 1997), 62 per cent said "no, not at all". These findings suggest that, contrary to many commentators who have

been concerned with inappropriate forms of coercion and control of young people in the conference process, and especially by police officers, SAJJ researchers find that, young people can hold their own and that with the exception of angry remarks made, the people who argue with or intimidate young people are their family members, not the police or victims. Moreover, in three out of eight conferences, the young person intimidated the victim (in all three cases the victim was also a young person). To the question, "do you think you were disadvantaged in the conference because of your sex, race or ethnicity, or some other reason?", small percentages of both victims (5 per cent) and offenders (6.5 per cent) said "yes".

Impact of Conferences on Victims

Conferences reduce victims' anger and fear. Over 75 per cent of victims felt angry toward the offender before the conference, but this dropped to 44 per cent after the conference and was 39 per cent a year later. Close to 40 per cent of victims were frightened of the offender before the conference, but this dropped to 25 per cent after the conference and was 18 per cent a year later.

For victims who attended conferences, there is an increasing positive orientation toward the offender over three points in time: from eight per cent feeling positive pre-conference in 1998 to 38 per cent after the conference and 44 per cent a year later. Negative orientations toward offenders were high before the conference (61 per cent of victims felt negative), dropping to 32 per cent after the conference and rising slightly to 40 per cent a year later. Thus, while there are increasing positive orientations of victims toward offenders, a similar proportion of negative and positive orientations was found a year later. Despite these equivocal findings, in the 1999 interviews, close to 80 per cent of victims said that the conference was worthwhile and 63 per cent said they had fully recovered from the incident.

Satisfaction

Like findings from research in New Zealand (Maxwell and Morris 1993: 115–122), SAJJ finds that offenders are more likely to be satisfied than victims with how their case was handled: whereas 90 per cent of offenders were satisfied or very satisfied, 73 per cent of victims were. One reason (among several) for victims' greater dissatisfaction and offenders' greater satisfaction is their contrary perceptions of how easy (or harsh) the outcome is. In a sub-set of cases that contains only the conference pairs of offenders and victims (N = 53)[15], 17 per cent

[15] This sub-sample includes those pairs having a victim who attended the conference and the primary offender when there were multiple offenders present, both of whom were interviewed in Year 1.

of offenders thought the agreement was "too easy" and 68 per cent thought it was about right; the remaining 15 per cent thought it was too harsh. Victims were twice as likely as offenders to say the agreement was too easy (36 per cent); 62 per cent said it was about right, and only 2 per cent thought it was too harsh. Of note is that the SAJJ observer's responses for this sub-set of cases are nearly identical to those of the *offender*, suggesting that a portion of victims either expected (or wanted) more in the way of a sanction or reparation than either the offender or researcher believed was necessary or just.

Of the larger sample of conference victims interviewed in Year One, 12 to 20 per cent registered negative reactions to the conference: 13 per cent each said they felt pushed into things and the conference made them angry, 16 per cent thought that the conference was a waste of time, and 17 per cent were "not at all" satisfied with how their case was handled. Likewise, for the larger sample of offenders interviewed in Year One, 14 to 22 per cent registered negative reactions to the conference: 22 per cent said they felt pushed into things, 14 per cent said that the conference made them angry, and 15 per cent thought that the conference was a waste of time. The majority of both victims (52 per cent) and offenders (61 per cent) said that the agreement was *better* for the offender than what they expected, and small proportions said it was *worse* for the offender than what they expected (12 and 15 per cent for victims and offenders, respectively). To the item "the agreement was unfair to you", 20 per cent of victims and 11 per cent of offenders agreed. Therefore, offenders came into the conference anticipating that outcomes would be more severe than they turned out to be, and, while some were critical of elements of the conference process, very high proportions said they were "satisfied". As Maxwell and Morris (1993: 128) suggest from New Zealand data on offenders, so too for SAJJ offenders: the meaning of being "satisfied" was "relie[f] that nothing worse (more severe) happened". A portion of victims came into the conference with raised expectations, which were subsequently not met; in addition to outcomes, other elements were salient to victims, and in particular, how the offender acted toward them. Two variables—the offender not showing remorse and the offender not taking responsibility for what they did—were the most frequently mentioned reasons for victims' negative judgements of offenders. Victims can separate their conference experience, and the degree of satisfaction they have with it, from the general idea of conferences. Whereas 74 per cent were satisfied with how *their case* was handled and 77 per cent said they would go to a conference again, a somewhat higher share (87 per cent) recommended that the government keep conferencing.

CONCLUSION

As one form of restorative justice, conferences have become a major fixture in New Zealand and in most Australian jurisdictions in handling juvenile crime.

The degree of variation in how conferences are organised is substantial, and this creates research opportunities to explore the strengths and limits of various models. In addition to using conferences in juvenile cases, there are other justice innovations occurring in the region, including using conferences in adult cases and collaborative methods by which indigenous groups and white justice officials decide how to handle certain cases. All of these developments are quite recent so that with the exception of the first wave of New Zealand research (Maxwell and Morris 1993), we know very little about what happens in conferences and how they affect people. The RISE and SAJJ projects promise to fill many gaps in our knowledge of the conference process and how it compares with court processes. Other research projects are planned or are underway, including studies in New South Wales and Tasmania, a second major study in New Zealand, and a programme of international collaborative research on conferencing.[16]

Several observations can be made about the current state of legislative development and research on conferencing. First, my impression is that there is a form of "jurisdictional jingoism" in Australia, where spokespeople for jurisdictions see their state or territory as having the best approach to conferencing. Relatedly, there can also be a kind of jurisdictional tunnel vision where spokespeople can only comprehend the conferencing idea through the lens of what occurs in their jurisdiction. Some cross-jurisdictional understanding is now emerging: (1) a National Practitioners' Forum was held in November 1998 at which Australian and New Zealand coordinators and police discussed practices; and (2) government officials, managers of conferencing units, and practitioners do travel to other jurisdictions. However, there can be institutional brakes on deepening cross-jurisdictional understanding as officials and managers work to keep conferencing practices afloat and well-resourced in their jurisdictional patch. They need to show that conferences are "successful" and that participants are "satisfied", which leads to my second observation.

Government-sponsored evaluations of conferencing, which are carried out quickly to suit ministers or department heads, often lack empirical depth and theoretical grounding (this problem is also evident in advocacy-oriented research). Their main purpose is not to contribute to a stock of scientific knowledge, but rather to be accountable to bureaucratic elements. No doubt, it is better to have some research than none at all, and there is value in conducting

[16] The New South Wales research is evaluating the implementation and impact of the *Young Offenders Act 1997*, including the uses of police discretion and conferencing; it is a collaborative project between the University of New South Wales, the New South Wales Department of Juvenile Justice, and the Aboriginal Justice Advisory Council (Janet Chan, personal communication). The Tasmania research is evaluating police-run and non police-run conferences, which are currently working along side each other in Tasmania, as well as the influence of the judiciary in establishing a restorative system; the project is based at the University of Tasmania (Jeremy Prichard, personal communication). The New Zealand research aims to identify factors associated with achieving effective outcomes in youth justice using an evidence based approach (Gabrielle Maxwell and Allison Morris, personal communication).

research with different aims and purposes. However, the contribution that Australia and New Zealand can make to the wider field of restorative justice is considerable. It would be a pity to squander that potential on a set of jurisdiction-specific small studies that do not add up to something larger or that do not address the difficult theoretical and political problems posed by the conferencing idea. In its most ideal application, restorative justice poses major challenges to old and settled modes of thinking about the response to crime. It also poses major challenges to old and settled modes of conducting research into justice practices. Australia and New Zealand are well-positioned to be innovative on both fronts and to become international leaders in the field so long as those in research, policy, and practice seize the moment to look beyond their jurisdictional borders and to stretch their theoretical and research imaginations.

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5

Restorative Justice and Family Group Conferences in England: Current State and Future Prospects

JIM DIGNAN and PETER MARSH

INTRODUCTION

THE CONVENIENT SHORTHAND "restorative justice" is commonly applied to a wide variety of practices that seek to respond to crime in a more constructive way than conventional forms of punishment (Dignan 1999: 48). It is not restricted to a particular approach or programme, but is applicable to any that have the following characteristics: an emphasis on the offender's personal accountability to those harmed by an offence (which may include the community as well as the victim); an inclusive decision-making process that encourages participation by key participants; and the goal of putting right the harm that is caused by an offence (see also Haley 1996: 351–2). Restorative justice approaches vary in the way that these three elements—focus, process and goals—are combined, and it may be helpful to think of a continuum of approaches, from those with a relatively narrow perspective to those in which the perspective is much broader (Dignan and Lowey 2000).

In this chapter we attempt to chart the recent development of restorative justice in England and will therefore concentrate initially on the current status and progress of family group conferencing there.[1] However, we also wish to assess its future prospects and, for this purpose, will need to take a closer look at recent legislative developments that clearly incorporate some key elements of restorative justice. Although their short-term impact is likely to be restricted to the narrower, more reparative, end of the restorative justice spectrum, we will also consider whether they are also likely to improve the longer-term prospects for conferencing.

We will begin by commenting on the changing implementational context within which family group conferencing initiatives have developed in England.

[1] Our attention is mostly confined to the New Zealand-style family group conferencing model as it is represented in England since the police-led model is the subject of the chapter by Richard Young.

Next we will review progress during the initial phase of development, which preceded the implementation of a major programme of youth justice reforms in 1998 and 1999. We will then assess the opportunities and prospects for the future development of family group conferencing initiatives in the light of these reforms, and will conclude by considering some possible longer-term developments that they might conceivably be associated with in the future.

CONFERENCING: THE CHANGING IMPLEMENTATIONAL CONTEXT

Until recently, England has been a classic example of the "stand-alone" model for implementing restorative justice reforms (Dignan and Lowey 2000: 45). The defining characteristic of this implementational approach is the absence of any statutory authorisation for restorative justice programmes. The projects consequently operate outside of the formal criminal justice system, usually in a fixed term and experimental capacity, and with the aid of small scale temporary funding. Although there are some short-term advantages associated with this approach, in terms of its flexibility and innovative potential in extending the boundaries beyond existing practice limits, these are outweighed in the longer term by its very limited impact on mainstream practice. Thus, "stand-alone" initiatives are nearly always local in character, and have a marginal, if not highly precarious, existence because of their dependence on the support and co-operation of larger, more powerful criminal justice agencies. They tend to be restricted to juvenile first time offenders and minor offences, and even then they often find it difficult to attract a sufficient number of referrals to ensure their longer-term viability. As we shall see, the early experience with family group conferencing in England, at least within the youth justice context, has certainly conformed to this pattern.

Within the "stand-alone" model, the survival of restorative justice programmes can be slightly less tenuous where they are able to secure a good degree of institutional support; one example was the adoption of victim offender mediation and reparation programmes by juvenile liaison bureaux and police-led cautioning panels in England during the 1980s (Davis et al 1988; Dignan 1992). However, implementational problems still abound, particularly when the restorative justice aims and ethos are compromised by rival goals such as the diversion of offenders. There is a parallel development within the sphere of family group conferencing, which managed to secure some institutional support from local authority social services departments within a child welfare context. Even in these circumstances, the viability of restorative justice programmes remains precarious for as long as they continue to operate within a "stand-alone" context.

Experience in other jurisdictions (most notably New Zealand, but also in parts of Europe) suggests that the implementation of a restorative justice approach is most likely to be successful (though still by no means guaranteed)

where it is formally and fully incorporated within the criminal justice system itself: the so-called "fully integrated" model (Dignan and Lowey 2000: 49–56):

> "By establishing restorative justice as a mainstream response that operates at the heart of the criminal justice system, it is much more likely that the problems of marginalisation and subordination that are associated with stand-alone programmes or a partially integrated compromise approach will be avoided" (Dignan and Lowey 2000: 55).

The incorporation of a restorative justice approach within a fully integrated model is likely to depend in turn on three key factors: the enactment and enforcement of an appropriate legislative framework, the creation or nurturing of a receptive professional culture, and the existence or establishment of a supportive institutional setting within which it can flourish.

Before 1997, none of these pre-requisites were in place in England. The "stand-alone" model was dominant, and restorative justice programmes (including family group conferences) seemed destined to languish on the periphery of the criminal justice system. Since then, however, the implementational context has changed dramatically, with significant developments in relation to all three factors.

First, the legislative framework has been transformed as a result of the Crime and Disorder Act 1998 and the Youth Justice and Criminal Evidence Act 1999, which have begun to implement a radical new youth justice agenda. One important theme within this agenda has been the incorporation of some significant elements of restorative justice as part of the mainstream response to youth offending. Second, a new institutional framework consisting of strategically powerful multi-agency youth offending teams has been established. Third, steps have been taken to foster a more focused and effective professional culture within those teams.

Later in the chapter, we examine the impact that this dramatic change in the implementational context has had on the prospects for restorative justice in general, and for the development of family group conferencing in particular. Before then, however, we will briefly trace the early history of family group conferencing in England, during the era of the "stand-alone" model.

DEVELOPING FAMILY GROUP CONFERENCES IN ENGLAND: THE EXPERIENCE SO FAR

Four of the best-known family group conference projects for young offenders in England are the London-based Victim Offender Conference Service (Liddle 1999), the Hampshire Youth Justice Family Group Conference Pilot Project (Jackson 1998), the Sheffield/Kirklees project (Crow and Marsh, 2000), and the Kent intensive support and supervision programme (Gilroy 1998).

The Victim Offender Conference Service was a pilot project that was initiated by the Inner London Chief Officers' Group and operated briefly in Lambeth and

Hackney. The project was aimed at young people (aged 10 to 17), and referrals were made either after a decision to caution had been taken, or after a decision to prosecute, once a guilty plea had been entered. A total of 160 referrals were accepted. However, none of these referrals resulted in a conference, and only a very small minority involved either direct or indirect mediation (4 and 13 per cent respectively). Almost half the cases involved work with only one party, usually the offender. Throughout the project, inter-agency tensions were compounded by entrenched working practices and differences in professional ethos.[2]

The Hampshire project was more typical of recent family group conference developments in that it emanated from the successful implementation of family group conferences within a child welfare context in the same county. The Youth Justice Family Group Conference project was managed by a multi-agency steering group, and made use of co-ordinators who had prior experience convening child welfare conferences. Those eligible for referral were repeat offenders who were deemed unlikely to respond to further cautioning. They were referred to the project (and also cautioned) instead of being prosecuted (or cautioned again). However, the project was slow to develop and encountered a familiar litany of problems. Referrals were slow to materialise, as a result of which the number of completed conferences (12 in the first year) failed to meet even the relatively low target initially adopted. This in turn caused problems for the type of evaluation that had been planned. Professional commitment was also difficult to sustain, and the role of youth justice staff in particular was unclear.[3]

The Sheffield/Kirklees project also experienced developmental problems resulting in a small number of referrals. Nonetheless, the conferences that have been carried out seem to have been well received, with both professionals and families expressing positive views. Victims have come to around half of the conferences, and their views have also been reasonably positive. Despite the small numbers involved (18 in total), the research showed that family group conferences were certainly achievable in the English system, but that considerable development work was still needed. It also showed that some of the lessons from the child welfare projects (considered below) are relevant in this sphere as well.

The Kent scheme targets a group of persistent young offenders who face a custodial sentence. The catchment group is restricted to 15 to 17 year olds (though younger ones may also be eligible), who have been charged or cautioned on three previous occasions in the preceding twelve months, and who have served a custodial or community sentence (JUSTICE 2000: 63). The scheme is court-based, and operates in part as an alternative to custody, not court.

[2] After the pilot phase was over, the Victim Offender Conference Service began to deliver reparative interventions to one of the pilot Youth Offending Teams established under the Crime and Disorder Act. These are discussed later.

[3] The project continues to operate, however, within the context of the Crime and Disorder Act, and offers conferencing to offenders who are given an action plan order. This is also discussed later.

Intervention in such cases takes place between conviction and sentence. Alternatively, offenders may be referred at the point of release from custody or while an offender is on licence.

The scheme employs a "family decision-making model" (essentially a family group conference), and the outcome forms part of the pre-sentence report to the court. The project has been evaluated, using a reasonably rigorous methodology based on the use of matched control groups in pilot and non-pilot sites, and also (because of the small numbers involved) a risk of reoffending prediction instrument. An interim evaluation tentatively recorded a 25 per cent reduction in the actual rate of reoffending compared with the predicted rate. However, problems have also been experienced. They include reluctance by victims to participate, and time pressure constraints brought about by tight court schedules that make it difficult for victims to participate in the programme. It has also proved difficult to promote meaningful restorative interventions with a group of offenders whose attitudes towards victims and their offending may often be problematic, and whose risk of reoffending and associated needs often appear to warrant alternative, more therapeutic, forms of intervention.

Within the child welfare field, family group conferences have established a somewhat more secure footing. It has been estimated that around half of the English social services departments may be involved in some way with family group conferences, the great majority of which are concerned with child welfare developments (Challiner et al 2000). There are unlikely to be more than a handful of social service departments who are currently providing family group conference services in the youth justice area and for many of these, as in the case of Hampshire, it is often an offshoot from their prior involvement with child welfare cases.

Family group conferences that operate in a child welfare setting have a number of advantages compared with the ad hoc initiatives that are involved in youth justice cases: notably a greater degree of institutional support and a relatively more secure funding environment. And, because there is no involvement by victims in child welfare conferences, the potentially problematic issue of the conflicting needs of the victim and the offender at the conference does not need to be addressed (Maxwell and Morris 1993). Moreover, in the child welfare field, there was already a well established ethic that developing a sense of partnership between professional and service users was a good thing, and likely to be the most effective way of working (Marsh and Fisher 1992). There was also a good degree of professional freedom, with less possibility of control by other professions, and somewhat less control by courts. Given all of these advantages, and the continuing relatively high profile of family group conferences, it may be surprising that conferencing does not have a higher profile within the child welfare sphere. Why is this?

The evidence from the development of child welfare conferences (Marsh and Crow 1998) provides substantial reasons why it is likely to be a slow process, requiring a relatively high degree of effort. Working with all of the agencies

providing the relevant services has proved crucial to the successful implementation of conferencing within child welfare. All agencies need to agree at least at the level of principle, and all need to examine many aspects of their practice to make sure that obstacles are removed that could stall the family group conference process. Experience shows that discussion alone is rarely enough to convince most staff of the value or practicality of the new approach. It needs a real example or two. But, of course, getting these examples depends on convincing at least some people in discussion. Overall, this a time consuming and difficult process.

The combination of one or more strongly interested practitioners, with a committed senior manager to support them seems the most powerful force to establish family group conferences. The combination is not that common, and there are many examples of practitioners left to fight policy battles, and of senior managers unable to convince practice staff in the child welfare field. Skilled and trained co-ordinators are needed to carry out the conferences, and this requires some new finance beyond existing services, plus a good degree of project planning. It is, therefore, not at all surprising that in the child welfare field there was generally two years between initial planning meetings and the first conference taking place.

Even with the advantages that accrue from the more supportive institutional environment, it is clear that widespread and rapid adoption of family group conferences is unlikely, and that substantial effort will be required to get them established. As we have seen, there are some powerful positive factors at work, particularly in the child welfare sphere, and we will come to others. But there are also substantial obstacles to be overcome. It is hard to imagine that this could have been achieved, even in the child welfare field, within the conventional "stand-alone" context that prevailed until 1997 and it is almost inconceivable that it could happen in the youth justice sphere. The question that we will now address is whether the prospects for family group conferences have improved as a result of the move towards implementing at least a partially integrated model of restorative justice after 1997.

MOVES TO INTEGRATE A RESTORATIVE JUSTICE APPROACH WITHIN THE ENGLISH CRIMINAL JUSTICE SYSTEM: THE CRIME AND DISORDER ACT

Shortly after coming to power in 1997, the incoming Labour government introduced a radical new agenda for dealing with youth crime (Home Office 1997), the first part of which was set out in the Crime and Disorder Act, 1998. The main thrust of this new agenda is to promote more effective ways of preventing offending by children and young people, by undertaking early interventions that seek to address known criminogenic factors such as truancy and poor parenting. However, for the first time in England, it also establishes some elements of a restorative justice approach as part of the mainstream response to youth offending.

The measures that have been introduced so far are located very firmly at the narrow end of the restorative justice spectrum, since the emphasis is on making offenders accountable for what they have done by requiring them to undertake some form of reparation for either their victim or the community. In fact, reparation features in a number of new and existing sentencing disposals available to the courts. The first is the reparation order (section 67), which can vary in length up to a maximum of twenty-four hours. This occupies the same place on the sentencing tariff as the conditional discharge[4] and is clearly envisaged as an appropriate entry level penalty for less serious offenders. However, the use of reparation is not confined to less persistent or even less serious offenders, since it can also form part of another new sentencing measure known as the action plan order (section 69). The latter is a short but intensive community sentence that operates higher up the sentencing tariff and is thus aimed at more serious offenders. Moreover, reparation can also be included as a requirement in a supervision order (section 71), which is a measure widely used for more persistent young offenders. The concept of reparation seems to have moved from the margins towards the mainstream, becoming a routine response to a wide range of offences committed by young offenders.

The second important element of a restorative justice approach which the 1998 Act introduces relates to the greater scope for victims' involvement in the sentencing process. The Act stipulates that, before any reparative intervention, of whatever kind, is imposed, the views of the victim should be sought and relayed to the court. Moreover, offenders can only be ordered to make direct reparation to a victim where the latter has consented (which amounts, in effect, to a limited veto). As with the focus of the reforms, the relatively limited scope of the victim's role in the decision-making process confirms that these new restorative justice elements are likely to operate at the narrow end of the spectrum we identified earlier. Nevertheless, compared with their total exclusion from any part in the process for determining outcomes in the past, even these limited changes represent a significant step in a restorative justice direction.

As for the content of the reparative interventions, the 1998 Act is non-prescriptive, but the accompanying guidance (Home Office 2000a: para. 5.5) stresses that, where possible, any reparation should be made directly to the victim (assuming there is consent). Among the examples cited are letters of apology, meetings or restorative conferences, or several hours per week of practical reparative activity that should, if possible, be related to the nature of the offence. The reference to practical reparative activities suggests a further tendency to operate at the narrow end of the restorative justice spectrum, though the specific reference to mediation meetings and conferences is also consistent with a broader, more participatory and potentially more cathartic type of restorative justice process. We will return to this issue when examining the

[4] This will no longer be available for most young offenders who have received a "final warning" within the previous two years.

potential impact of the Act specifically in relation to the future development of family group conferencing.

One final comment on the scope of the 1998 Act is that the range of reparative interventions it introduces is not confined to the post-conviction stage, but may also be available at the pre-trial stage. Under the Act, the traditional system of police cautions is replaced for offenders under the age of 18 by a more structured set of warning measures, known as reprimands and final warnings. Assuming that an offence falls within a formally prescribed gravity range, young offenders may expect to receive a reprimand for a first offence, to be followed respectively by a final warning and then prosecution for second and third offences. Offenders who are given a final warning may also be required to take part in a rehabilitation or change programme, which could also involve some form of reparative activity either for the benefit of the victim or the community. New guidelines, introduced in early 2000, emphasised the benefits of a restorative justice approach. They commended, in particular, the adoption of police-led restorative conferencing of the kind pioneered in certain Australian jurisdictions and adapted for use in an English context by the police force in Thames Valley (see the chapter by Richard Young for more information on the operation of restorative conferencing in Thames Valley).

Taken as a whole, the reparative measures introduced by the Crime and Disorder Act have the potential to incorporate significant elements that are associated with restorative justice as part of the mainstream youth justice system. We will assess the extent to which this potential has been realised later in the chapter. Meanwhile, there is one further aspect of the Crime and Disorder Act that could have an even greater impact in the longer term on the development of restorative justice measures, including family group conferences. This concerns the distinctive new institutional framework created by the Act in order to deliver the new youth justice agenda.

The centrepiece of this new framework involves the creation of a statutory system of strong, multi-agency Youth Offending Teams throughout the country, with effect from 1 June 2000. These Youth Offending Teams or "YOTs", as they have become known, are staffed by personnel from a range of agencies—social services, police, probation, health services and education—that have never before been required to work so closely together, despite their relevant skills and shared interest in the problem of youth crime (Hine et al 1999).

Assuming they are adequately resourced, YOTs clearly have the potential to develop into powerful new players in the youth justice arena. From the outset, they have been given a strategic remit to develop a more constructive range of interventions to tackle the problem of youth offending, which includes the battery of restorative justice measures that we have already outlined. YOT staff are also responsible for undertaking consultation with victims, and for ensuring the delivery of the reparative interventions themselves, though they are free to outsource some of this work to specialist external contractors, including those operating in the voluntary and not-for-profit sectors.

The final part of the Act's key developments has been the creation of a powerful new non-departmental public agency, the Youth Justice Board, to monitor the operation of the youth justice system and to support it in pursuing its principal aim by making available substantial sums of money for the purpose of training and the development of good practice (section 41).

A PROFESSIONAL RESTORATIVE JUSTICE CULTURE?

So far we have concentrated on the legislative framework that has sought to integrate elements of restorative justice within the mainstream youth justice system, and on changes in the institutional arrangements for delivering such an approach. However, we have also suggested that restorative justice is only likely to become an active part of mainstream youth justice services if there is a receptive professional culture at work within this new institutional set-up. In this section, we will examine the potential for the emergence of a professional restorative justice culture in the light of findings derived from the recently concluded evaluation of the pilot youth justice reform programme (Holdaway et al 2001).

A culture that is well attuned to restorative justice is likely to involve three main elements. The first and most fundamental is a recognition of the importance of professional work with victims. If this recognition is missing, then motivation will be low and the fulcrum of restorative justice absent. The second is a view that work with offenders needs a clear understanding about the nature, type and impact of the offences committed. Without this, the restorative process will be poorly matched to the harm that has been caused by the crime. The third is a commitment to seeing youth justice work as an integral part of the judicial process, and not as a service add-on to that process. If it is seen as the latter, it will risk over-emphasising offenders' welfare or punishment at the expense of an overall judicial restorative culture.

Work with Victims

Historically, youth justice teams in social services have done very little work with victims. Although there has been some finance in recent years to develop victim support services, it is fair to say that most of the staff working in traditional youth justice teams have been directly concerned with offenders, and have rarely had much contact with victims. The picture that is emerging following the introduction of YOTs is a very different one, both in terms of their composition and also, as we have seen, in terms of their remit. Only around half of the professional staff are from social services (which compares with nearly 80 per cent in pre-YOT days), with the others coming from probation, police, education and health. There is now considerably more fertile ground for

professional interest in the concerns of victims. What effect has it had on the practice of the YOTs?

One obvious measure of any change in professional culture with regard to victims is the level of consultation with victims carried out in the pilot YOTs. The provisional findings of the pilot evaluation showed that there is some way to go in this area, given that victims' views are supposed to be routinely canvassed before making any recommendation to the court involving reparation on the part of an offender. In fact, this only happened in around two thirds of the cases involving reparation orders and half of all cases involving action plan orders (and in as few as one in six cases involving final warnings).

A number of factors lay behind this relatively low level of consultation with victims. There was some cultural resistance from longer serving staff; there were poor consultation procedures; and, in particular, there were data protection problems. There was a severe conflict between the rival governmental policy goals of consultation with victims and speeding up the process of justice. These issues will need to be addressed if the measures for consultation with victims are to be successfully implemented, though it is a common finding with restorative justice initiatives that victims' involvement is difficult to secure first time round (Morris et al 1993).

Work with Offenders

The YOTs have also made it more likely that disposal options are well linked to the particularity of offences. The past use of pre-sentence reports continues, providing some of this link, but it is enhanced by the necessity for the YOTs to provide for the court a more detailed link between the disposal and the offence for the new orders. For example, if a reparation order is proposed then the way that the reparation will be undertaken, and how it links to the offence, should be outlined. New-style specific sentence reports have been introduced for this purpose, since pre-sentence reports would not normally have been used in the past for sentences of this kind. Over time, this will also provide some additional underpinning for the development of a relevant professional culture.

In the meantime, the national evaluation found that while the range of different types of reparative activities varied considerably both between and within the pilot YOTs, much of it undoubtedly fell within the narrow range of the restorative justice spectrum that we identified at the outset. For example, as might be expected in the early days of the YOTs, almost 60 per cent of the reparation orders involved the undertaking of some form of reparation for the benefit of the community, rather than for the benefit of victims. Nevertheless, some of the reparative work that is being done with offenders, even in the sphere of community reparation, is developing more imaginative and effective ways of conveying the impact of the original offence as part of a restorative process.

Integration of Youth Justice Work and the Judicial Process

The YOTs are very clearly part of the judicial system in a way in which the old youth justice sections of social services were not. All of their work is clearly focused on offending, and they are an integral part of many developments in youth justice, such as community safety plans. There is no doubt that the new approach emphasises that these professionals are solidly part of the judicial process, and that they should engage in relevant judicial developments. Of course, this needs to be a two-way process. There is a need for a change in the culture of the courts to match the change that is being sought in the youth justice profession. If it is to be achieved, this will necessitate a much greater emphasis on training for magistrates (preferably conducted jointly with YOT staff and other relevant practitioners).

Developing a Receptive Professional Culture

There are now indications that the basis for a receptive professional culture is there. However, the practice development that should accompany this new culture may be difficult to enact in this new area of restorative justice. In social work, there has been a history of the poor and partial understanding of new ideas, and a failure to see the differences with existing practice (Marsh and Fisher 1992). This problem is not helped by the weak connection between academic research and practice, although there are substantial recent projects, such as the Research in Practice initiative at Dartington and the University of Sheffield, which is attempting to make this connection stronger. The link between academic research and practice may be stronger in the case of the probation service, but there the commitment to victims is relatively vestigial. The professional culture of the police may aid the focus on victims, but their practice development may exhibit similar weaknesses to social work. The work of health and education staff bears little or no professional relation to issues of restorative justice.

Supervision may be the key to the development of a restorative justice culture in these circumstances, and again we have reasons to be cautious about the effectiveness of this with, for example, substantial weaknesses evident in social services' supervision regarding any link between theory and practice (Marsh and Triseliotis 1996). It will be important for this work that supervision is sophisticated enough to determine whether relevant skills are present but are not used or are absent altogether, as different training strategies are needed for these different circumstances. Such sophistication has been unusual in the past. Perhaps an approach that combines initial and ongoing skills auditing with appropriate supervision, that is backed by routine and thorough monitoring of practice implementation, might offer a useful developmental approach, but it will be a substantial move from current practice.

Lastly, we should note that in the new Youth Offending Teams the professional culture is likely to be extended and enhanced by the development of contracted out services. This is a relatively new initiative in the field of youth justice and regarding the development of restorative justice it could be a mixed blessing. On the one hand, it could provide a vehicle for the theory and practice of restorative justice to spread via the new skills of the outside contractors. This is particularly important given the relatively low reservoir of trained and experienced staff, particularly within traditional criminal justice agencies. On the other hand, it could impede the changes if it allows YOT staff to ignore the issues of restorative justice, seeing them as somewhat esoteric or as simply dealt with by the outside project. The use made of such projects in both practical and strategic development will be crucial.

Overall, the development of a restorative justice culture may be rather similar to the way that research moves into policy and practice: a relatively slow process, first through dissemination, then through some adoption of the ideas, then by practical implementation. Powerful forces are needed for each of these stages to be successful. A sense of realism is, therefore, needed on the part of policy makers, practitioners, academic evaluators and those who commission evaluations, as the switch from a "stand-alone" to an integrated implementation approach for restorative justice is not something that is likely to be achieved overnight. It is likely to be a much longer term and more organic process. Indeed, the same may true of the legislative framework itself. Experience elsewhere suggests that the adoption of a restorative justice approach is likely to be an incremental process as, for example, in New Zealand's four year period between the not wholly successful attempt to establish reparation as a victim-focused sentence in its own right in the Criminal Justice Act of 1985 (Jervis 1996: 417; Dignan and Lowey 2000: 51) and the introduction of family group conferencing in 1989.

Current Developments in Family Group Conferences

So far, as we have seen, there have been relatively few family group conferences carried out within youth justice in England, although there are now a growing number of developments. A potentially major boost to the number of conferences in England occurred in 1999, when the Youth Justice Board, responsible for promoting professional practice in youth justice, set in train a number of development projects. Agencies were asked to tender for work in a variety of areas, one of which was restorative justice. Nine projects with a family group conferences focus were funded. This provides a useful way to examine the way in which family group conferences are being conceptualised within restorative justice developments. We have examined the plans put forward by the projects, and we outline below the focus that they adopted, the way they talked about restorative justice, and the overall aims they set themselves.

Nearly all of the projects described their key objective as reducing offending. Accompanying this, for half of the projects, there was a clear aim to increase victims' satisfaction. Only one talked specifically about repairing the harm done by crime. The language, as we will consider later, was predominantly technocratic around these twin aims of reducing offending and increasing victims' satisfaction. This was in part to be expected given that the documents were tender bids, but there was scope to accompany this with more explicitly restorative aims. Three projects clearly did this and mentioned additional aims, including increasing school attendance, reducing repeat victimisation and increasing community confidence in the justice system.

Specific categories of offenders were identified in the majority of the documents, covering a wide range in all: for example, "potential persistent offenders", "first offenders where past interventions have failed [sic]" and "offenders remanded to care." Two of the projects linked the work to the new parenting orders available to the courts, where parents of young offenders can be required to attend a specific programme of parenting training. In one case, the family group conference was seen as an alternative to such an order and in the other it was seen as part of such an order.

There were substantial ambitions for the number of family group conferences that were to be held, with three of the projects aiming for over 100 family group conferences in the first year (and one of these talking of up to 250). In half of the projects it was possible to identify the size of the potential target group, and family group conferences were planned for over half of this group in the first year. Ambitions on this scale seem highly optimistic and, in the light of previous experience in developing new projects of this kind, are likely to prove woefully unrealistic.

As noted, the language of the planning documents was predominantly technocratic, outlining work in terms of practice solutions likely to reduce offending and/or increase victims' satisfaction. One of the documents did talk in terms of "humanising the criminal justice system" and another talked of "repairing the harm caused by an offence". Despite these ideas, the language was, overall, distinctly reparative rather than restorative.

The message for restorative justice from these developments is mixed. First, there is clearly interest in the area, with a willingness to move beyond talk to action. Secondly, the recognition of the importance of victims is coming through clearly. But there is little in the way of an underpinning value base in the planning we examined and, given the evidence from other areas, there are over-ambitious hopes for the activities that are proposed, especially in the number of family group conferences in the early years of the projects. Indeed, although it is understandable in view of the "evidence-led approach" that underpins the current youth justice agenda, there is a risk that an excessive concentration on crime reductivist outcome-based measures may raise unrealistic expectations that could prove very difficult to deliver, particularly when adopted for challenging target groups.

AN UNFOLDING RESTORATIVE JUSTICE AGENDA?

Much valuable progress is now undoubtedly being made in integrating elements of restorative justice as part of the mainstream criminal justice system in England. At the same time, one of us has cautioned previously that there must be grave doubts as to whether the framework that has been established by the Crime and Disorder Act could ever provide a satisfactory basis for the kind of broader, more inclusive and forward-looking strain of restorative justice initiative that we have been considering in this chapter (Dignan 1999: 58). Early experience with the YOT pilots, and the first tentative moves to develop family group conferences in England, has confirmed the need for continuing caution. However, we made the point earlier that the process of developing restorative justice is necessarily an incremental one, and one that is unlikely to be accomplished in just one legislative sitting.

It is worth pointing out, therefore, that the next phase in the unfolding youth justice agenda is also now being implemented in England, and that this could help to consolidate the development of broader, more inclusive, and somewhat less overtly reparative strains of restorative justice in the near future. The present government's long-term agenda for reform was spelt out in the White Paper *No More Excuses* (Home Office 1997: para. 9.21), in which it spoke of the need to "reshape the criminal justice system in England to produce more constructive outcomes with young offenders", and emphasised its commitment to three restorative justice principles: responsibility, restoration and reintegration.

The first part of this legislative programme was accomplished by means of the Crime and Disorder Act. The following year the government enacted the Youth Justice and Criminal Evidence Act 1999 which built on the restorative justice foundations laid by its predecessor. Under this Act, all first time offenders who plead guilty (with the exception of those who are given an absolute discharge or who are sentenced to custody) *must* be referred to a newly created "youth offender panel" for a specified period. In addition to the mandatory referral provisions, the courts will also have a discretionary power to refer one or more associated offences provided offenders plead guilty to at least one of the offences with which they are charged.

The panels themselves are to be set up by YOTs, and are to comprise three members, one of whom will be from the YOT, while the others will be drawn from a panel of community volunteers. The role of the panel will be to provide a forum away from the formality of the court, in which the young person, the family and, where appropriate, the victim of an offence, will be able to reflect on the offence and its consequences, and to agree a contract that will include reparation for either the victim or the community and a programme of activity that is designed to prevent further offending. A wide range of terms could be included in the agreement which, unlike the reparation order, does not exclude the possibility of financial compensation for victims. It is important to note that

where a young offender is referred to the youth offender panel this will constitute the only sentence that may be imposed for the relevant offence(s). Thus, it will not be possible for the court to combine a referral with any other disposal (with the exception of ancillary orders, for example, with regard to costs or compensation).

How might we assess the potential impact of this new measure in restorative justice terms and, in particular, in terms of the three elements we identified at the start of the chapter: focus, process and goals? Perhaps the most significant aspect is the process that is adopted, which is much more inclusive and adopts a conferencing model as the key forum within which decisions are to be taken. Indeed, this switch of decision-making forum, from a court-based judicial model to a community conference model, is potentially one of the most radical aspects of the entire youth justice reform agenda, though not all recent commentators appear to have recognised this. Morris and Gelsthorpe (2000: 29), for example, state incorrectly that "youth offender panels do not supplant court proceedings; rather they supplement them and so a key issue will be the extent to which magistrates accede to the recommendations and plans made". In fact, magistrates have no such power. The panel is responsible for reaching and enforcing any agreements, and only if offenders fail to comply will they be sent back to court.

Secondly, in terms of its focus and goals, there is less emphasis on the offender's accountability towards the immediate victim (though this still does feature) and correspondingly greater emphasis on notions of the restoration and, in particular, of the reintegration of the offender once the matter has been dealt with satisfactorily. This is reflected in the fact that, once a young offender has satisfactorily completed the agreement, the panel (not the court) will discharge the referral order, the effect of which will be to purge the offence, in the sense that it will immediately be regarded as spent for the purposes of the Rehabilitation of Offenders Act 1974. This represents a significant and welcome shift towards a more socially reintegrative approach and away from the conventional open-ended form of stigmatic shaming that has long characterised most retributive forms of punishment.

It is too soon to say how the new procedure will work, and certain aspects (for example, to do with the role of victims and the extent to which they will be encouraged to take part in the panel meetings) are still not entirely certain. Nevertheless, there are grounds for cautious optimism that over time, and provided the reform agenda continues to unfold in the present direction, a somewhat broader and more inclusive form of restorative justice will become an integrated part of the mainstream youth justice system.

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6

Conferencing in South Africa: Returning to Our Future

ANN SKELTON and CHERYL FRANK

INTRODUCTION

SIX YEARS INTO South Africa's historic change to democracy, criminal justice in the country remains in a state of dynamic transition. Recent years have seen raging debates about how to deal with crime, with the newly won human rights ethos coming under pressure from those calling for tough law enforcement measures. These years have also witnessed the state's struggle to implement many of its new policies, toiling against severe resource constraints, overwhelming need and a large and seemingly immovable bureaucracy. This transition has been accompanied by high levels of crime, with issues such as violence against women and the victimisation of children receiving much media attention. The emerging system for children accused of crimes has been in development throughout this period of transitional turmoil, and has also been the focus of a great deal of discussion and debate.

This chapter traces the source of restorative justice in traditional conflict resolution, making the point that the concepts underpinning family group conferencing are not new to South Africa, and have in fact been at the core of African society for hundreds of years. The chapter explores the community courts, which sprung up during the Apartheid era, the alternative dispute resolution movement and the Truth and Reconciliation Commission and suggests that these processes have demonstrated an acceptance of community involvement in the administration of justice. Having shown how South Africa's history created a fertile environment for discussions about family group conferences during the 1990s, the chapter goes on to describe how family group conferences have emerged through policy, pilot projects and law reform. In conclusion, a number of ideas are raised about the development of a unique model of conferencing for South Africa.

THE HISTORY OF RESTORATIVE JUSTICE IN SOUTH AFRICA

At the outset, it is important to establish that while the term restorative justice may be relatively new to South Africans, the spirit of the concept is strongly embedded in the history of African society through the notion of *ubuntu*. Mokgoro (in Boraine 2000) describes *ubuntu* as an African worldview, which is both a guide for social conduct as well as a philosophy of life. Therefore, more than merely applicable to issues of justice, *ubuntu* describes the individual's status in relation to others through the idea that a person is only a person because of other people. *Ubuntu* embodies ideas about the interconnectedness of people to each other, the importance of the family group over the individual, and the value of benevolence towards all others in the community.

Traditional Justice

For as far back as oral history can take us, African communities have seen justice through a restorative lens. African customary law has always had traditional mechanisms to deal with problems arising in communities. It has been said that "reconciliation, restoration and harmony lie at the heart of African adjudication" (Allott 1977: 21) and that the central purpose of a customary law court was to acknowledge that a wrong had been done and to determine what amends should be made (Dlamini 1988). Many of these customary courts, known as *Inkundla* or *Makgotla,* are still in operation throughout South Africa today, mostly in rural areas. While many problems arose out of attempts by the state to co-opt these structures in the 1920s,[1] they still serve to resolve community problems and do so in such a way as to repair the relationships between disputing parties.

The traditional model currently practiced in rural areas in South Africa is similar to aboriginal traditions in many countries such as New Zealand and Canada. It involves elders (almost exclusively men) who preside over the resolution of problems experienced by members of the community. With the emphasis on problems rather than offences, these structures hear the stories of the parties involved and then make decisions regarding outcomes. These outcomes often include reparation.

Notwithstanding the tendency to romanticise traditional African society, it is undisputed that these mechanisms provide a more holistic and balanced approach than does the retributive criminal justice system. Traditional courts focus on the resolution of problems rather than the allocation of blame; they

[1] The Black Administration Act [No. 38 of 1927] set up a system which included these structures although they were at the bottom end of a hierarchy of structures aimed at the effective management of the African population (Human Rights Committee 1999).

aim to heal relationships; and they ensure restitution or compensation to victims (Van Eden 1995).

Community Courts[2]

Since the urbanisation of Africans in the late nineteenth century, people in townships have sought to create structures to enable them to cope with township life (Scharf in press). The 1980s, a time of increased community organisation against the repressive actions of the Apartheid state, saw the emergence of an estimated 400 street committees and community courts in African townships around the country (Human Rights Committee 1999). The formation of these structures signalled a rejection of state authority in these areas and the decision of people to control issues of safety and security for themselves through these organs of people's power. These structures sought to maintain order through the establishment of mechanisms at street level that would serve to hear disputes between people and make decisions regarding the appropriate resolution of the problems that were brought before them. Essentially, these community courts mirrored the mechanisms of governance and community conflict resolution that had served traditional African societies.

The procedures in these structures mirrored traditional practices in many ways. Again, the focus of the community court was on the resolution of problems. Those wishing to have problems resolved would lodge these and the case would be heard at the next sitting. The parties would appear voluntarily. The forum would hear both stories and allow for questions to be asked of both parties. This questioning could be done by anyone in attendance on the day. On the basis of the information gleaned from this process, a decision would be made as to the resolution of the problem, and about how reparation could be made. These community courts recognise that some problems (serious crimes such as murder and rape) are outside their scope and beyond their problem-solving capabilities and these are dealt with by the formal criminal justice system. Scharf (in press) states:

> "Community courts are not only courts. They are part of an important array of social support and social control mechanisms created by community members to suit their needs. More importantly, they are almost always a substructure of civic associations."

In the 1980s, however, these structures specifically identified their role as "political and revolutionary" (Human Rights Committee 1999: 64). These turbulent times produced official accounts of violence perpetrated in some of these structures and real concerns as to the nature of power wielded by court functionaries.

The 1990s brought their own brand of turbulence to these structures. With the unbanning of political organisations in 1990 and the preparation for South Africa's first democratic elections, the number of these structures dwindled. For

[2] A comprehensive review of community courts is undertaken in Scharf and Nina (in press).

those that remained, there was a period of consolidation which saw non-governmental organisations engaging with them seeking to provide training in such diverse areas as organisational development and human rights.

More recently, the South African Law Commission (SALC) has sought ways to give recognition to these and other informal mechanisms of justice. In its discussion paper on Community Dispute Resolution Structures, the SALC states:

> "Because community-based dispute resolution structures serve a useful purpose in meeting the needs of the majority of the South African population for accessible justice, these structures must now be recognised and supported by law" (SALC 1999: IV).

The discussion paper also states that whatever legislation is developed it should ensure that these community structures "remain informal and flexible in their procedures, inexpensive in their operations, accessible, non-alienating and responsive to the needs of the communities in which they operate" (SALC 1999: V). It remains to be seen how these structures will be legislated for, and in what ways this will impact on the services they can deliver. The consultation that the Law Commission has undertaken with key stakeholders in this sector does bode well for the protection, improvement and proliferation of these structures.

Mediation, Peace-Building and Alternative Dispute Resolution

A further contribution to the thinking regarding conferencing has been the range of work that has been undertaken in what may be referred to as the Alternative or Appropriate Dispute Resolution sector. Here, we refer to the work undertaken by a range of organizations (for example the Community Dispute Resolution Trust, IMMSA, the Community Peace Programme, UMAC and the Centre for Conflict Resolution) which all adopted a focus on conflict resolution. During the 1990s, the organisations operated in a range of spheres—for example, the provision of training and the resolution and management of conflict which was also referred to as peace-building. While the work in this sector has recently seen something of a decline in the sphere of community conflict resolution (the sector has tended to specialise in areas such as labour matters or family disputes), the experiments undertaken were promising and showed a willingness amongst South Africans to explore alternative ways of seeking justice and provided strong models of community-based work that demonstrated real benefits for community members.

The Truth and Reconciliation Commission (TRC)

South Africa's most famous and engaging experience with restorative justice has undoubtedly been the Truth and Reconciliation Commission (TRC).[3] The

[3] The Truth and Reconciliation Commission was established in terms of the Promotion of National Unity and Reconciliation Act [No. 34 of 1995].

Commission sought to explore some of the most painful periods in South Africa's history with a view to unearthing the facts of politically motivated violations of human rights and enabling the country to move into its future, having confronted its past.

In his recent book, Dr Alex Boraine (Boraine 2000: 362), the Deputy Chairperson of the TRC describes the core process of the TRC as follows:

> "Essentially it is the holding in tension of the political realities of a country struggling through a transition founded on negotiation and an ancient African philosophy which seeks for unity and reconciliation rather than revenge and punishment" (Boraine 2000).

While the testimonies of the perpetrators of human rights violations were central to the proceedings of the TRC, more important was the fact that victims told of their loss and pain, and were afforded the opportunity to ask questions of perpetrators. The public hearings of the Commission, which received extensive coverage in the print and electronic media, exposed the South African public to this different understanding of the function of justice. This type of justice, while also serving political needs, returned power to victims, demanded accountability from perpetrators and aimed to provide some level of reparation to those that had suffered.

The report of the TRC stated:

> "Given the magnitude of this exercise, the Commission's quest for truth should be viewed as a contribution to a much longer-term goal and vision. Its purpose in attempting to uncover the past had nothing to do with vengeance; it had to do, rather, with helping victims to become more visible and more valuable citizens through the public recognition and official acknowledgement of their experiences . . . In addition, by bringing the darker side of the past to the fore, those responsible for violations of human rights could also be held accountable for their actions. In the process, they were given the opportunity to acknowledge their responsibility to contribute to the creation of a new South African society" (TRC Report, Volume 1: paragraphs 27–28).

THE PROMOTION OF RESTORATIVE JUSTICE AND FAMILY GROUP CONFERENCING IN THE 1990S: POLICY, PRACTICE AND LAW REFORM

The Role Played by Non-governmental Organisations

South Africa's connection with modern ideas of restorative justice began in the non-governmental sector. As early as 1992, the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), a national non-governmental organisation, took the lead in seeking to frame their diversion and sentencing programmes firmly within a restorative justice paradigm. They looked particularly at American models of victim offender mediation, and were the first to experiment with these principles in a formal pilot project. Over the

years, their interest in the issue grew, especially with regard to the New Zealand model of family group conferencing. In 1994, a group of NGOs[4] published a document entitled "Juvenile Justice for South Africa: proposals for policy and legislative change." These proposals suggested the establishment of a separate juvenile justice system in South Africa, and proposed that family group conferences[5] be the centrepiece of this new system. Although these proposals had no official status, they excited much interest among those working with youth at risk, and captured the discourse in the field of juvenile justice (Pinnock et al 1994).

Government Policy

Following the coming into power of the first democratically elected government, there was a flurry of new policymaking. This was a wonderful opportunity for introducing new ideas, as there was a strong feeling at the time that the country was painting with a bright new brush on a clean canvas. Through the lobbying efforts of people in the non-government sector, who were very influential at this early stage of the new government's incumbency, restorative justice concepts (including family group conferencing) found their way into a number of key government policy documents.

In their policy White Paper published in 1997, the South African Department of Welfare highlighted crime prevention through restorative justice, and indicated a move towards restorative conflict resolution processes in the place of prosecution and sentencing. The National Crime Prevention Strategy (NCPS), led by the Department of Safety and Security (South Africa's Ministry for Police) echoed these ideas, saying:

> "Diversion programmes are aimed at assisting the offender to build personal resources and self-esteem. They serve to strengthen the restorative component of the criminal justice system, and mobilise family and community resources in problem solving." (Department of Safety and Security 1995: 60).

The Inter-Ministerial Committee on Young People at Risk (IMC),[6] an intersectoral process led by the Department of Welfare, took up the notion of restorative justice. Restorative justice was a practice principle of the Interim Policy Recommendations for the Transformation of the Child and Youth Care System (IMC 1996), expressed in the following manner:

[4] NICRO, Lawyers for Human Rights, the Institute of Criminology (University of Cape Town), the Community Law Centre (University of the Western Cape), Child Welfare (Cape Town) and the Community Peace Foundation.

[5] Dr Gabrielle Maxwell from New Zealand was invited to South Africa by the drafting consultancy to provide advice, and this no doubt influenced the prominence of family group conferences.

[6] The IMC (consisting of seven key government ministries) was established in 1995 in response to a crisis relating to the management of children awaiting trial. This Committee was charged with the task of transforming the child and youth care system.

> "The approach to young people in trouble with the law should focus on restoring societal harmony and putting wrongs right rather than on punishment. The young person should be held accountable for his or her actions and where possible make amends to the victim" (IMC 1996: 17).

The interim policy recommendations specifically emphasised the need for family group conferences to be developed in South Africa. Arising from this, a family group conference pilot project was set up and run in Pretoria for one year from 1996 to 1997. This project is discussed in more detail below.

Family Group Conferencing in South Africa

When family group conferences were first heard of in South Africa they excited immediate interest among juvenile justice advocates. The process of conferencing promised a set of benefits that went to the heart of many of the problems inherent in the administration of justice for children accused of crimes. Whereas the current system was eurocentric, family group conferencing resonated with the themes and mechanisms for the resolution of conflicts in traditional African society. Whereas the current system seemed only to seek vengeance and often served to victimise offenders, family group conferencing offered an opportunity for real accountability by offenders. Whereas the current system was all but blind to the needs of victims, family group conferencing sought to bring them into the centre of the justice process. South Africa has undertaken two formalised experiments with family group conferencing. Although the projects both had shortcomings, they have provided illumination to practitioners and policy makers, while raising further questions of both a practical and philosophical nature.

The Wynberg pilot in 1995

The first project was conducted in the early stages of South Africa's interest in family group conferencing. This early excitement was channelled into a project aimed at testing family group conferencing in relation to ten randomly selected cases at the juvenile court in Wynberg, Cape Town. Cases being heard at this court ranged from offences such as theft by shoplifting to assault with intent to do grievous bodily harm. An independent report of this project (Sloth Nielsen 1996) draws out a number of difficulties that were experienced.

Firstly, some of the cases referred by the prosecutor were petty offences, and the powerful intervention of family group conferencing was evaluated by the report as being over-intensive in relation to the nature of the offence and the circumstances of the child. In fact, it was suggested in the report that some of the cases might not have resulted in a prosecution at all had they stayed in the criminal justice system. The report also records that the facilitators of these family group conferences were faced with cases where a range of other problems and

needs were found to underlie the actual incident of offending. For example, in some cases, welfare needs emerged in the family group conference, and the facilitator became engaged in seeking ways of resolving these. It was also found that family group conferencing took time to set up due to the preparation of all those who would participate; they were also lengthy in duration with the parties taking some time to reach a satisfactory resolution.

The report concluded that the time and skills required for each case rendered family group conferencing to be an expensive process and one that South Africa would not be able to afford in relation to all cases. However, the report acknowledged that family group conferencing would be a valuable option if a range of diversion options existed. Family group conferencing could then be used for matters requiring a more intensive intervention.

The criticisms of the Wynberg pilot project must be viewed within the context of the project and the time at which it took place. Firstly, the sample was extremely small, which made it impossible to observe any reliable trends. Secondly, the people who conceptualised the project and those who actively participated in it had a limited understanding of conferencing, and did not set clear goals for the project. They were also unable to control what kinds of cases would be referred to them. Despite these shortcomings, the project was useful in that it did raise questions about whether family group conferencing, being the powerful intervention it is, would be appropriate to use in petty offences, and this debate has continued in ongoing discussions about family group conferencing in South Africa.

The Pretoria pilot in 1996/7

The second experiment, conducted in Pretoria, was one of several pilot projects established by the IMC, for the purposes of testing various aspects of a proposed new system for child and youth care in South Africa. This project was well planned and the project manager had a sound appreciation of restorative justice and of family group conferencing.[7] This understanding was passed on to others working directly on the project. The project was evaluated and the findings were published in a document, which is both a research study and an implementation manual (Branken and Batley 1998).

In this project, family group conferences were established as diversionary alternatives for juvenile offenders, with the aim of testing the model in eighty cases in the Pretoria area. This project specifically sought to divert cases involving offending deemed to be relatively serious, such as assault, theft of and out of motor vehicles, housebreaking and robbery. These categories of offences were not ordinarily considered to be divertable by the criminal justice system, which was accustomed only to the diversion of cases involving minor offences such as

[7] The project manager had been a member of a study tour to New Zealand prior to his appointment.

shoplifting and injury to property. The project attempted to insert family group conferences as a diversion option at the earliest stage of a young person's interaction with the criminal justice system by obtaining referrals directly from the police. This was unusual as all diversion in the country up to this stage was done through referrals from prosecutors just prior to a young person's first appearance in court. It was found that seeking referrals directly from the police did not yield cases as successfully as was hoped, and the project reverted to working directly with prosecutors to obtain referrals. Working directly with prosecutors proved to have its own problems. The project struggled to obtain the right kind of cases, as prosecutors continued to consider only the very minor offences to be suitable for diversion. The implementation manual makes the following observations in this regard:

> "People involved in setting up and running family group conferences should bear in mind that while restorative justice is the philosophy on which family group conferences are based, this is largely foreign to criminal justice staff, who have been trained and socialised firmly within a retributive philosophy" (Branken and Batley 1998: 42).

The document goes on to say that prosecutors saw diversion as doing nothing or as a soft option and concluded that in order to ensure appropriate referrals the prosecutor doing the referrals must be fully informed and convinced about the process and value of conferencing. Despite the difficulties described, the project did manage to process some fairly serious offences, including housebreaking and theft, assault with intent to do grievous bodily harm, common assault, malicious injury to property, theft from a motor vehicle and possession of an unlicensed firearm.

This project managed to undertake 42 family group conferences whereas it had planned for 80 conferences. In addition to the problems experienced in obtaining referrals from the police and prosecutors, the research study also identified as a major problem the lack of a legislative framework for family group conferencing. The current South African law does not even include the possibility of diversion, and all diversion is done through the exercise of the prosecutor's discretion to prosecute. In this regard, the research study made specific recommendations for consideration by the South African Law Commission. These included a suggestion that legislation should address the assessment of children, the criteria for diversion and the types of programmes deemed appropriate for different levels of offending behaviour. It was also suggested that family group conferences should be specifically provided for in legislation coupled with a confidentiality provision, as well as an enabling provision to allow for the referral of cases to a family group conference at any stage of the court process.[8]

The project appointed three conference facilitators who all had different work experience and backgrounds. One was a trained mediator, one was a

[8] These recommendations have all been incorporated in the draft Bill and the Report of the Juvenile Justice Project Committee, South African Law Commission, 2000.

therapist, and the third had a background in youth justice work. The project evaluation process examined and compared the styles and techniques of the different facilitators. The conclusion was that all of the backgrounds were relevant and that all three facilitators functioned well but that there were certain skills and areas of knowledge that were essential and needed to be developed in all. The facilitators did not set up the conferences; this was done by conference organisers who were employed by the project. They prepared all the parties for the conference, and had to brief the conference facilitator about the facts of the case. The research study notes that this built in an extra step, and that sometimes the conference facilitators were unaware of certain background factors or dynamics relevant to the case.

The research study raises some other interesting issues, which are particularly relevant to the South African context. Firstly, the project experienced difficulties with regard to interpretation when the victims and offenders spoke different languages from one another or from the facilitator. In South Africa, where there are eleven official languages it is inevitable that language difficulties will emerge. In a courtroom this is dealt with through the services of an interpreter. In the project, no official interpreters were appointed, and the conference organisers often undertook translations. The research study points out that this created problems because the participants in the conference then related strongly to the conference organiser and the facilitator's role was seriously weakened. The research study noted that independent interpreters would be better, but that they would need to be carefully trained.

The research study also raised the issue of race. Of the 42 conferences held, there were only three family group conferences where the victim and the offender were from different ethnic groups. However, this sample is too small from which to draw any conclusions. It is clear that the appropriate handling of issues of race and culture will be of vital importance to the future of family group conferencing in South Africa, and it is unfortunate that this aspect was not really explored in the project.

The issue of the intensiveness of family group conferencing and the relative costliness if used in petty cases, was also discussed in the research study. The authors had the following to say in this regard:

> "One of the first questions the project grappled with was what exactly the point of a family group conference is. If we can refer a child to a life skills programme or community service directly from court what is the point of the costly and time-consuming family group conference? At the end of the project, the answer is clear: the power lies in the process. A change in attitude and behaviour of any person cannot be guaranteed by just completing a programme. It is rather a function of a complex set of dynamics and feelings. Family group conferences invest in these dynamics and create the opportunity and possibility for change to occur" (Branken and Batley 1998: 144).

An attempt at costing the setting up and holding of a family group conference was attempted by the project, and this was later used by economists who costed

the operation of the draft Child Justice Bill. Their findings in this regard are detailed below.

The sample produced by the project for analysis by the research study was small, and it is therefore difficult to fully indicate levels of satisfaction by either victims or offenders. Nevertheless, the stories that emerged from the project richly illustrated the healing possibilities of family group conferences. Furthermore, the implementation manual arising from the project has been used as the basis for training probation officers running family group conferences at a one-stop youth justice centre project in the Eastern Cape. NICRO has also provided training based on this manual to its employees who are running family group conferences as a diversion option on a limited scale from some offices around the country. The work undertaken by NICRO in the rural areas of the Western Cape, conducting over 30 family group conferences, has provided interesting anecdotal information. Many of these conferences have, unusually, been for indecent assaults involving young victims and perpetrators. It was often found that these young people and their families had been neighbours or friends for years. In these situations, family group conferences were found to be an effective means for healing relationships. NICRO noted that this work was enabled by the co-operation of the deputy director of public prosecutions who accompanied the NICRO facilitators to these rural areas (Fairoza Brey, NICRO, 16 August 2000, personal communication).

Law Reform

South Africa is soon to have a new statute that will introduce an entirely new system for dealing with children accused of crimes. A consultative method of law-making was followed, which coincided with many of the policy developments and pilot projects described above. This allowed for an iterative process, in which the experiences of testing policy through pilot projects was able to influence what was included in legislation. The law-making process began when the Minister of Justice requested the South African Law Commission to include in its programme an investigation into juvenile justice. A project committee was set up which commenced its work in 1997 and a discussion paper (SALC 1998) with a draft Bill was published in 1998. The final report of the Commission is now complete, and was released as a public document in August 2000 (SALC 2000).

The draft Bill accompanying the report is called the Child Justice Bill. The Bill includes the following as part of the objectives clause:

The objectives of the Act are to promote *ubuntu* in the child justice system through:-

(i) fostering of children's sense of dignity and worth;
(ii) reinforcing children's respect for human rights and the fundamental

freedoms of others by holding children accountable for their actions and safe-guarding the interests of victims and the community;

(iii) supporting reconciliation by means of a restorative justice response; and

(iv) involving parents, families, victims and communities in child justice processes in order to encourage the reintegration of children who are subject to the provisions of the Act (SALC 1998 Section 4).

Restorative justice is defined in the draft Bill as follows:

> "Restorative justice means the promotion of reconciliation, restitution and responsibility through the involvement of a child, a child's parent, family members, victims and communities" (SALC 1998 Section 1).

The new system includes alternatives to arrest, compulsory assessment of each child by a probation officer, and appearance at a preliminary inquiry within forty-eight hours of the arrest (or the alternative to arrest). The preliminary inquiry will be chaired by a magistrate, but will take the form of a case conference, the main purpose of which is to promote the use of diversion. The prosecutor, probation officer, and police official will attend this inquiry, as well as the child and his or her family.

Diversion is a core component of the new system, and the draft Bill offers three levels of diversion. Level one includes programmes which are not particularly intensive and are of short duration. The second and third levels, however, contain programmes of increasing intensity, which can be set for longer periods of time. The clear intention of setting out a range of options in this way is to encourage those working in the system to use diversion in a range of different situations, even in relatively serious offences. Family group conferences are available at level two and level three, indicating that they are viewed as intensive diversion options by those drafting the Bill.

The draft Bill also includes detailed procedures for the setting up and running of family group conferences. A probation officer (a social worker employed by the Department of Welfare) has the responsibility of convening the conference as soon as possible but not longer than 21 days after the decision that such a conference should take place. The persons entitled to attend a family group conference are: the child and his or her parent or an appropriate adult; any other person requested by the child; the probation officer; the prosecutor; the relevant police official; the victim and, where the victim is under the age of eighteen, his or her parent or guardian and other family member; a member of the community in which the child is normally resident; the legal representative of the child; and any other person authorised by the probation officer to attend the conference.

The family group conference is empowered to regulate its own procedure and to make such plan as it deems fit, provided that it is appropriate to the child and family and is consistent with the principles contained in this draft Bill. The plan must specify the objectives for the child and the family, as well as the period in which they are to be achieved, must contain details of the services and assistance

to be provided for the child and family and must include such other matters relating to education, employment, recreation and welfare of the child as are relevant.

According to the draft Bill, family group conferences can happen as diversion options prior to trial, but the court can also stop the proceedings in the middle of a trial and refer the matter to a family group conference. The court can also, after conviction, send the matter to a family group conference to determine a suitable plan, which the court can then make into a court order for the purposes of sentencing. The draft Bill includes provisions for the failure of family group conferences, as well as for non-compliance with the plan arising from the conference.

In addition to the possibility of referral to a family group conference, the draft Bill also allows for referral to a victim offender mediation or other restorative justice process. The idea behind the wording "other restorative justice process" is to allow for creative or indigenous models of restorative justice procedures to be developed or to re-emerge. It constitutes a recognition of the fact that the model of family group conferences outlined in the Bill is largely a borrowed model, based on the experiences of other countries such as New Zealand, Australia and Canada. The Bill, therefore, provides space for the emergence of a locally developed model.

Finally, the South African Law Commission project committee on juvenile justice was very concerned that the proposals being made should be realistic and affordable. In order to ensure this, the committee commissioned a costing of the draft Bill by the Applied Fiscal Research Centre at the University of Cape Town. The report produced by the economists weighed up the cost of a family group conference against the cost of a residential sentence. The point made is that the Government currently spends over 100 times more on sentencing children to prison than it spends on diversion and alternative sentences. If the new law is implemented, this should be reduced to 12 times. The report suggests that there is a direct trade off between the amount of money spent on diversion and alternative sentences and the expenditure on prison sentences. A comparison of the figures for the current system and the one proposed in the draft Bill "suggests that increasing expenditure on diversion and alternative sentences by R16 million plays a significant role in reducing expenditure on prison sentences by R212 million" (Barberton and Stuart 1999: 31). Those drafting the Bill were thus satisfied that family group conferences are not unaffordable when compared with what the current system spends on channelling children through courts, secure care and imprisonment. The savings realised by the new system would be well spent on diversion and community-based sentencing options including family group conferences.

A CONFERENCING MODEL FOR SOUTH AFRICA?

New Zealand has been the source of much inspiration and support for the transformation of the child justice system in South Africa. The pilot projects have been based on the New Zealand model, but there has been little analysis on the part of practitioners or policy makers about whether this model is really suitable for South Africa. The stage is now set for family group conferences to become an important part of our future child justice system. As we set out on this journey, we need to seek our own model of conferencing: one that serves and promotes the needs of both victims and offenders while responding to the range of unique conditions existing in South Africa, and one that capitalises on the rich diversity of experience in restorative justice that already exists. As we embark on this search for a unique model, the following are offered as an incomplete list of important issues and ideas that should be considered.

The Need to Harmonise the Formal and Informal Systems of Justice

As South Africa suffers serious constraints on resources (both human and material), it is vitally important that maximum use be made of structures and procedures that are already in existence. Structures such as traditional courts and community courts are available to many South Africans as access points to justice, and people have faith in them. However, the formal justice system is also recognised as playing an important role in guaranteeing safety in the community, and the communities seem to want a dual system. It had been argued that what we needed was to "foster a system that recognises the interrelation between organs of State justice and popular justice." (Nina 1995: 18). However, some caution must be exercised when engaging existing community structures, as there are indications that some community courts are becoming increasingly retributive. Public anger about crime and frustrations about the ineffectivess of the formal justice system has led in some instances to bush justice being meted out.

The Challenge of Social Injustice

African models of conflict resolution worked well in homogenous societies where there was substantive equality between the parties. Restitution and compensation was often linked to the payment of goats or cattle and ordinary people could afford to make these payments. Colonisation and apartheid have left a legacy of gross inequalities. The challenge which will need to be faced in developing a model of conferencing that can work in this situation is to find an answer to the question of how one frames restorative justice outcomes for crime

in an environment of social injustice. Poverty is one of the major causes of crime in South Africa, and many crimes are committed by extremely poor people. Conversely, many victims of crime are wealthy. Bringing these people from very different social situations together in a conference to ensure that the poverty-stricken offender should be held accountable and make restitution to the wealthy victim requires a carefully thought through process, very special management and highly developed skills in a co-ordinator.

Urbanisation and the Breakdown of Family and Communities

The African concept of *ubuntu* is under threat. The constant drift of people off the land into cities began with the migrant labour policy of the apartheid government, but now continues due to people's search for employment. The break away from the carefully structured traditional family life has led to many children being raised in female headed households, rarely seeing their fathers. Middle income and more affluent African families living in cities are moving towards nuclear family patterns, and have little connection with the communities they live in. The liberation movement has empowered women and young people, so that the guiding power of elder male community leaders has waned. These changes in family structures will make it difficult to bring the vital concept of *ubuntu* to the centre of the conferencing model which we seek. On the other hand, the process of conferencing itself may provide a catalyst to rebuild families and communities and may provide a springboard for a recommitment to *ubuntu*.

Negotiating the Law Enforcement Climate

The post-apartheid government itself has in the past three years shown an increasing tendency to follow crime control methods espoused by the United States of America, with zero tolerance, minimum sentencing and tougher bail laws being high on the agenda (Skelton 1999). Those trying to find a unique conferencing model will need to ensure that there is confidence in the model not only amongst community members, but also amongst those working within the system. The value of restorative justice and the power of the process used will need to be fully appreciated by the police, prosecutors, magistrates and probation officers. Without their belief in the model, they will be unlikely to refer matters for conferencing.

Human and Financial Resources

There is a need to develop appropriate skills for setting up and undertaking conferences. This would need to include attention to issues of language ability and

cultural sensitivity. The Department of Welfare will be responsible for the setting up and running of conferences, but in order to do this they will need to outsource the service to carefully selected organisations or practitioners. The cost of conferencing will remain with the Department of Welfare however, and the budget for social services is relatively small. Although the cost of family group conferences has been shown to be less expensive than methods used at the present time by the current system, the realisation of those savings is more difficult than it sounds. The sectoral budgeting system used by the South African parliament makes it difficult to transfer money across departmental budgets. Savings made by the Department of Justice or the Department of Correctional Services will not easily be made available for expenditure by the Department of Welfare.

CONCLUSION

Consedine (1999: 179), in assessing the harm done in South Africa by the colonially inherited system of law comes to the following conclusion:

> "A parallel restorative system based on personal and collective responsibility, recognition of and empowerment for victims, and an overall aim of repairing damage done and healing the effects of crime, can only offer hope to all involved."

South Africans accept the idea of community involvement in decision-making. This is clear from the fact that traditional courts have survived the tides of different political pressures and still play a role in conflict resolution today, especially in rural areas. There is further evidence of confidence in community-based justice through the development of community courts, which are seen by policy makers as part of a future system in which formal and informal justice systems are harmonised. By choosing healing rather than vengeance through the Truth and Reconciliation Commission, South Africans have demonstrated that they understand the value of a restorative approach to justice. There is a will to make family group conferencing an important part of the future child justice system. We now need to find the way towards a unique model which unlocks the innate conflict resolution skills which undoubtedly exist in communities, and merge them with the realities of life in South Africa in the 21st century.

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7

Victim Impact of Meeting with Young Offenders: Two Decades of Victim Offender Mediation Practice and Research

MARK S UMBREIT, ROBERT B COATES and BETTY VOS

INTRODUCTION

From its inauspicious beginning as the response of a concerned probation officer to a juvenile offender in Kitchner, Ontario in 1974, Victim Offender Mediation (VOM) has grown into a widespread restorative justice practice with over 1300 programmes in more than twenty nations. Across its many venues, VOM is offered pre and post disposition, for both juvenile and adult offenders, for crimes ranging from petty misdemeanors to assault and murder, and in a wide variety of formats. As is so often the case, practice has vastly outrun the pace of knowledge provided through empirical investigation. However, over the course of the last twenty-five years, more than 40 studies have investigated various aspects of VOM programme characteristics, processes and outcomes (Umbreit and Coates, 2000a).

This chapter examines the impact of VOM on the victims of crimes perpetrated by juvenile offenders. A total of twenty-seven empirical studies examining various aspects of the impact of VOM on victims are reviewed. Of these, fourteen studies specifically address VOM programs working only with juvenile offenders (Bradshaw and Umbreit 1998; Carr 1998; Collins 1984; Evje and Cushman 2000; Fercello and Umbreit 1999; Flaten 1996; Galaway 1989; Niemeyer and Shichor 1996; Roberts 1998; Strode 1997; Umbreit 1988; Umbreit 1989a; Umbreit 1991; Umbreit 1994). Thirteen studies examine VOM programs working with both adults and juveniles (Coates and Gehm 1989; Gehm 1990; Marshall and Merry 1990; Perry et al 1987; Umbreit 1995; Umbreit and Bradshaw 1997; Umbreit and Bradshaw (in press); Umbreit and Bradshaw 2001; Umbreit et al 1998; Umbreit and Roberts 1996; Warner 1992; Wynne 1996; Wyrick and Costanzo 1999). Because of the importance victims frequently place

upon rehabilitating offenders or reducing further criminal behaviour, an additional six studies which assessed the impact of VOM on recidivism rates among juvenile offenders are also reviewed (Nugent and Paddock 1995; Nugent et al 2001; Roy 1993; Schneider 1986; Stone et al 1998; Wiinamaki, 1997). The chapter also makes use of additional studies shedding light more generally on the characteristics of VOM programs, victims' interest in VOM and the use of VOM in crimes of violence.

BRIEF HISTORY AND SCOPE OF VICTIM OFFENDER MEDIATION

As with most reform ideas, victim offender mediation has many historical roots (Umbreit 2001). It shares its ideology and purpose with some of the early neighbourhood dispute resolution experiments of the late 1960s and 1970s which sought to mediate disputes at the local level. Many community volunteers were recruited to serve as mediators. In some of the larger neighbourhood dispute resolution programmes, cases were frequently handled by lawyers or paralegal staff and did not necessarily involve face-to-face encounters of the disputants.

A second direct link, and probably the strongest, to the broadly based victim offender movement is the development of Victim Offender Reconciliation Programs, also known as VORPs (Peachey 1989; Zehr 1990). The initial VORP was founded in Kitchener, Ontario, in 1974 by the Mennonite Central Committee and was later replicated in Elkhart, Indiana in 1978. The idea spread quickly through the Mennonite community with VORPs starting up in a number of Indiana counties and other states during the late 1970s and early 1980s. With their emphasis on reconciliation, these early VORPS focused on humanising the criminal justice process, helping offenders change their lives and providing assistance to crime victims. VORP programmes involved direct face-to-face meetings with victim and offender in the presence of a trained mediator.

The third significant root of VOM is the influence of the victims' rights movement that has developed over the past two decades. Initially many proponents of victims' rights were skeptical of and heatedly opposed to the idea of bringing victims and offenders together to talk about the offence and to develop a restitution plan. They believed that such meetings would only result in further victimisation of the victim, and they feared that VOM might also reduce punishment for the offender. Some within the victims' rights movement still hold this position. Many others, however, have worked closely with victim offender mediation advocates to ensure that the mediation process is conducted in a highly victim-sensitive manner. Some victim advocates have played an active leadership role in the development of new victim offender mediation programmes.

Victim advocates are increasingly viewing victim offender mediation as an important option to have available for interested victims, as long as it is clearly voluntary. A recent Minnesota survey of victim service providers, conducted by

the state Crime Victim and Witness Advisory Council (1996), found that 91 per cent of victim service providers throughout the state believed that VOM is a valuable programme and should be available in all courts. Beginning as an early skeptic of the process, the National Organisation for Victim Assistance is now an active supporter of restorative justice and victim offender mediation. The victim advocacy movement has helped the victim offender mediation process achieve, at least theoretically, a balance between the needs and interests of offenders and victims.

Tension among these three roots can still be seen today in the VOM movement. Some contend that face-to-face mediation is unnecessary; many in victim advocacy groups find the word "reconciliation" to be an anathema; and others wonder whether mediation will be turned into a massive victim restitution programme and lose its focus as a programme also designed to help offenders change.

In the twenty-five years since VOM began, interest in bringing victims and offenders into a variety of VOM formats has continued to grow. By the year 2000, more than 300 VOM programmes were operating in the United States (Umbreit 2001). Two-thirds of these programmes were private community based or church based, while about a fourth operated under the auspices of probation or corrections. Mediation was fairly equally distributed across the criminal justice process occurring as a diversion from court, taking place between adjudication and disposition, and being included as a post-disposition option. The majority of cases involved juvenile offenders charged with vandalism, minor assault, or theft. Programme staff reported pressures to mediate more serious cases. Many programmes routinely work with burglary cases and an increasing number are receiving referrals of more violent crime. Perhaps one of the most dramatic examples of the growing acceptance of VOM within the United States is seen in the American Bar Association's 1994 endorsement of VOM and its recommendation that VOM should be available in courts throughout the country.

The victim offender mediation movement is clearly international in scope. The vast majority of programmes are located in North America and in Europe, with additional programmes in South Africa, Australia and New Zealand. In at least two countries, some form of VOM is mandated to be available in all jurisdictions. Cross-national research and dialogue continue to shape the VOM movement.

DESCRIPTION OF VICTIM OFFENDER MEDIATION

Victim offender mediation is a process which provides interested victims of primarily property crimes and minor assaults the opportunity to meet the offender, in a safe and structured setting, with the goal of holding the offender directly accountable for his or her behaviour while providing important assistance and

compensation to the victim. With the support of a trained mediator (most often a community volunteer), victims are able to let the offender know how the crime affected them, to receive answers to questions they may have, and to be directly involved in developing a restitution plan for the offender to be accountable for the losses victims have incurred. Offenders are able to take direct responsibility for their behaviour, to learn of the full impact of what they did, and to develop a plan for making amends to the person(s) they violated. In addition to "victim offender reconciliation", some victim offender mediation programmes are called "victim offender meetings", "victim offender conferences" or "victim offender dialogues".

In some programmes, cases are primarily referred to victim offender mediation as a diversion from prosecution, provided the agreement is successfully completed. In other programmes, cases are referred primarily after a formal admission of guilt has been accepted by the court, with the mediation being a condition of probation (if the victim is interested). Some programmes receive case referrals at both the diversion and post-adjudication level. Most cases are referred by officials involved in the juvenile justice system, although some programmes also receive referrals from the adult criminal justice system. Judges, probation officers, victim advocates, prosecutors, defence attorneys, or police can make referrals to victim offender mediation programmes.

Once an offender and victim have been referred to mediation, typically a trained mediator will meet with each separately one or more times before the actual session. This is done to listen to each individual's story, to invite their participation and, if they are interested, to share with them the process to be expected, to help participants shape realistic expectations, and to screen out, if necessary, individuals who are not appropriate for mediation.

The mediation session will include the victim, the offender, the mediator, and often family members or other support people of the victim or offender. A recent national survey (Umbreit and Greenwood 1999) found that in 92 per cent of the programmes surveyed, parents or a support person were sometimes or always present. The mediator's task is to facilitate a discussion between the victim and the offender so their questions and issues may be dealt with. If a restitution plan emerges, the mediator will often write up the details in a contract for the participants. In most jurisdictions, the mediator will return the contract to the programme and programme staff will send a copy to the referral source.

Victim offender mediation is different from other types of mediation. Mediation is being used in an increasing number of conflict situations, such as divorce and custody, community disputes, commercial disputes, and other civil court related conflicts. In such settings, the parties are called "disputants", with an assumption being made that they both are contributing to the conflict and therefore need to compromise in order to reach a settlement. Often, mediation in these settings is focused heavily upon reaching a settlement, with less emphasis upon a discussion of the full impact of the conflict upon the parties' lives.

In victim offender mediation, the involved parties are not disputants. One has clearly committed a criminal offence and has admitted doing so. The other has clearly been victimised. Therefore, the issue of guilt or innocence is not mediated. Nor is there an expectation that crime victims compromise and request less than what they need to address their losses. While many other types of mediation are largely "settlement driven", victim offender mediation is primarily "dialogue driven", with the emphasis upon victims' healing, offenders' accountability and restoration of losses. It is based upon a non-directive humanistic model of mediation (Umbreit 2001) which emphasises creating a safe place, through the prior in-person preparation of the parties, for the victim and the offender to talk directly to each other with minimal intervention by the mediator. Most victim offender mediation sessions (in many programmes over 95 per cent) do in fact result in a signed restitution agreement. This agreement, however, is usually secondary to the importance of the initial dialogue between the parties that addresses the emotional and informational needs of victims which are central to their healing and to the development of the offender feeling empathy for the victim which can itself lead to less criminal behavior in the future.

IMPACT OF VICTIM OFFENDER MEDIATION ON VICTIMS

The twenty-seven VOM victim impact studies reviewed here cover programmes across the US, Canada, England and Scotland. Most programmes focus on property crime and minor assaults, although a few include more violent crimes. Both quantitative and qualitative studies are represented. Some are fairly direct programme evaluation studies. Some are more comprehensive with comparison groups. Some offer simple descriptive statistics and a few present very sophisticated multivariate analysis.

All the studies explore victims' satisfaction with victim offender mediation. No single study addresses all the questions under discussion in the present chapter. Moreover, differences in how researchers frame particular questions complicate cross-study comparisons. For most of the questions of interest in understanding the impact of VOM on victims, we will report the number of studies addressing the question and the range of responses reported by the relevant studies. These sketchy quantitative data will be fleshed out through the use of typical comments taken from the qualitative components of many of the studies.

Are Crime Victims Interested in Meeting Offenders?

The desire of victims to meet with the person who violated their space or person surprises, if not shocks, many observers of the criminal justice system. Yet,

repeatedly, victims of crime volunteer to meet the offender who has done them wrong. Some become quite aggressive in their interactions with the criminal justice system in seeking such a meeting.

A statewide representative survey conducted in Minnesota included questions to assess the public's sentiment toward handling criminal offenders (Pranis and Umbreit 1992). Participants were asked to place themselves in a hypothetical situation in which they were a victim of a non-violent property crime. In such a circumstance, they were asked how likely they would be to participate in a programme that allowed them to meet with the person who committed the crime? More than four out of five Minnesotans indicated an interest in meeting with the offender.

In a British Crime Survey, victims of offences which had occurred during a previous twelve month period were asked if they would be willing to meet with their offender so "the offender could make a repayment for what he had done". Overall, 49 per cent indicated a willingness. Just under one third of victims of violent offences and approximately 60 per cent of those experiencing property offences said they were willing to participate (cited in Reeves, 1989).

From the hypothetical we can move on to look at programmes which keep statistics on the characteristics of the victims who are referred to victim offender mediation programmes and compare those who choose to participate with those who do not. A study of 555 cases from six programmes serving both juveniles and adults in Indiana, Oregon and Wisconsin (Gehm 1990) found that 53 per cent of possible cases referred failed to meet because of the victims' refusal to participate. Applying regression analysis to the case records available, it was discovered that victims were more likely to meet if the offender was white, if the offence was a misdemeanour, and if the victim represented an institution or organisation rather than him or herself as in a house burglary.

Some of these findings were supported by research in a large Orange County, California programme serving both juveniles and adults (Wyrick and Costanzo 1999). Records were examined for an eight year period amounting to some 2428 cases. These were divided into those cases that reached mediation and those that did not. A logistic regression analysis was conducted to determine factors differentiating the two groups. The key dependent variable in this study is defined somewhat differently than in Gehm's (1990) study which compared those victims who chose not to participate with those who chose to participate. Wyrick and Costanzo's (1999) study compares those cases which were mediated with those which were not, regardless of the reason the case did not come to mediation. In addition to the refusal of the victim, such reasons could also have included the refusal of the offender or the decision to resolve differences without mediation.

In the Wyrick and Costanzo's (1999) study, property offence cases were more likely to reach mediation than personal offence cases. And, like Gehm's (1990) study, victims representing organisations or institutions were more likely to be

among the cases reaching mediation than individual victims of crime. White offenders, however, were no more likely to reach mediation than Hispanic offenders, but they were more likely to reach mediation than other minorities. An interesting question for further pursuit here is whether or not victims are more likely to agree to mediation if the offender is of a similar ethnic background. The same question could be asked about the ethnic similarity of victims and mediators.

A final significant finding from Wyrick and Costanzo's (1999) study has considerable implications for practice. That is, the longer the time lapse between the crime and the referral to VOM, the less likely victims of property offence are to reach mediation. In contrast, the reverse is true for victims of personal crimes. The longer the lapse time between the crime and referral, the more likely such cases are to reach mediation.

While these correlation studies of large numbers of cases provide useful data helpful for understanding victims' participation, they do not tell us why victims make the decisions they do. To begin to develop such a picture we must turn to smaller studies which included interviews with participants and non-participants. In a 1984 study of VORPs serving both juveniles and adults in Indiana and Ohio (Coates and Gehm 1989), victims reported desiring to participate, in descending order: to recover restitution for loss; to help the offender; to participate usefully in the criminal justice process; to ask questions of and express feelings toward the offender; or to punish the offender more effectively than through the traditional criminal justice process. Many indicated that they wanted to "teach the offender a lesson" (Coates and Gehm 1989: 252). A small sub-sample of victims who had refused to participate were also interviewed. Their reasons for choosing not to participate were: the perceived hassle of involvement was not merited by the loss; they feared meeting the offender/meeting at the victim's home; they had already worked out settlement; and there was too much time delay from point of crime.

Similarly, in a four state study of juvenile VOM programmes, victims indicated that getting repaid for their loss and helping the offender were of nearly equal importance for participating (Umbreit 1994). Likewise those choosing not to participate indicated that "the loss was small. . .it just was not worth the trouble" (Umbreit and Coates 1992: 70). Or, "I didn't want to see him because I would get mad" (Umbreit and Coates 1992: 71). An Orange County, California study which included interviews with victims of juvenile offenders found that 35 per cent of the victims choosing not to participate did so because the case was not important enough to merit participation (Niemeyer and Shichor 1996).

In English studies, corporate victims appear less willing to meet offenders than individual victims (Marshall and Merry 1990) and those who choose to participate primarily express curiosity about the offender and why the crime was done. There are two important differences between mediation in England and in the US First, British comprehensive health coverage and victim

compensation laws provide considerably more financial assistance to crime victims than is common in the US, making financial restitution a more secondary concern of victims. Second, the VOM practice as it has evolved in England includes two formats: face to face meetings, and an indirect mediation in which the mediator carries information back and forth in working out a settlement without conducting a face-to-face meeting. Most cases in VOM programs in England involve indirect mediation (Umbreit and Roberts 1996).

Only one study of the victim impact of VOM in juvenile crime focused on serious or violent crimes (Flaten 1996). The results of this Anchorage, Alaska qualitative study of seven juvenile cases concur with what is being learned from VOM participants in cases of adult violent crime. Victims who choose to meet with violent offenders are largely interested in getting facts from the offender about the why and the how of the crime, telling the offender their feelings and pain, and, in capital cases, teaching the offender about the person whose life was taken (Flaten 1996; Umbreit 1989b; Umbreit et al 1999; Umbreit and Brown 1999; Umbreit and Vos 1999). Restitution is often relegated to a secondary concern.

Across seven studies of VOM with juvenile offenders (Carr 1998; Evje and Cushman 2000; Niemeyer and Shichor 1996; Roberts 1998; Umbreit 1989a; Umbreit 1991; Umbreit 1994), the percentage of cases reaching mediation ranged from 42 to 90 per cent. Among eight studies of VOM programmes working with both juveniles and adults (Coates and Gehm 1989; Gehm 1990; Marshall and Merry 1990; Perry et al 1987; Umbreit,1995; Umbreit and Roberts 1996; Warner 1992; and Wynne 1996), the percentage ranged from 37 to 67. Marshall and Merry (1990) reported separate rates for police-based juvenile programmes (79 per cent) and court-based adult programmes (51 per cent).

Is the Process of Victim Offender Mediation Voluntary for Victims?

Ten of the studies under review addressed the question of whether or not victims felt their participation in VOM was voluntary (Coates and Gehm 1989; Flaten 1996; Marshall and Merry 1990; Perry et al 1987; Roberts 1998; Strode 1997; Umbreit 1994; Umbreit 1995; Umbreit and Roberts 1996; Warner 1992). Between 83 and 100 per cent of victims interviewed were reported as saying that they voluntarily chose to meet with the offender, with no appreciable difference between the juvenile samples and the mixed samples. Only in a few instances did victims feel pressured by a mediator, family member, or friend. Comments ranged from victims indicating that they felt little pressure to participate (Coates and Gehm 1989) to researchers suggesting that victims were exposed to less pressure to participate than offenders (Marshall and Merry 1990). Pressure to participate may be subtle: "Mediation should be voluntary, i.e., offered only, and not recommended. Because if you decline, you are the bad guy" (Umbreit 1995: 164).

In those programmes where the emphasis is on working with the victims of serious crime, pressure from the system or the mediation programme to participate is seldom mentioned. All seven of the victims in Flaten's (1996) study reported that their participation was voluntary. With such cases, there are often pressures from family members and friends not to meet the offender who has wreaked havoc and pain upon the victim and the family. In cases of serious or violent crime, mediation is nearly always initiated by the victim or a family member of the victim. Most programmes offering VOM in such cases take the position that any other process risks the danger of revictimising the victim. Even when offenders have expressed an interest in such meetings, this information is usually simply kept on file until such time as the relevant victim seeks to arrange a meeting (Umbreit 2001).

Do Victims feel Adequately Prepared for Meeting the Offender?

Across five empirical studies reporting percentages (Collins 1984; Fercello and Umbreit 1999; Roberts 1998; Strode 1997; and Umbreit 1995), the proportion of victims feeling adequately prepared to meet the offender ranged from 68 to 98 per cent. Most working in the field of victim offender mediation contend that preparation is the key to effective mediation: it leads to a true dialogue between the parties, with little intervention or speaking by the mediator. In most programmes, considerable time is devoted to preparing both victims and offenders for the mediation session through separate in-person meetings. Each is informed about the process, about the nature of the person they will encounter, and about realistic expectations. With victims of serious crime, preparation may require months, if not years. In a study of VOM with victims of serious offences committed by juveniles (Flaten 1996), preparation was identified as the single most important factor contributing to the success of the mediation. Preparation included telephone conversations, counselling sessions, pre-mediation meetings and self-preparation.

Regardless of the nature of the crime event, there is a need to know what to expect when considering the possibility of meeting with an offender. Not knowing, in and of itself, can generate anxiety and fear. An English victim reported being well prepared: "I was in no doubt as to what it [mediation scheme] constituted by the time I had agreed to take part in it" (Marshall and Merry 1990: 159). Some victims in the studies under review felt no more prepared than they might have been for going to court. "I was given insufficient preparation for the mediation—ill prepared because of insufficient information", said a Canadian victim (Umbreit 1995: 163). Without adequate preparation, victims may experience mediation as merely another victimising encounter.

Are Victims Satisfied with Justice System Response to Their Case?

Seven of the studies reviewed for this chapter asked directly about victims' satisfaction with the criminal justice system referral of their case to mediation (Collins 1984; Fercello and Umbreit 1999; Strode 1997; Umbreit 1989a; Umbreit 1995; Umbreit 1994; Umbreit and Roberts 1996). Nearly all programmes reported satisfaction rates of 70 to 79 per cent. The exception was a juvenile VOM programme where participating offenders were court ordered to participate (Strode 1997). 50 per cent of the 16 victims in this programme were dissatisfied with the criminal justice system referral, largely due to the low rate of completion of the negotiated restitution agreements.

In those studies with comparison groups, satisfaction levels were higher for victims referred to face-to-face mediation than for those who were not (Umbreit 1994; Umbreit 1995; Umbreit and Roberts 1996). These three multi-site studies report victims' satisfaction in several programmes in the United States, Canada and England. In the US study of juvenile VOM programmes, there was a statistically significant difference in satisfaction scores between those going through mediation (79 per cent of whom were satisfied) and those not referred to mediation (57 per cent of whom were satisfied) (Umbreit 1994). The respective figures for England were 79 per cent compared to 55 per cent (Umbreit and Roberts 1996), and, for Canada, they were 78 per cent compared to 48 per cent (Umbreit 1995). The English and Canadian VOM programmes work with both adult and juvenile offenders.

The following are typical comments from victims in Canada, England and the United States regarding the justice system and mediation:

> "Mediation is better than court because it solves the problem" (Umbreit 1995: 156).
>
> "I had a sense of control. It gave me a voice. I felt totally powerless before" (Umbreit 1995: 160).
>
> "My viewpoint was listened to and I felt less like a crime statistic" (Umbreit and Roberts 1996: 10).
>
> "It [mediation] gave us a chance to see each other face to face and to resolve what happened" (Umbreit and Coates 1992: 106).

The minority of victims who were not satisfied with having been referred to mediation are represented by these comments by a Canadian victim:

> "I'd have been happier if it [case] had gone to court. My Lawyer was not allowed to participate in mediation. I felt he [offender] was getting off scot-free" (Umbreit, 1995: 162).

One of the goals frequently attributed to victim offender mediation programmes is humanising the criminal justice system. The responses of a significant majority of victims would suggest that steps have been taken in this

direction. While victim offender mediation was not established with the purpose of improving the public's perception of the criminal justice system, those who shape criminal justice policies may regard these kinds of positive responses as a major benefit.

Are Victims Satisfied with Victim Offender Mediation?

It is not surprising to find that researchers ask different kinds of questions about satisfaction. Some ask a generic overview question; others try to break the question down into component parts; and some do both.

Five studies of juvenile programmes (Carr 1998; Collins 1984; Evje and Cushman 2000; Flaten 1996; Fercello and Umbreit 1999;) and four studies of mixed programmes (Coates and Gehm 1989; Marshall and Merry 1990; Perry et al 1987; Umbreit and Bradshaw 2000) addressed the broad question of victims' satisfaction with VOM. The range of victims satisfied is 90 per cent to 97 per cent.

Victims across a number of sites often indicated that meeting the offender was the most satisfying part of the VOM experience: this could be to tell the offender of their pain, to hear the why and how of the crime, or simply to put a human face on the offender (Coates and Gehm 1989; Umbreit 1988; Umbreit 1991; Umbreit 1995). Receiving restitution for losses and sensing the offender's remorse were also noted as factors contributing to overall satisfaction. One victim stated: "It put my mind at ease because we had conjured up the big thugs breaking in . . . they were small kids" (Umbreit 1988: 97). An Alaska victim of a violent crime by a juvenile claimed: "The mediation saved my life, and I am so thankful I was able to participate" (Flaten 1996: 394).

Not all victims, of course, were enamored with VOM. One expressed his distress in the following manner: "It made me mad seeing him there. It made me feel taken advantage of. Wasted time" (Umbreit 1995: 163). Victims sometimes complained about the amount of time they had to contribute, the delay between the crime event and the resolution of the conflict, and the lack of follow-up (Coates and Gehm 1989; Perry, Lajeunesse and Woods 1987; Strode 1997; Umbreit 1995).

One way to begin to explore the underlying meaning of victims' satisfaction is to look for those elements of the victim offender mediation experience which correlate with satisfaction. Two of the studies reported here attempted to do just that. These studies, one with a US juvenile sample (Bradshaw and Umbreit 1998) and one with a Canadian mixed sample (Umbreit and Bradshaw 2001) found very similar results. Subjecting factors related to victims' satisfaction to a regression analysis, the authors found that three factors were highly explanatory: victims' attitude toward the mediator; victims' perceived fairness of the restitution agreement; and the importance of meeting the offender. These findings underscore the importance of the interpersonal nature of mediation.

A study comparing a Canadian adult VOM programme with a US juvenile VOM programme addresses the question of whether and how victims' satisfaction might be related to the age of the offender (Umbreit and Bradshaw 1997). Victims of juvenile offenders were more likely to believe that mediation helped the victim participate in the justice system. Victims of adult offenders were significantly less afraid that the offender would commit another crime against someone. There was no significant difference between the two groups regarding victims' satisfaction with the criminal justice system or victims' satisfaction with the mediator, willingness to recommend the programme to others, or how upset the victim was about the crime after the mediation.

An indirect measure of victims' overall satisfaction with VOM is the victim's willingness to participate again in such a programme or to recommend that others do so. Six out of nine studies asking this question reported over 90 per cent of victims answering affirmatively (Carr 1998; Coates and Gehm 1989; Fercello and Umbreit 1999; Flaten 1996; Strode 1997; Umbreit 1991). One study (Perry et al 1987) reported 80 per cent and two others (Collins 1984; Marshall and Merry 1990) found that "most" or "a majority" of victims would be willing to do so.

Umbreit and Bradshaw (2001) report the development of a scale to measure overall victims' satisfaction through assessing satisfaction with eleven specific components of the VOM experience, including many of the factors previously discussed. The scale was normed on victims from VOM programmes serving both juveniles and adults in four sites across California and Minnesota. The average satisfaction score for the 197 participants was 32.74 on a scale of 11 to 44. Satisfaction was not significantly related to the victim's gender, income, education or age. Although there were no statistical differences in satisfaction between victims of personal and property offences, this finding may be an artifact of the relatively small number of offences against the person and the unequal variance between the two groups. However satisfaction is measured and analysed, victims report high levels of satisfaction with their VOM experiences. Not only is mediation well received by victims; so are the criminal justice systems which support such programmes.

Are Victims Satisfied with the Outcome of Victim Offender Mediation?

Outcomes of mediations between victims and offenders can be quite varied and include monetary restitution, service to the victim, community service, apologies and participation of offender in various intervention programmes. Any specific outcome depends upon the needs and interests of the parties involved in a particular mediation.

Of the studies under review, seven studies of juvenile VOM programmes directly addressed the question of how satisfied victims were with the outcome of the mediation (Carr 1998; Collins 1984; Evje and Cushman 2000; Fercello and

Umbreit 1999; Strode 1997; Umbreit 1994 and Umbreit 1995). Satisfaction levels ranged from 80 to 97 per cent with the exception of the small Strode (1997) study in which offenders are court ordered to participate. Only 56 per cent of these victims were satisfied, largely due to the low rate of offender compliance with negotiated agreements, 94 per cent of these victims found the meditation to be helpful.

Satisfactory resolution was the appraisal by a victim in a Canadian programme: "It was a chance to work out an agreement. The agreement was getting this resolved to my satisfaction" (Umbreit 1995: 159). While many victims across sites were pleased to receive restitution for their losses, in some situations, the actual monetary restitution was less important than the attitude of the offender. As one US victim stated: "I wanted them to show their willingness to pay me. But money wasn't important" (Umbreit 1994: 96). Another US victim emphasised the larger outcome context: "It gave me satisfaction that the kid had to face up to what he had done" (Roberts 1998: 17). However, a comment from another victim reflects the mixed reactions that victims can have about the outcome of mediation: "It wasn't ensured that he pays me on time as agreed upon. Now he can identify me. I felt that there was a greater chance that he could retaliate" (Umbreit 1995: 165).

The word "closure" was used often by victims. Even with victims of violent crime, there was the sense that mediation had helped them integrate, to some degree, the terrible tragedy in their lives in order to better move forward with their lives (Flaten 1996). There was no way that mediation could pay back or replace the loss of a loved one. Yet these victims, too, appreciated the outcome of meeting with the offender.

A few studies have addressed the impact of VOM on whether or not offenders complete the terms of the restitution agreements which are negotiated, and whether or not VOM has an impact on the amount of restitution victims receive. Looking at VOM programmes serving juvenile offenders, Umbreit (1988) and Umbreit (1991) found that between 79 and 81 per cent of negotiated agreements were completed. A study of programmes serving both adults and juveniles (Gehm 1990) found a completion rate of 89 per cent. The only study reporting a comparison between the completion rates of VOM and non VOM youth (Umbreit 1994) found that juvenile offenders who participated in VOM were significantly more likely to complete their agreements (81 per cent) than similar youth who did not (58 per cent). In the multi-site California study reported by Evje and Cushman (2000), data were collected on the average amount of restitution paid out by VOM and similar non-VOM youth. In all six counties, VOM youth paid more; the percentage difference ranged from 5 per cent more to 178 per cent more.

Are Victims Satisfied with the Mediator?

Only three of the studies of juvenile VOM programmes reviewed here specifically asked victims their opinions about the mediators who facilitated the VOM meetings. Fercello and Umbreit (1999) found that 90 per cent of participants thought the mediator was "fair". Though they did not report percentages, studies by Carr (1998) and Roberts (1998) concurred that victims felt the mediator had been fair.

Comments about mediators were reported in additional studies. Victims' assessment of mediators include:

> "We were allowed to speak . . .[mediator] didn't put words into anybody's mouth" (Umbreit 1988: 97).

> "The mediator was very competent and experienced with this type of thing" (Umbreit and Coates 1992: 107).

> "He provided guidance, but at the same time provided an open forum with no limits. He gave us an opportunity to tell each other, without pressure, what each of us felt. It was a tension-filled situation, but having him diffused the tension" (Umbreit 1995: 183).

Victims participating in a VOM programme in Scotland which served both adults and juveniles were favourably disposed toward the mediator even if their contact was only by phone. While most of the victims never met face-to-face with the offender, they still gave the VOM programme and mediators high marks (Warner 1992).

Mediators working with victims of violent crime typically have more frequent and longer contact with victims than do those working with victims of less serious crime. These mediators are consistently praised for their caring, neutrality, patience and experience both in the study on VOM with youth violence (Flaten 1996) and in other studies involving adult violent offenders (Roberts 1995; Umbreit et al 1999; Umbreit and Vos 1999).

As noted above, victims' positive perception of the mediator was one of the three factors most highly correlated with victim satisfaction with VOM (Bradshaw and Umbreit 1998; Umbreit and Bradshaw 2001). The importance of the mediator to victims' satisfaction cannot be overstated. Over and over, victims underscore the importance of preparation as the key to their experiences in VOM. If anything, preparation is even more critical when working with long term cases where individuals are victims of violent crime. Training in mediation skills, sensitivity, and awareness are essential for the long run success of VOM. As noted by Roberts (1998: 15), "given the nature of two disputing parties, the mediator needs to remain both fair and impartial. This is a basic assumption of the process of mediation."

Does Victim Offender Mediation Have an Impact Upon Victim Fear and Vulnerability?

Only in four studies reviewed for this chapter did researchers directly ask about the possible impact of VOM upon victim perception of fear and vulnerability about re-victimisation. The percentage of victims reporting fear of revictimisation ranged from 6 per cent to 16 per cent in studies across US, Canadian and English sites (Umbreit 1991; Umbreit 1994; Umbreit 1995; Umbreit and Roberts 1996). In the latter two countries, victims who went through mediation were over 50 per cent less likely to express fear of revictimisation than a sample of victims who did not go through mediation. In the US study, reduction in fear was looked at by interviewing victims both before and after mediation. Prior to mediation, 23 per cent of victims reported being fearful of further revictimisation by the offender; after mediation, the portion expressing such fears (10 per cent) was reduced by more than half (Umbreit 1994). In addition, Umbreit and Bradshaw (1997) found that victims of adult offenders were more fearful that the offender would reoffend than victims of juvenile offenders.

Personal contact with the offender through mediation was often cited as a factor in the reduction of fear:

> "It is very unlikely that he'll do another crime against me, but I would have never have known that if it hadn't been for mediation" (Umbreit 1995: 158).

> "I've gotten some questions answered. Was assured and put at rest re: offender wanting to victimize me personally" (Umbreit 1995: 158).

Though few in number, there were some victims who felt they had been revictimised by the VOM process. One man said: "It's like being hit by a car and having to get out and help the other driver when all you were doing was minding your own business" (Coates and Gehm 1989: 254). In another study, a victim reported: "I feel like I am being treated as the offender because of this meeting and everything. It's all a waste of time" (Umbreit 1994: 100).

Moving beyond the perceptions of victims about the likelihood of being revictimised by the same offender, we can turn to the question of whether or not such perceptions have a basis in reality. A number of VOM programme evaluation studies have attempted to assess the impact of mediation on the actual behavior of participating juvenile offenders (Evje and Cushman 2000; Niemeyer and Shichor 1996; Nugent and Paddock 1995; Roy 1993; Schneider 1986; Stone et al 1998; Umbreit 1994; Wiinamaki 1997). Comparison groups varied across studies and included similar youth not referred to VOM, youth who were referred to VOM but who could not participate because the victim refused, or youth in court-based restitution programmes. Though the definitions of recidivism and the period studied varied across the eight studies, within each study the same criteria were applied to examine the two comparison groups.

Two studies specifically focused on the serious juvenile offender. Schneider (1986) examined a Washington, D.C. VOM programme and found, that over a 30 month period, 53 per cent of youth randomly assigned to VOM had reoffended compared to 63 per cent of youth assigned to probation. Fifty five per cent of those referred to mediation but who refused to participate reoffended. Studying programmes in Indiana and Michigan, Roy (1993) compared serious youth offenders in VOM to similar youth in a court based restitution programme and found no difference in either the rate of recidivism or the rate of completion of restitution contracts.

The remainder of the studies examined programmes offering VOM in less serious cases. Stone, Helms and Edgeworth (1998) evaluated the VOM programme in Cobb County, Georgia and found no overall difference in recidivism rates between youth who participated in VOM and a similar sample of youth who were not referred. However, youth who successfully completed the terms of their mediated agreement were less likely to reoffend than those who did not.

Four studies using similar designs and measures examined recidivism in a total of eight US programmes (Niemeyer and Shichor 1996; Nugent and Paddock 1995; Umbreit 1994; Wiinamaki 1997). In two of the studies (Niemeyer and Shichor 1996; Umbreit 1994), the recidivism rate for the VOM youth was not significantly different from that of the non-VOM youth. In the remaining two studies (Nugent and Paddock 1995; Wiinamaki 1997), youth who participated in VOM were significantly less likely to reoffend than youth who did not. Nugent et al (2001) conducted a secondary analysis of these four studies to determine whether or not the studies were successful replications, whether or not the cohorts were comparable across the four studies, and what the overall recidivism results were for the combined studies. Their examination demonstrated that the four study samples were sufficiently similar to be combined for analysis. They concluded that, for the 1,298 youth who were studied, participation in VOM reduced recidivism by 32 per cent, and that the VOM youth who did reoffend committed less serious offences than the comparison group.

The most recent recidivism study looked at juvenile VOM programmes in six California counties (Evje and Cushman 2000). This evaluation asked the question "was the recidivism rate of the VORP participants at least 10 per cent less than that of the comparison group?" For five of the six programmes studied, the answer was "yes", with a range of 21 per cent lower to 105 per cent lower.

Though inconclusive, these are encouraging results. Taken as a whole, they suggest that many juvenile VOM programs do in fact make an impact on the future behavior of the participating youth. As Schiff (1999) points out, crime victims have an important stake in the impact of VOM on offenders, and are best served if VOM is benefiting the offenders as well as the victims who participate.

Do Victims Feel the Victim Offender Mediation Process and Outcome is Fair?

Fairness is at the heart of justice. This is evident when speaking with judges, probation officers and other criminal justice officials. It is also true when speaking with crime victims. When victims in an Indiana programme serving both juvenile and adult offenders were asked whether justice had been met in their cases, most defined justice as "making things right", "holding the offender accountable for his/her actions" and "fairness and equality is settling disputes" (Coates and Gehm 1989: 256). Seventy-nine per cent of the victims felt that justice had been served in their cases.

In a study of a juvenile VOM programme in Minnesota, Umbreit (1989a) delved deeper into the meaning of fairness. While victims varied in how they defined fairness, the notion of victims having the opportunity to participate genuinely within the criminal justice process cut across all types of victims. Eighty per cent of those victims participating in the victim offender mediation programme indicated that they experienced the criminal justice system as fair compared with 38 per cent of those victims going through the traditional criminal justice process.

Among the studies reviewed here, six studies of juveniles specifically asked whether or not the victims felt the outcome of the mediation was fair (Collins 1984; Fercello and Umbreit 1999; Strode 1997; Umbreit 1988; Umbreit 1989a; Umbreit 1991). Two simply reported that "nearly all" victims felt the agreement was fair (Collins 1984; Umbreit 1991). Percentages across the remaining four studies ranged from 67 to 90 per cent.

A Minneapolis victim of a juvenile offender articulated fairness in the following way:

> "I don't think fairness means punishment. It means restitution and responsibility. I want to give him an opportunity to make right what he's wronged. And to do this in a way that is not degrading or humiliating or vengeful, but in a way he can feel good about himself, take responsibility and correct the things he damaged" (Umbreit and Coates 1992: 115).

In this same cross-state study of juvenile VOM programmes, more than eight out of ten victims going through mediation believed the criminal justice system processed their case fairly compared to six out of ten victims who were not referred for mediation. Surprisingly, of those who were referred to mediation but who did not participate in mediation for whatever reasons, even fewer (53 per cent) assessed the criminal justice processing as fair.

A Canadian study yielded similar results (Umbreit 1995). Eight out of 10 victims who went through victim offender mediation felt the process was fair contrasted with 43 per cent of those victims who did not experience mediation. An English VOM study compared the sense of fairness reported by those experiencing direct face-to-face mediation to that reported by victims who

participated in indirect mediation. More of the direct mediation participants believed the process to be fair (71 per cent) than did the indirect participants (50 per cent) (Umbreit and Roberts 1996).

A Canadian victim, speaking on behalf of those who regard participation as an element, if not the key element, of fairness, had this to say: "I experienced fairness in mediation, because I had input. I made the decision that and how he was made accountable" (Umbreit, 1995: 207). Others, commenting on what made for a fair process, pointed to: "A safe place to be heard"; "Considering the crime from the victim's perspective"; "Justice system should take time to know the victim and offender before sentencing—no stereotyping"; and "Fair is that I feel safe again" (Umbreit 1995: 206–8).

It should not surprise the reader that victims' perception of whether or not the restitution agreement is fair is highly correlated with victims satisfaction overall (Bradshaw and Umbreit 1998; Umbreit and Bradshaw 2001). Fairness of the system and fairness of the outcome, usually embodied in a restitution agreement, is confirmed by these studies as being central to how victims perceive that justice is being served. Victims' comments on fairness reflect their sense that, in order for them to feel justice is being served, not only their own needs, but also the offender's needs must be addressed. It would appear that a beneficial by-product of VOM is its contribution to victims' perception of the criminal justice system as being fair and responsive.

CONCLUSIONS

Victims' Response to Victim Offender Mediation

In the context of criminal justice programming, victims' responses to their experience with victim offender mediation is quite remarkable. Across multiple sites and cultures, among many different kinds of victims, on the whole, victims who choose to participate in VOM walk away quite satisfied with the process and the results of their encounter with the criminal justice system. Certainly, there are those who were not pleased with their experiences, but the research demonstrates that these represent a distinct minority.

Interpretation of victims' satisfaction responses must take into consideration the voluntary nature of the programme. It is highly unlikely that such results would be found if victims were forced to participate. The matter of choice, here, colours the entire experience. Choosing to participate may very well predispose the individual to being satisfied with the VOM experience; after all, it was the individual's own choice to become involved.

Still, even with the caveat of choice clearly stated, the high levels of satisfaction remain noteworthy, particularly within a criminal justice system which so often earns the ire and disillusionment of most who come into contact with it. The end result for victims is a sense of bringing about closure or at least partial

closure to an invasive, inexplicable event in their lives. This sense may be the consequence of having questions answered, recovering losses, participating in the punishment of the offender, helping develop a rehabilitation plan for the offender, or simply feeling involved in the criminal justice process.

While the victim is typically walking away with a good feeling about the VOM experience, the individual programmes and the criminal justice systems are also reaping direct and indirect benefits. Good will in the community cannot be overrated. And support for what many still consider to be alternative or unusual justice responses is helpful politically and socially.

Practice Implications

Certain implications for the practice of VOM do emerge from this look at victims' satisfaction. Victims appreciate mediators who take time to inform them of what to expect prior to the mediation. This becomes even more critical with victims of violent crime. Victims respond favorably to a mediation environment which allows them direct dialogue with the offender yet in a safe place where the mediator can step in to facilitate or exercise control if need be. It is clear that most victims simply want to talk to the offender and appreciate the mediator being in the background, saying very little. Many victims are interested in more than simply receiving restitution. Mediators who facilitate quick, rote-like restitution agreements are short-changing the potential impact of VOM. Victims want to know that their participation in this process matters—for themselves, for the offender, for the criminal justice system, and for the community at large. Many victims mentioned the hope for follow-up information to help them confirm that their own commitment of time and overcoming their fears helped or mattered. Finally, family members and/or other support people are increasingly present during many VOM sessions. Yet the importance of the more intimate encounter between only the victim and offender in numerous cases because of the needs of the parties is still recognised by many in the field. This bodes well for integrating victim offender mediation with the newer restorative justice interventions of family group conferencing and peacemaking circles, as part of a multi-method approach to each case that is grounded in the desire of the victim and offender, their cultural context, and practical realities related to scheduling such matters as preparation.

Research Questions

Replication of the kinds of studies reviewed here will enhance the ability of researchers and practitioners to tease out their implications with more and more confidence. Beyond replication, wherever comparisons can be made with similar groups of victims who did not participate in VOM, results can yield more

telling and convincing guidance for practice. And those studies which incorporate qualitative components—that is, which elicit victims' descriptions of their experiences—provide a basis for describing how VOM actually works as well as adding depth to our understanding of how and why victims are satisfied or dissatisfied.

As the field moves toward using VOM more often in cases of violent crime, research needs to focus on how VOM works for these victims, how the process and/or structure must be altered, and what kinds of safeguards are required to continue providing a safe environment for victim offender encounters. Likewise, cross-cultural interests should guide some of the research in this field. How do victims of different ethnic backgrounds experience VOM? Are variations in mediators' approaches, styles and expectations required? (Umbreit and Coates 2000b).

Researchers can further the knowledge base regarding victims' experience with VOM by taking advantage of the many differences which naturally occur across programme settings, auspices and practices. Examples of such differences include contrasting direct face-to-face mediation with indirect mediation, assessing the impact of the presence or absence of parents in mediation sessions for juveniles, studying the impact of the number of persons present at a mediation, and looking at variation across the number present supporting the victim versus the number present supporting the offender. Additional existing variations worthy of investigation include the use of co-mediators, the length of time between preparation and meeting, the nature of the preparation, the location of the meeting, and private versus public sponsorship of the programme. While a considerable amount of research with encouraging findings has been done on what is still an emerging field of practice, much yet can be garnered about victims' experiences with VOM which can inform practice and hopefully further enhance those experiences.

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8

Mediation in Europe: Paradoxes, Problems and Promises

ELMAR G M WEITEKAMP

INTRODUCTION

RESTORATIVE JUSTICE IS the main phrase used worldwide to describe alternative ways of responding to crime. Europe, however, seems to prefer the terminology of mediation or victim offender mediation. This is quite clear from the newly founded European network of people interested in restorative justice matters. It is called the "European Forum for Victim Offender Mediation and Restorative Justice"; thus victim offender mediation comes first and restorative justice comes second. There are reasons for this: in Europe, restorative justice schemes seem to do fairly well in countries where a weak victim support system exists, while in countries with strong victim support systems restorative justice schemes do not play a major role or are almost nonexistent. An additional reason is that restorative justice and mediation schemes are administered by very different organisations and structures. Not much attention is being paid to the effects of these in hampering or assisting schemes to flourish or on their influence on the development of restorative justice. This paper explores the paradoxes, problems and promises of mediation and restorative justice in Europe, provides examples of them, tries to explain the development of some of them, and argues that there exist possible ways out of the current dilemmas and that the time is ripe for strong steps to be taken towards restorative justice.

PARADOXES

Weitekamp (1999a) pointed out, in reviewing the historical background and the development of restorative justice, that the terms restitution, reparation, compensation, reconciliation, atonement, redress, community service, mediation and indemnification are used interchangeably in the literature and that the term restorative justice is a fairly new one, which means different things depending on the country, state or community in which such programmes exist. As described above, Europe uses victim offender mediation more often than other

countries. Nevertheless, and this is the first paradox, Germany is the only country in the world which does not use the terminology victim offender mediation. If one looks at texts written in English (for example, Bannenberg 2000), one always finds the claim that Germany has victim offender mediation programmes. However, the German term used in the law, literature and practice is "Täter-Opfer Ausgleich" which means in English "offender victim mediation". One wonders why this is the case. Austria, on the other hand, uses the a rather neutral terminology "Aussergerichtlicher Tatausgleich" which translates to "out of court settlement". In all other countries, the term "victim" comes first.

Restorative justice is a distinct and unique response to crime and has to be distinguished clearly from retributive and rehabilitative responses to crime. As Walgrave (1994) rightly points out, retributive responses to crime take place in a societal context of state power, focus on the offence, inflict harm, seek just deserts and ignore the victim. The rehabilitative response takes place in the societal context of a welfare state, focuses on the offender, provides treatment for him or her, seeks conforming behaviour and ignores the victim as well. Conversely, restorative justice takes place in the societal context of disempowering the state, focuses on losses, repairs the damage inflicted, seeks to satisfy the parties and views the victim as the central person in the whole process.

The centrality of the victim is the key to restorative justice philosophy and that is clearly expressed in the terminology victim offender mediation. If, on the other hand, the focus or the central person in the whole process is the offender, one should logically call the process offender victim mediation, which clearly implies that the offender comes first and then the victim. If one takes this matter seriously, as one should in my opinion, one has to question the German approach towards restorative justice, since the terminology indicates that there is a lack of understanding of the basic philosophical roots of restorative justice and victim offender mediation. This issue has not been discussed in Germany at all and there has been no effort to change this mistaken or at least misleading situation.

One explanation for this might be the fact that the victim offender mediation movement and the first programmes were started in Germany by criminal justice officials, often by the probation/parole services. The offender and his/her rehabilitation is, of course, the main goal for probation/parole officers and organisations of that sort and, if such an organisation starts mediation programmes, it makes good sense for them to concentrate their efforts on offenders. I would like to argue, however, that these schemes should then not be called "restorative justice" or "victim offender mediation" programmes but "rehabilitation programmes" which also take victims into account. This point becomes even clearer when one looks into the matter of who, in different European countries, runs the victim offender mediation and restorative justice programmes. It seems to me that there are a lot of stakeholders with different and contradictory views involved and that, for restorative justice to develop further, it is necessary to find organisations with clearly defined missions and

objectives based on the principles of restorative justice which do not have different or contradictory aims and goals. I will come back to these issues later.

A second paradox in this context can be found in Spain and France. As Trujillo (2000) points out, France and Spain use the terminology "penal mediation". Penal mediation was introduced in France as a process in which the victim, the offender and a mediator act under the control of the prosecutor. However, this constitutes a paradox since bringing together the term "penal", which stands for punishment, and "mediation", which stands for restoration, is contradictory. One should be careful not to mix up these different concepts.

Mediation United Kingdom, the only umbrella organisation for all initiatives and individuals interested in conflict resolution in the UK, defines victim offender mediation the following way:

> "A process in which victim(s) and offender(s) communicate with the help of an impartial third party, either directly (face-to-face) or indirectly via a third party, enabling victim(s) to express their needs and feelings and offender(s) to accept and act on their responsibilities" (quoted in Vanfrechem 2000: 29).

This definition is clear and puts the stakeholders in the conflict in the right perspective. It is based on restorative justice philosophy and could stand as a model for other national agencies which promote restorative justice and victim offender mediation.

Trujillo (2000) tackles another contradiction in Spain. While, in Catalonia, victim offender mediation has been working well since 1990 and handles quite a large number of cases (4,550 offenders and 2,804 victims between 1990 and 1997), victim offender mediation is almost nonexistent in other parts of Spain. This is even more astonishing if one takes into account the fact that the reported recidivism rate of these offenders after up to eight years is only 17 per cent. This could be taken as evidence that victim offender mediation works quite well, but Trujillo (2000) points out that there is strong resistance to restorative justice and victim offender mediation in Spain.

He cites Serrano Pie de Casas, the head of the Department of Criminal Law of the University of Las Palmas de Gran Canaria, who argues that victim offender mediation means the privatisation and submission of the criminal justice system to financial reparation, leaving in private hands what is, or at least used to be, in democratic societies, an exclusive right of the state to safeguard the equal treatment of offenders and the protection of the community. Serrano Pie de Casas paints the gruesome picture of people relying again on self-defence and revenge and claims that the privatisation of justice would lead eventually to the privatisation of prisons, as has already happened in some countries, and that economic profit will become the major approach to "doing justice". Trujillo (2000) interprets these arguments as an expression of frustration about the "cultural colonisation" of Europe, and specifically of Spain by the United States of America: "first came Coca Cola, then hamburgers and now victim offender

mediation" (Trujillo 2000: 36). Whether this "cultural colonisation" is really taking place in other European countries is doubtful. This claim overestimates the American influence on the development of restorative justice in Europe.

Austria and Norway are exceptional in Europe in that victim offender mediation schemes are the most developed and are applied in a more or less systematic way. In other European countries, the introduction and implementation of restorative justice and victim offender mediation programmes goes on in a very unsystematic way and differs, as in Spain, greatly from region to region. While victim offender mediation programmes flourish in some parts of some countries, there are other parts where they are nonexistent and yet others where they are applied poorly or have no impact. In Germany, for example, the local structure usually determines whether or not restorative justice schemes exist and, if so, the ways in which they are applied and how extensive the volume of cases being handled through victim offender mediation is.

To illustrate this, I will describe what happened in one of the States in Germany. The Ministry of Justice in that particular State wanted to extend existing victim offender mediation programmes and provided some millions of German marks to fifteen cities in order to start new victim offender schemes for adults. In one of those cities, the Minister of Justice and the Prosecutor General of that State came in person to the opening of the newly opened mediation service and pointed out how important it was to establish such services and that victim offender mediation was a valuable tool for resolving conflicts caused by crimes. One would expect with such publicity and support at the highest level of the State executive that this programme would flourish in no time and become a major player in the local infrastructure of the criminal justice system, but this was not the case at all. According to the legality principle, the majority of cases in Germany are referred to mediation by the prosecutor's office and only a few are referred by judges. The local prosecutor's office in the described city strongly opposed victim offender mediation. Also the judges were not much in favour of it and they boycotted the newly established victim offender mediation office. The result was that two full time mediators and one secretary sat around for over one year without any cases being referred to them.

Once again, there is a paradox. Even when a Minister and the Prosecutor General want to encourage restorative justice, the local key players can boycott this easily and can prevent the introduction of more innovative measures to handle conflicts caused by crimes. What this example clearly indicates is that countries need general policies and laws under which restorative justice and victim offender mediation schemes can be implemented and applied in a systematic way.

In Germany, a way out of this dilemma might now have been found. Since 1 January 2000, section 155a of the Penal Procedure Code requires prosecutors and judges to look at the possible resolution of cases through restitution and/or victim offender mediation, including instigating these measures through non governmental organisations. It has still to be seen how the criminal justice

system will handle and apply this new requirement and how seriously higher courts will look after it. But the groundwork and the basis for a wider application of victim offender mediation has been laid. A good sign that the higher courts will make sure that this new requirement will be applied is that, late in 1998, a Court of Appeal handed a case back to the lower court arguing that the lower court had not taken into consideration the possibility that the case could have been resolved by victim offender mediation. More decisions like this are needed for restorative justice to be applied more widely.

Another paradox in the development of restorative justice and victim offender mediation in Europe is the fact that, in countries in which a strong victim support system exists, restorative justice and victim offender mediation programmes have developed in an unsystematic way. They vary greatly from region to region and have almost no importance, while countries with a poor victim support system seem to be a more fruitful ground for restorative justice. For example, the most elaborate victim support organisations in Europe are in the Netherlands and Great Britain. Victim support in England, Wales, and Northern Ireland has now, according to Reeves (2000), some 18,000 volunteers, over 1,000 staff members, and an annual budget of close to thirty million pounds. Victim Support in the Netherlands is also a nationwide organisation and is very active and strong. However, the restorative justice movement in Great Britain plays only a minor role and it is almost non-existent in the Netherlands. On the other hand, the restorative justice movement is in a better position and plays a more important role in countries where victim support is not so strong such as Austria, Germany and Belgium.

In Germany, there is a victim support organisation, the "Weißer Ring", which operates nationwide, but the whole concept of it and the organisation itself are highly controversial. The "Weißer Ring" is also a law and order organisation which condemns offenders in general. It is, for example, supportive of the "three strikes and you are out" legislation in the United States of America.[1] Unsurprisingly, the victim offender mediation movement in Germany has almost no contact with the "Weißer Ring" and each goes their own way. The controversy about and the weakness of the "Weißer Ring" are most probably decisive factors in restorative justice becoming increasingly popular in Germany.

While it is, in my opinion, a paradox that we have, on the one hand, countries with a well developed and influential victim support and with a limited restorative justice movement and, on the other hand, countries with weak victim support and a stronger restorative justice movement, it does nevertheless make some sense. As Weitekamp (1999b) pointed out, one of the factors in the rediscovery of restorative justice in the last century was the recognition that victims

[1] Weitekamp and Herberger (1995) pointed out in this context that the "Weißer Ring's" support for this is puzzling. They question how one can speak of a liberal criminal justice policy in the United States of America when that country is known as the most punitive society of the Western, industrialised world with a record number of people incarcerated.

of crimes were completely left out of existing criminal justice programmes and procedures and that they were the losers in the criminal justice process. Before victim offender mediation and other forms of restorative justice were rediscovered, Margery Fry (1951) asked if our ancestors were not wiser with reference to the extensive use of restorative justice approaches to solve problems. Fry argued, according to Weitekamp (1989, 1999a), both for restitution and restorative justice schemes as well as for state administered compensation schemes. She believed that victim compensation should be seen as an integral part of an enlightened social policy similar to workers' compensation programmes. Her proposal neither precluded the possibility of restorative justice measures imposed by the courts nor ruled out civil court actions by the victim. She realised, however, that restitution/restorative justice could not reach all victims equally and suggested an approach which combined restorative justice whenever possible with state compensation whenever needed (Geis 1977). Her efforts ultimately led to the creation of state victim compensation programs in New Zealand and Britain which served as models for many other countries.

Margery Fry's position symbolises, in my opinion, the ideal combination of victim support and restorative justice, since her model includes all victims of crimes. Ideally, restorative justice measures will occur in which the victim is the most important and central person and in which the offender will take responsibility for undoing the wrong. However, in cases where no offender is available, society at large should compensate the victim. This issue is often neglected by even the most ardent restorative justice advocates. It is interesting to note that the victim support—restorative justice paradox developed after Margery Fry had called for this almost ideal combination between the two movements. State compensation programmes developed earlier than mediation and restorative justice schemes, but one has to wonder why, in Europe, victim support reached such a prominent position in countries like Great Britain and the Netherlands, while, in other countries, it never blossomed at all. And one also has to wonder, on the other hand, why restorative justice and mediation gained some influence in some countries, such as Austria, where victim support organisations played a much more limited role. Austria is certainly the European leader in the application of victim offender mediation; this was described by Pelikan (personal communication, 2000) as "the Austrian miracle".

That a strong victim support movement has important implications for the better treatment of victims in the framework of criminal law and procedure has just been demonstrated by the monumental work of Brienen and Hoegen (2000). Their evaluation of recommendation (85) 11 of 28 June 1985 by the Ministers of the Council of Europe[2] on the position of the victim in criminal law and procedure in 22 European States revealed that this recommendation is being implemented most effectively in England and Wales and in the Netherlands.

[2] The recommendation was made to improve the treatment of victims of crime and reduce instances of secondary victimisation. It contains 16 guidelines as to how victims of crime should be dealt with by the police, prosecution services and courts of the Member States.

These countries, as noted already, have by far the best victim support schemes in Europe, while Malta, Greece, Cyprus, Italy and Turkey were rated the poorest. They are also little involved in the restorative justice movement.

The demonstrated strong influence of victim support on outcomes for victims is not evident in any victim offender mediation programme in Europe. I believe that the reason for this is that victim offender mediation still plays only a limited role in European criminal justice, even in Austria, which has a systematic and well implemented victim offender mediation scheme nationwide. It does make sense that a strong victim support system coexists with a weak restorative justice system, since the needs of the victim are taken care of by a variety of different services and, therefore, the ill treatment and disregard of the needs of victims through the traditional courts becomes less apparent. One could argue in this context that a good victim support system compensates for the evils done to victims by the judicial system. The advantage of this is that victim support and the judicial system do not compete with each other, while, on the other hand, restorative justice advocates, who want at the extreme to get rid of the traditional judicial system and replace it with a fully fledged restorative justice system, compete directly with or are dependent on the traditional criminal justice system. This might be the decisive difference between victim support and restorative justice and why restorative justice is lagging behind or becoming almost obsolete in countries with a strong victim support system (as is the case in the Netherlands).

This gap between victim support and restorative justice constitutes in a way both a dilemma and a good way to enhance the victim's position. However, the best way would be for both movements to join forces. Vanfraechem (2000) was one of the first to point out that both movements could and should join their forces since both would benefit from it. When victim support finds cases where victims are unwilling to go through the judicial process, they could easily refer these victims to restorative justice programmes which handle cases not necessarily completely outside of the judicial system, but certainly do not represent the judicial system. On the other hand, victim support also has a lot to offer the restorative justice movement since they provide services which cannot be provided by mediators or conference facilitators.

PROBLEMS

This brings me back to an earlier issue: the existence of a number of contradictory stakeholders and organisations involved in the restorative justice movement. There is a need to find organisations with clearly defined missions and objectives based on the principles of restorative justice without these different and contradictory aims and goals. The first meeting to establish the European Forum for Victim–Offender Mediation and Restorative Justice took place in Leuven in October 1999. It discussed whether the Forum should be

placed under the Conférence Permanente Européenne de la Probation (CEP) or whether it should become an independent organisation. It was decided that the Forum would become an independent organisation, but one has to ask why an attempt was made to bring it under the umbrella of an European organisation whose business is probation and parole matters? Probation and parole organisations, whether they exist on local, regional or national levels, are of utmost importance for societies and the rehabilitation of offenders. However, what has a probation/parole organisation to do with victim offender mediation and restorative justice and organisations which run mediation and restorative justice schemes? The answer is and should be simply nothing!

However, in practice in Europe, there has been a mixture of tasks, goals and programmes which, I would argue, will continue to hamper the movement of restorative justice. If one examines the development of victim offender mediation and restorative justice, it becomes clear that without probation/parole and/or other organisations which have different tasks and goals, victim offender mediation and restorative justice would not exist or would not be as developed as they are today. To illustrate this, I will examine the development of victim offender mediation in Germany. Most of the programmes which started victim offender mediation in Germany were located in juvenile divisions of city and local administrations. They started at courts or in probation and parole services. Mediation was usually only a small part of the workload of the social workers, who were usually the professionals who conducted victim offender mediation.

Wandrey and Weitekamp (1998) found in their evaluation of the organisation of victim offender mediation programmes three forms of organisations offering victim–offender mediation services:

—integrated services, where victim offender mediation is done by a professional who has already had contact with either the victim or offender in his/her role as a juvenile court aid, probation or parole officer, court aid workers, or other social services officer and who then acts, in addition, for this case as a mediator;
—partially specialised services, in which again the social workers work as juvenile court aid, court aides, probation/parole officers, or deliver other social services and, as part of that job, work as mediators in cases where they do not already know or work with the offender and victims;
—specialised services, in which the social workers work exclusively as mediators.

The worst service is, of course, the integrated service in which the mediator is, so to speak, wearing different hats which basically contradict each other and he/she has a clear role conflict. He/she knows either the victim or the offender and then is meant to act as a neutral mediator. This is almost impossible, but calls to abandon such practices are being ignored.

In 1989, there existed in Germany, 119 integrated, 8 partially specialised, and 18 specialised victim offender mediation programmes; in 1992, there were

138 integrated, 48 partially specialised, and 34 specialised services; and, in 1995, the last time such a survey was made, the numbers had increased to 155 integrated, 60 partially specialised, and 46 specialised services. The good news is that mediation services are increasing in Germany and the bad news is that the integrated services are still increasing. However, the proportion of integrated services is diminishing: while they constituted, in 1989, 82 per cent of all victim offender mediation services, the proportion went down to 63 per cent in 1992, and to 59 per cent in 1995. At present, more than half of all services are integrated, but they handled only 25 per cent of all mediated cases in 1995, while the specialised services, who represent only 20 per cent of the mediation services, handled 60 per cent of all mediated cases. One can see a trend towards increased professionalism of victim offender mediation, but, in my opinion, one cannot see any clear development toward restorative justice or mediation which is solidly based on restorative justice philosophy.

With the exception of the specialised services, which are usually provided by non-governmental and non-profit organisations, organisations involved in victim offender mediation provide services which aim at the rehabilitation of offenders. They work with offenders and their rehabilitation and/or supervision and the offender is the central part of their efforts. As previously noted, this contradicts or is completely different from restorative justice since, in restorative justice, the victim plays the major role and not the offender. Weitekamp (1999b) argued that one of the five reasons for the rediscovery of restorative justice is that it leads to less severe and more humane sanctions for offenders. Restorative justice is, in this context, considered a viable alternative to incarceration. Not only does the offender in particular, and probably also his family, benefit from this, but society in general benefits too. Offenders play a vital role in restorative justice but its philosophy places victims in the central place of the whole process. While offender-oriented organisations and services played a major role in the introduction and implementation of victim offender mediation programmes in Germany, it is, after some fifteen years of experimenting with it, time to base restorative justice on solid and independent ground. The implication of this is that restorative justice, which in practice at this point in time means victim offender mediation programmes, has to become an independent movement which is not mixed up with other philosophies, goals and aims.

The dilemma for advocates of restorative justice in Germany is exemplified by the National Offender Victim Service Bureau. The Bureau is part of the German Association for Social Work, Penal Law and Criminal Policy (DBH) which was formerly the German probation/parole association. Even though the Association now has a new name, it is still perceived as the German probation/parole association and a great deal of their work deals with probation and parole matters. Such an unholy alliance between two contrary philosophies leads to potentially disastrous consequences, as can be seen in the newly created not-for-profit Organisation for the Enhancement of Offender–Victim Mediation in Germany,

which was initiated by the German Association for Social Work, Penal Law and Criminal Policy together with the offender–victim service bureau.

The purpose of this organisation is to enable the offender-mediation service office to collect fines, for instance, imposed by the courts and to use the funds for further strengthening offender–victim mediation in Germany. This is a noble task and such a newly funded organisation should exist in Germany. However, if one looks at its goals and aims, one finds that three out of four aim at the rehabilitation of offenders and, once again, the victim comes last—mentioned only in the fourth goal. Apparently, the founders of this organisation have not understood the philosophy of victim offender mediation and restorative justice. It shows clearly that the creation of the new association for the enhancement of offender victim mediation in Germany was dominated by rehabilitation which focuses on offenders and not on restorative justice or on victims. This should not happen in these days when the basics of restorative justice are well developed. The foundation of this new association can only be called dilettantism. These developments also clearly show that one should strictly separate institutions which have contradictory goals and tasks. This is a good example of what Umbreit (1999) calls the McDonaldisation of mediation and what he considers to be a threat to restorative justice. Rather than planning carefully and basing restorative justice programmes on its philosophy, people want to expand quickly and quantity becomes more important than quality.

That similar problems exist in almost all European countries can be seen from a careful examination of the country accounts in the report by the European Forum for Victim Offender Mediation and Restorative Justice (2000). It is of utmost importance that in countries where mediation and restorative justice is just starting or has just started that one, first, plans carefully where and how to set up restorative justice schemes and, second, one tries to strictly separate them from other interest groups and/or organisations.

PROMISES

The old systems of criminal justice do not seem to work properly anymore and people are looking for alternatives. They feel that what is needed in times of growing complexity with regard to criminal justice systems is: decentralisation, de-formalisation, downscaling, restructuring, de-specialisation, and decriminalisation. We need a radical and fundamental change to deal with crime, fear of crime and the security of citizens and communities and to develop prevention strategies and programmes.

Many scholars believe that one way out of this dilemma would be developing the restorative justice paradigm as a fully fledged alternative to both the rehabilitative and retributive approaches to justice. What we need is a completely different model from the old criminal justice approach and different perceptions

of the crime "event". What is needed is a system which empowers communities and in which communities take rights seriously. This is even more important at times of massive migration and in countries where many cultures exist and where often different understandings of justice can lead to major problems and, eventually, to processes of marginalisation, segregation, and social exclusion.

In the new paradigm of restorative justice, all parties with a stake in a specific offence come together to resolve collectively how to deal with the aftermath of the offence and its implication for the future. The people who have a stake in a specific offence are citizens, potential offenders and victims, police officers, and other interested parties. While victim offender programmes take the needs of the victim and the offender into account, other important aspects are often neglected such as the extended family, the clan, people who are close and important to the victim and to the offender, representatives of the community and the state.

While I have concentrated my attention so far on paradoxes and problems in victim offender mediation and restorative justice, I now look into the promise of this movement. I think that the development of mediation and restorative justice in Europe is, some twenty years after the rediscovery and first implementation of such schemes, ripe for change and for an extension beyond what exists so far. Today, the more advanced restorative justice approaches and programmes—circle sentencing in Canada and Alaska, peace circles in the United States of America and family group conferences in Australia and New Zealand—are not found much in Europe (though see the chapters by Marsh and Dignan and by Young for conferences in England).

The underlying philosophy and applied practice of family group conferences in New Zealand and in some Australian states (described in the Chapter by Daly in this book) can be seen as a model for Europe in order to deal with more complicated cases and in particular with immigrant groups who are often marginalised and live in segregated areas of cities. The family group conference seems to be a promising and more suitable way of promoting justice than victim offender mediation, improving the role of victims and leading to peaceful solutions, since it takes the cultural background and values of immigrants into account and focuses more on family and clan traditions.

The philosophy of community and problem oriented policing is proactive and promotes solving social conflicts that can lead to criminal events which in turn produce victims, affect our quality of life, and increase our fear of crime. Community and problem oriented policing involves cooperation between the police, citizens and the community in solving these problems and in improving the quality of life in the community. The involvement of citizens is of extraordinary importance at times when a diffusion of the community takes place and ties among organisations and a community become weaker. A quite similar approach is taken by a new form of social services: the preventive model of "communities that care" which was developed in Seattle by Hawkins (1993). This new model is also based on restorative justice. All these developments

point to ways in which we can improve our dealings with problems and with problematic groups.

I will turn now to the situation of youth and youth groups and the development of youth violence in Europe. Pfeiffer (1998) found that, since the middle of the 1980s, Europe has experienced an increase in youth violence. One has to ask what the social features of this increase in violence are and how gang structures are developing in Europe. James (1995), for one, argues in this context that one of the legacies of the recent developments toward economic rationalism is the creation of a "winner-loser culture" which creates profound disparities between those who are economic winners in the present financial and public policy climate and those who are left stranded at the bottom of the economic heap: the losers. James (1995: 74) asserts more specifically that:

> "It is abundantly clear from the many studies . . . that inequality in incomes combined with false promises of equality of opportunity, American-style lack of welfare support for the disadvantaged and poor job-quality are major causes of violence in developing and developed nations alike. From 1979 onwards in Britain, all three of these patterns were adopted as a deliberate government policy; the gap between rich and poor increased to pre-war levels, the amount and kind of state support for the disadvantaged was reduced dramatically; the quality of jobs available to young men decreased after union power to guarantee minimum wages and conditions of work was removed. These changes coincided with an unprecedented increase in violence against the person since 1987."

Polk and Weitekamp (1999) speak in this context of juveniles who are abandoned. One of the most critical features of the emergence of a "winner/loser" culture is that the life circumstances of those located at the lower points of the social structure have changed. Boys and girls who are "losers" are caught in a dreadful developmental trap. Historically, virtually all young people, regardless of their place in the class structure, looked forward to a process, which would move them from childhood, through schooling, into adulthood with some combination of work and family roles. The trajectories were quite different at different class levels, so that those lower in the class structure historically would exit school much earlier than high status students who might stay on through university and professional school before leaving to enter work. Full time jobs have virtually disappeared in the space of one generation: it is now estimated that, with the onset of the millennium, there will be literally no full time jobs available for teenagers. Wilson (1996) speaks in this context of work that has disappeared especially in the new, urban areas. Forced out of education by selection criteria which either reject or discourage their continuation, these young people leave school and enter into a world where there are neither jobs nor economic supports to sustain them: they are being, in short, abandoned.

The problem of abandonment is limited primarily to those who select pathways out of school in the early years, that is, those who would previously have entered the "working class". For these young people with little to offer in the way of qualifications, skills or experience, there are currently in Europe few

opportunities for full-time career oriented work. As a consequence, they lack access to a wage, and the increasing independence that occurs once a person enters waged employment. Without this vital income support, other steps which are expected to follow in the pathway cannot happen, including movement upwards in work, growing independence from parents, the establishment of sexual relationships, focusing on an exclusive partner, marriage and then the establishment of a family.

The situation of abandoned youth thereby places them under a number of stresses, which are likely to increase their willingness to use violence. Their entrapment in a social no-man's land outside of the conventional pathways leading to adulthood means that they do not have available the traditional structural supports for their identity. There is a resultant economic and social status ambiguity that presses for resolution. Caught in conflicts with others, the abandoned young person cannot fall back on a wide network of other definitions of self as a way of asserting a self-concept which says "this is who I am". Violence is an apparent low-cost alternative and gangs can be a great attraction. The gang and the status it brings can change the rules of the game and make a loser into a winner.

In Europe, we find at the moment many signs that we are creating even more "winner-loser cultures", which present a fertile ground for the formation of gangs in which men use violence as an expression of their masculinity. In Germany, for example, Russians of German descent feel abandoned by their "new" society. These immigrants received, immediately after coming to Germany, German citizenship. However, they are, culturally speaking, double losers since they were treated in the former Soviet Union as a minority group and were labeled as German fascists. Shortly after arrival in their new society, they experienced again the status of a minority group and were labeled as Russians even though they had German citizenship. In addition to belonging to a minority group, they have language problems, and experience difficulties in schools and in finding jobs. The schooling and job skills they acquired in the former Soviet Union are not acknowledged in Germany. This means that they have to start all over again and that they cannot immediately built up a "legal" career. They may, therefore turn to criminal activities, thus becoming marginalized and this leads to social exclusion. Language problems and cultural differences also lead to isolation. The group, clique and clan represent the social environment in which they feel good and the German culture and environment can become dangerous worlds and this also contributes to the formation of gangs. The gang gives them a feeling of belonging and a way in which they can develop an identity. The reliance on group activities and groups as a way of belonging in an "enemy State" or in an "enemy society" are behaviours that Russians of German descent had learned and were accustomed to in the former Soviet Union and were needed in order to survive. They experience now for the second time the German State and society as again "enemies" and once more believe that they have to rely on their minority group.

Stoll (1999) described growing up as a Russian of German descent in the following way. The newly immigrated Russians are usually housed in special housing units where they live for more than two years. These housing units are ghettos and the young Russians of German descent usually hang out in groups in front of them. The groups are strongly hierarchically organised, and status is determined by age and time spent in "enemy country". This isolation and the social exclusion of these groups makes them often the only source of friends, especially in rural areas. Contacts with people who live outside of these ghettos are often only possible for those who have moved out of the ghetto. These latter persons come often to visit people in the ghettos and display their improved status in their clothes, cars and other possessions which represent wealth. The people who have made it outside then often recruit young members for their illegal activities. Another result of isolation is that those who are marginalised treat the State and its representatives as the enemy, and display a great distrust towards all official institutions and especially towards the police, justice and the criminal justice system. They consider German police officers as "sissies" since they ask "how can I help you?" and are not beating people up as the police did in the former Soviet Union. The sentences imposed by courts are considered to be lenient and prison time is sometimes considered a vacation.

CONCLUSION

It has become clear that, with traditional forms of court hearings and criminal justice, we are not being effective in changing those who offend. The new forms of restorative justice, be it mediation, peace circles, sentencing circles or family group conferencing, may offer more. The reason for this is that these new processes can take the traditions and values of the clan or group into account and can involve family and clan members more. If we want to tackle youth abandonment more successfully than we do now, especially among immigrant and minority groups, we have to rely more on restorative justice. The time in Europe seems to be right to experiment more with new forms of mediation and restorative justice to overcome existing problems and to solve existing paradoxes.

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9

Circle Sentencing: Part of the Restorative Justice Continuum

HEINO LILLES

INTRODUCTION

RESTORATIVE JUSTICE IS a broad term that encompasses a variety of distinctly different activities that can occur prior to, during or after a criminal prosecution. Circle sentencing, described briefly earlier in Paul McCold's chapter, is one such restorative justice initiative. It aims to recognize the needs of victims, secure the participation of the community and identify the rehabilitative needs of the offender. Unlike many other restorative initiatives, it is part of and replaces sentencing in the criminal justice system. It engages the community and the criminal justice system as partners and, to a lesser extent victims and offenders in the resolution of criminal justice-based disputes. Although initially used to address the special circumstances of aboriginal offenders in criminal proceedings, circle sentencing has also been used for non-aboriginal offenders. The process is as suited to adult offenders as to young offenders and is sufficiently flexible to be adapted to other situations, including child welfare disputes. Circle sentencing has many of the attributes of family group conferencing (as developed in Australia and New Zealand and described previously in Kathleen Daly's chapter), but avoids many of the criticisms levied against restorative justice programmes. It is not a panacea and its use should be restricted to motivated offenders who have the support of their community.

THE CANADIAN SITUATION

Canada has one of the highest incarceration rates in the world, substantially higher than comparative rates in most European countries, and Australia, but less than in the United States (Canadian Centre for Justice Statistics 2000). When only youth incarceration is considered, Canada's incarceration rate exceeds that of the United States by almost 50 per cent: 447 per 100,000 youth, compared to 311 per 100,000 youth in the United States (Hornick, Bala and Hudson 1995). The high youth incarceration rate for young offenders does not

tell the whole story. Over half of the young people are sentenced to custody for property offences, not for crimes of violence. When incarcerated for the more common offences, such as theft and breaking and entering, young persons were likely to receive a longer jail sentence than adults convicted of the same offence (Canadian Centre for Justice Statistics 2000).[1]

The situation is even more severe for Canada's aboriginal people, as numerous studies and commissions have documented (Hamilton and Sinclair 1991; Cawsey 1996; Linn 1992; Royal Commission on Aboriginal Peoples, 1996). Aboriginal people are incarcerated at more than eight times the national rate. This over-representation is significantly higher in the northern territories and in the prairie provinces (Lilles 1990; Jackson 1989). Crime rates in aboriginal communities remain high and the number of aboriginal persons in Canadian jails continues to increase and, without radical change, this problem will intensify (The Royal Commission on Aboriginal Peoples 1996). The over-representation of aboriginal youth in the criminal justice system appears to parallel that of adults (Doob, Marinos and Varma 1995).

These harsh realities were apparent to many working in the front lines of the justice system and resulted in Judge Barry Stuart of the Yukon Territorial Court convening a sentencing circle in the case of Philip Moses.[2] The circle is premised on three principles that are also part of the culture of Yukon's aboriginal people. Firstly, a criminal offence represents a breach of the relationship between the offender and the victim as well as the offender and the community; secondly, the stability of the community is dependent on healing these breaches; and, thirdly, the community is well positioned to address the causes of crime, which are often rooted in the economic or social fabric of the community. These principles are consistent with how restorative justice views crime: not merely as an offence against the state but as an injury done to another person and the community that must be repaired.

THE CIRCLE SENTENCING PROCESS

Circle sentencing is a process adopted by judges as an alternative to hearing formal sentencing submissions from the defence and Crown lawyers. Circles require a significant commitment from community members, so it is in the community's interest to limit access to those individuals who demonstrate high levels of motivation and commitment to the process. The offender must normally

[1] This result is surprising for several reasons. Adult offenders, due to their greater age and additional years at risk, are more likely to have lengthy criminal records. In addition, the Canadian Young Offenders Act, RSC 1985, c.Y-1 directs that young people should not receive a harsher sentence than that given to an adult for the same crime.

[2] *R.* v. *Moses* (1992), 71 CCC (3d) 347 (Yukon Territorial Court). This case is generally recognized as the first circle sentencing in Canada, upon which many other initiatives in Canada and elsewhere have been modeled.

enter a plea of guilty at an early stage of the proceedings indicating a full acceptance of responsibility for the offence.

Circle sentencing is used almost exclusively for serious cases, meaning that the offence is serious or the circumstances of the offender are such as to justify a significant intervention.[3] It is not often used for minor charges, as the process is intrusive, lengthy and requires a significant commitment from all participants.[4] It has been used for both adults and youth, but primarily for aboriginal offenders. Circle sentencing is not a form of diversion; it is part of the court process and it results in convictions and criminal records for offenders.

The procedure is as straightforward as the name suggests. Everyone in the community is invited to attend and participate. Chairs are arranged in a circle and the session is chaired either by a respected member of the community, sometimes called "the keeper of the circle" or by the judge. Usually between fifteen and fifty persons are in attendance. The participants in the circle introduce themselves, then the charges are read and the Crown and defence lawyers make brief opening remarks. The community members then speak. A justice system professional participating in a circle for the first time may wonder about the relevance of much of what is said. Unlike court-based sentencing, the discussions focus on more than just the offence and the offender and often include the following matters:

—the extent of similar crimes within the community;
—the underlying cause of such crimes;
—a retrospective analysis of what life in the community had been before crime became so prevalent;
—the impact of these sorts of crimes on victims generally, on families and on community life and the impact of this crime on the victim;
—what can be done within the community to prevent this type of dysfunctional behaviour;
—what must be done to help heal the offender, the victim and the community;
—what will constitute the sentence plan;
—who will be responsible for carrying out the plan, and who will support the offender and victim in ensuring the plan is successfully implemented; and
—a date to review the sentence and a set of goals to be achieved before review.

The victim is advised of the offender's application for a circle sentencing hearing in advance and is provided with information about the circle process. The victim is assisted in establishing a support group and is encouraged to attend the hearing with the support group. Unlike formal court, where the role of the

[3] The most serious cases, however, will be excluded if a lengthy period of imprisonment must be imposed to protect the public or to denounce the offence.

[4] But see *R.* v. *Rich (No. 1)*, [1994] 4 CNLR 167 (Nfld. S.C.) where O'Regan, J. stated that "sentencing circles will be most useful in minor cases."

victim at sentencing is usually limited to providing a victim impact statement, the victim is a full and equal participant in a circle sentencing hearing.

In most cases, these discussions will take from two to eight hours, usually spread out over two separate circle sentencing hearings. Often at the end of the first circle, the offender is given a set of goals to determine whether he or she can follow through with his or her plan before a final sentencing plan is imposed. The circle will reconvene several weeks, or even months later to review the offender's performance and make any necessary changes to the recommended plan. At this time, the judge will impose the final sentence incorporating the recommendations of the circle.

In court hearings, the justice system professionals dominate and control the sentencing process. The decision imposed by the judge is largely based on legal principles and precedents that may only be marginally relevant to offenders and their community and which seldom address the real concerns of victims. In circle sentencing, the judge hears less from the lawyers and more from those directly or indirectly affected by the crime.

Circle sentencing has not been authorised by statute but exists solely as a result of judicial discretion.[5] Nevertheless, it is still a sentencing hearing and is part of the court process. It follows that the procedure is not rigid but must conform to the rules of natural justice and other legal requirements imposed by statute or common law. For example, the law requires the following safeguards to be present in all circle sentencing hearings:[6]

—Any criminal record or any other reports are received and marked as exhibits in the circle hearing process;
—A record is made of the proceedings;
—A disputed fact is judicially determined in the usual manner through evidence heard under oath;
—The circle hearing is open to the public;
—The offender must participate voluntarily;
—The offender is entitled to representation by counsel and to address the circle;
—A Crown attorney is present and able to speak to the public interest, ensure victim's issues are fully canvassed and make recommendations with respect to sentence;
—Media are allowed to attend and to report on the proceedings, although restrictions may be imposed on attributing statements to specific individuals in the circle;[7]

[5] The practice of circle sentencing was indirectly endorsed in the Supreme Court of Canada decision, *R.* v. *Gladue*, [1999] 1 SCR 688 (SCC). The Court recognised the legitimacy of restorative justice, directed judges to use jail as a sentencing tool as a last resort, especially in the case of aboriginal people, and recognised healing as an important cultural value to be used in sentencing.

[6] See *R.* v. *Richard James Gingell* (1996), 50 CR (4th) 326 (Yukon Territorial Court). This case also describes in detail the procedure followed by the Yukon aboriginal community of Kwanlin Dun in circle sentencing hearings.

[7] In *Re Gingell and Canadian Broadcasting Corporation*, 14 August 1996, Yukon Territorial Court TC-01480A (unreported), this limitation on attribution was unsuccessfully challenged.

—Participants in the circle must have access to any documentation filed with the court, including the pre-sentence report;
—The judge has the sole responsibility for imposing the sentence, which must be a fit one in accord with the law;
—The decision is subject to appeal or review in the same manner as any other court decision.

Notwithstanding these common legal requirements there can be substantial differences in how circle sentencing is conducted. These differences arise because community members are directly involved in deciding what the circle process should be and this allows for the inclusion of culture and traditions. Available community resources will influence the kinds of cases the community is prepared to undertake. Judge Stuart (1996: 294) makes the argument in favour of diversity:

> "This is a good and necessary development. Significant differences in demographic composition, cultural, social, economic, and geographic conditions render each community unique. A process for resolving conflict must accommodate the special circumstances, blessing or hindering the specific ability of each community to process conflict. Recognizing the uniqueness of each community, and the uniqueness of each dispute, warrants departing from the audacious presumption of the formal justice system that 'one process fits all forms of disputes."

The procedural variations which result from the community being a full partner in the circle sentencing process is at odds with legal culture and the reliance on precedent within the criminal justice system. Several Courts of Appeal have been unable to appreciate the need for flexible rules in a community based justice initiative.[8] In *R.* v. *Johns*, for example, Prowse J. A. stated at page 178:

> "In my view, however, circle sentencing is no longer in its embryonic stages, particularly in the Yukon. . . . That being so, further heed must be paid to the recommendation of the Yukon Territorial Court of Appeal in *R.* v. *Johnson* . . . that rules, or, alternatively, well-publicized guidelines for circle sentencing, should be established by Territorial Court judges, with the assistance of those with expertise in the process."

Notwithstanding the urging of the Court of Appeal, Yukon Territorial Courts have resisted dictating procedures for circle sentencing to the communities (McNamara 2000a). Rather, the communities have been encouraged to develop their own procedures, taking into account their traditions and available human resources. Nevertheless, as circles have similar objectives and must follow due process, the differences are not major.

[8] See, for example, *R.* v. *Johns*, [1996] 1 CNLR 172 (Yuk. CA); *R.* v. *Johnson* (1994), 31 CR (4th) 262 (Yuk. CA); *R.* v. *Morin*, [1995] 4 CNLR 37 (Sask. CA).

AFTER THE CIRCLE

The result of the circle sentencing hearing is most often a community-based disposition involving supervision and some kind of programme. The terms of the order are quite lengthy and detailed, specifying attendance at pre-determined counselling and treatment programmes, and may also include culturally relevant conditions that would rarely be found in a probation order made in court.[9]

After being sentenced in a circle, the offender's progress in following the sentencing plan is monitored by his or her support group, the community Justice Committee (if one exists) and a probation officer. Thereafter, the offender can expect to appear before the circle several times in order to review his or her progress. How much contact has the probation officer had with the offender during the last review? Have referrals been made for alcohol assessment and counselling? Has restitution or community service been initiated or completed? Has contact been made with the counsellors at the young person's school? Knowing that they will have to report to the circle, the probation officer and other professionals tend to be more diligent in fulfilling their obligations in a timely manner.

Very few offenders who participate in circle sentencing fail to complete their community disposition successfully. Several reasons account for this. It is generally appreciated that circle sentencing dispositions are "tough" and as a result only those who are truly motivated will apply. As well, the requirements imposed as a condition of acceptance into the circle are demanding, and those who are not fully committed are screened out prior to sentencing. Most importantly, the sentence plan is an undertaking given by the offender, not to a foreign or faceless justice system, but to his or her own community.

IMPACT OF THE CIRCLE

In Canadian aboriginal communities, there are often ongoing relationships between the offender and the victim, and between their extended families. In a small community, many others can be affected by a criminal offence. The circle provides a safe environment to hear what happened, how it impacted on the victim and the community, how best to fix the damage that was done and how to prevent future offending. It is a restorative process because it requires wrongdoers to make reparation to the victim and to others harmed by the offending behaviour, including the community. It also expects offenders to restore themselves, meaning that they must address those personal issues that contributed to the offending behaviour, such as addictions, unresolved grief and historical

[9] For example, in *R* v. *Richard James Gingell*, n. 6 above, the circle recommended that the offender make a gift by way of money to each of the victims in accordance with aboriginal custom, as a symbol of remorse and of his acceptance of full responsibility for his actions.

abuse.[10] The sentencing circle provides a voice for all persons affected by the offending behaviour, including victims and family members. It also provides a forum for those community members who, while not directly affected by the offence, are generally concerned about safety in their community.

Although sentencing circles have evolved significantly since the *Moses* decision, the goals, and advantages remain largely as stated in that judgment. Since everyone seated in the circle has equal standing, the dominance of the justice system professionals (the judge, lawyers and probation officers) is significantly reduced. At the same time, the role of the community members, including the victim and the victim's family, offender's family, neighbours and other interested persons is increased. This equality within the circle is essential to building a partnership between the community and the justice system. The circle process redirects significant responsibility for the offence, offender and victim back to the community.

The goal of the circle is to develop a consensus. As a result, the participants do not direct their remarks to the judge. Everyone speaks to the circle. The legal jargon and pro forma submissions which are much too common in courts are replaced with questions and information about the offender, victim, and about the resources available in the community. Much more information is forthcoming about offenders—their personal circumstances, their social history and the factors contributing to their criminal behaviour. The resulting disposition responds to offenders' needs and their risk factors and makes better use of the limited resources available in the community. The language used in the circle avoids legal jargon and, unlike in court, can be understood by everyone present. The judge's decision, even when in written form, should speak to the community, the offender and the victim.

In circle sentencing, the participants know that, whatever the disposition, offenders will be coming back to their communities, possibly to live next door. They have seen first hand the negative effects of jail sentences on family members or neighbours. As a consequence, they are much more concerned with rehabilitation and reintegration of the offender and the healing of everyone affected by the offence than with abstract notions of general deterrence. The circle discussions, and the involvement of the support group in assisting the offender, force community members to look beyond the actions of the offender and to address the causes of crime in their community. If an offender re-offends, the community will better understand why, and will be less likely to blame the justice system, the police or the judge. In this way, the sentencing circle can be an effective vehicle for public legal education.

Circle sentencing shares many of the attributes of family group conferencing, one of which is that offenders must acknowledge responsibility for their actions

[10] Victims in circle sentencing hearings rarely ask for punitive sanctions for the offender. Instead, they frequently want the offender to participate in appropriate treatment or counselling so that the offending behaviour will stop and others will not be victimised. In a restorative context, making things right for the victim includes the offender's rehabilitation.

at a very early stage of the proceedings (Maxwell and Morris 1994). The victim benefits from knowing at a very early stage that an adversarial trial will be avoided. The acknowledgment of guilt must be made before the offender's family, community members and the victim, if present. Without defence counsel to act as a buffer and to speak on their behalf, offenders must address the circle and explain their actions. They hear directly about the pain and fear experienced by the victim and the disappointment of their family and community. While expressions of remorse in a court setting often sound hollow and insincere, the remorse expressed in the circle is emotional, often accompanied by tears, and includes a genuine apology.

The circle allows offenders to participate in shaping the sentence plan, thereby taking back a measure of control over their life. They are extended the dignity of offering to make amends to the victim, their communities and their families and to have input into their healing plans. The circle makes a clear distinction between the bad actions of offenders and the offenders themselves who, like most people, have many good qualities. The supportive statements made in the circle by community members usually surprise young offenders. This community support contrasts with the negative feedback these same young people often receive from parents, teachers and justice system officials on a regular basis.

Less time is spent by the probation officer in supervising the offender as the support group and other family members are sharing this responsibility. More time is spent in identifying and developing suitable programmes, working with and training the offender's support group. As a result, community development becomes a significant part of the probation officer's job description.

The circle generates dialogue among offenders, their families and their communities. This process models communication for family members where effective communication is often lacking. But equally as important as dialogue, the process also engages the participants and triggers a full range of emotional responses that are discouraged in the criminal justice system (Stuart 1998). This shared emotion, as much as the shared ownership of the sentencing plan, creates a degree of commitment and responsibility, on the part of everyone, including family members, rarely generated in a court setting.

CRITICAL COMMENTARY

Barriers to Implementation

Circle sentencing, along with other restorative justice initiatives, face significant barriers to implementation. As long as the public, encouraged by the media, continues to be anxious about crime, it will be difficult to convince politicians to abandon their "get tough on crime" policies. Restorative programmes such as circle sentencing are wrongly viewed as easy options that are inconsistent with

crime reduction. Similarly, judges may be reluctant to adopt a sentencing approach that appears to be "soft" while the public is demanding stiffer sentences for criminals. In order to overcome these barriers, a concerted effort has to be made to convince the public that jailing offenders, and young offenders in particular, for long periods of time is not a cost-effective way to reduce recidivism or to increase public safety (Greenwood, Model, Rydall and Chiesa 1996).

Circle sentencing is more time consuming and, therefore, more expensive than processing offenders through the court system. Unlike other restorative processes, it is a court hearing and, therefore, requires the involvement of a judge along with support staff. It cannot be fully delegated to others, as can family group conferencing or other programmes that divert young offenders away from court. As a result, resistance to adopting circle sentencing can be expected from a number of different sources. Administrative judges will worry about delay and the resulting backlog of cases. Governments may not see beyond the short-term increases in cost to the benefits that may only be realised in the longer term. These longer-term benefits will be difficult to measure and are, therefore, difficult to sell to the public. For example, greater community participation in the justice system will result in a more informed public, which in turn should reduce public demands for harsher sentences and should decrease the need for more jails and corrections staff.

Many justice system professionals, including lawyers, will resist giving up or sharing control with members of the community. Judges may also resist giving up their role as ultimate decision-makers. Required by law to impose the sentence, the weight given to the circle's deliberations will determine whether the community is indeed a full partner. On one hand, the judge may view the circle's deliberations as merely advisory. The other view is to adopt the recommendation of the circle as long as it falls within the scope of a fit and proper sentence (McNamara 2000b). Unless the judge is prepared to concede substantial decision-making authority, there will be little motivation for the community to participate.

The Community

Most of the reported cases have involved aboriginals living on reserves or small communities in largely rural or remote locations, where the offender's community is a geographic one and is well defined. Since nearly everyone in that community has experienced, directly or indirectly, the negative impact of the criminal justice system, they are, therefore, willing to volunteer and to participate in a non-retributive alternative. But a large number of aboriginal people live in major urban centers, away from their immediate families and their original geographic community. Community in an urban setting, however, need not be defined in geographic terms. A number of urban initiatives that incorporate aspects of circle sentencing have sought to include people with similar experiences and shared

interests who understand the issues facing the offender. One of these is the Aboriginal Legal Services of Toronto Community Council. The underlying philosophy of this project is that the aboriginal community in Toronto is in a better position to respond to the needs of aboriginal offenders than is the criminal justice system. Aboriginal volunteers participate in the programme, reach decisions by consensus and have a wide range of restorative dispositions to draw from, including referral to treatment programmes. An evaluation of this project was largely positive (Moyer and Axon 1993). In fact, circle sentencing has great potential in urban centres because, unlike small isolated communities, they are rich with organisations such as service clubs, recreational clubs, churches, schools and trade unions that share a sufficient connection with their members to qualify as "communities of interest". While it may require a greater effort to identify and involve these urban communities in circle sentencing, the results may be more rewarding, due to the varied experience and educational backgrounds of the participants.

There are significant differences in culture among aboriginal peoples across Canada. Circles and decision-making by consensus may not be part of a particular aboriginal group's traditions (Crnkovich 1993). This concern speaks to the importance of communities being directly involved in the preparation and planning of their own community justice initiatives. Circle sentencing is only one point in the restorative justice continuum and a community may well choose a different approach, one more consistent with its traditions (Lilles 1997).[11] Circles provide an effective forum for communicating and problem solving and can be adapted for use for other than justice-related purposes.[12]

In Canada, aboriginal peoples hold the view, with some justification, that the "white man's justice system" has not worked for them and has added to their victimization. As a result, in its eagerness to reject the criminal justice system, a community may adopt circle sentencing before it is ready to do so. Circle sentencing, and other community-based initiatives, require a critical mass of healthy participants who are able to support and counsel both victims and offenders. In this sense, "healthy" refers to emotional health, family stability, and an absence of substance addictions. For this reason, some communities may not be ready to take on the responsibilities of supporting victims and offenders and may require, as a first step, to engage in a broader programme of healing (Ellerby and Bedard 1999).

In attempting to help their members, communities may take on cases that place too many demands on their available resources. Sexual offending, domestic violence, chronic substance abuse and mental illness are not uncommon in

[11] For example, one Yukon community has chosen a Clan Leader model, where the clan leaders sit with the judge as a sentencing panel, representing the community and advise the judge on the sentence to be imposed.

[12] It is quite common for meetings of all kinds to be held around a table, sometimes round, often rectangular, with one person designated to chair the meeting. Remove the table and designate the chair as the "keeper" and a circle has been created.

many aboriginal communities. Many aboriginal youth charged with sex-related crimes suffer from foetal alcohol syndrome or foetal alcohol effects. In order to deal with these cases effectively, experienced counsellors, long-term programming and professional support will also be required, but these are often not available in small communities. When communities attempt to deal with such cases using only traditional methods, they may encounter frustration and failure and this, in turn, will undermine the credibility of their programme.

Circle sentencing aims to keep offenders in their communities and as a result fewer jails will be needed. Government may be tempted to use these savings for some other unrelated purpose. Whether one is dealing with family group conferencing, circle sentencing or other community based restorative justice processes, it is important that sufficient resources are made available to enable the offender to rehabilitate successfully in the community.

The Victim

Circle sentencing and other restorative justice alternatives that are designed to keep offenders in the community create concerns about victims' safety in small isolated communities, where victims have no anonymity and are particularly vulnerable (Crnkovich 1993). The absence of counselling or treatment programmes in the community exacerbates these concerns. The circle must be constituted so as to be able to address concerns about the victim's safety if the offender remains in the community. That concern will be heightened where the offence involves personal violence and even more so if it is domestic violence. Where that concern cannot be alleviated, the judge may have no choice but to remove the offender from the community, as the victim's and public safety must remain the highest priority.[13] However, in comparison with adults, young people are more likely to be involved in property-related crimes and low level assaultive behaviour; they, therefore, present less of a public safety risk (Canadian Centre for Justice Statistics 2000). This risk will be further reduced if community members are willing to participate in supervising the young person.

Deciding which cases are eligible for circle sentencing can also create concerns. While the community must necessarily have considerable input, the decision should not be perceived as biased by favouritism or by the exercise of power by a dominant family group (LaPrairie 1995). Such perceptions can be alleviated if the judge makes the decision after hearing from community representatives and counsel. By establishing criteria for eligibility, communities can minimise disputes that will inevitably result if eligibility is decided on an *ad hoc* basis.

[13] Victims' safety is a relative concept, for even when offenders are sentenced to jail, they will probably return to the community when their sentences are completed.

Attendance at the circle may also be problematic. The community may wish to keep the proceedings private and exclude the media, contrary to the requirement that criminal proceedings must be open to all members of the public, subject only to the very limited exceptions prescribed by law. The offender's support group at circle sentencing hearings may be disproportionately large in comparison to the support available for the victim. There can also be power imbalances within aboriginal communities (Griffiths and Hamilton 1996), where political and economic power resides with a few families and others are totally dependent on those in power for housing and employment. Care must be taken, therefore, to ensure that the views expressed at the circle are balanced, that recommendations are not dictated by relatives of the offender, and that the victim's issues are not displaced by the discussion focusing exclusively on the needs of the offender. Involving community representatives, counsel and victim workers in planning for circle sentencing can ensure a proper balance among those attending and the views expressed at the circle.

Not all victims attend circle sentencing hearings and, in the absence of reliable research data, it is not possible to determine accurate participation rates. One can state with confidence that a greater proportion of victims attend circle sentencing hearings than court sentencing proceedings.[14] The absence of the victim, however, does not mean that the victim's views are not put forward. A victim impact statement is made available, as in court proceedings. In addition, a close relative is often in attendance and speaks on behalf of the victim, as will friends of the victim. It is often the case that other participants who have experienced similar victimisation in the past act as surrogate victims by speaking about their experiences. It is nearly always the case that the harm done by the offender to the victim is communicated clearly and often very emotionally to the offender.

Some court decisions have held that victims' participation is a prerequisite for circle sentencing.[15] This argument fails to recognise that circle sentencing is part of the court process and that victims rarely attend sentencing hearings in court. It should not be considered a benefit for the offender but rather an alternative process with safeguards for all involved. While circle sentencing encourages the attendance of victims, it is not intended to be entirely victim-oriented, as its goals include providing a forum for community involvement and the improvement of the offender's prospects for rehabilitation. These goals can be achieved even in the absence of the victim. Others have noted that giving the victim a veto will transfer an unacceptable degree of power to the victim and could result in a disparity of treatment for similar offences depending on the victim's participation (Roberts and LaPrairie 1996).

[14] Based on my experience of conducting circle sentencing hearings, it is estimated that the participation rate of victims at circle sentencing hearings in the Yukon is greater than fifty per cent. Where there is a community coordinator for the programme the rate is much higher.

[15] See for example *R.* v. *Rich (No.1)*, n. 6 above. In *R.* v. *Joseyoumen,* [1996] 1 CNLR 182 (Sask. Prov. Ct.) the court set out guidelines for circle sentencing which included victims' participation but noted that these were not "etched in stone".

Sometimes the victim does not share the offender's culture and traditions, does not live in the same community and has no interest in attending or participating in circle sentencing. In such instances, the circle sentencing can be adjourned in order to convene a formal court session for the sole purpose of hearing from the victim if he or she wishes to address the court.

Victims can be encouraged to attend by receiving information about the circle early in the process. Individuals who can support the victim should also be identified well before the circle sentencing commences. Independent victim support workers who are employed to assist victims in court proceedings should also be available to support and advise victims who attend circle sentencing hearings. The hearing should be scheduled at a convenient time for the victim and any financial costs incurred, such as babysitting or loss of employment income, should be reimbursed. As Stuart J. noted in *R.* v. *Moses* at page 363:

> "Much work remains to find an appropriate means of including the victim or, at the very least, including the impact of the victim in the sentencing process."

In aboriginal communities, elders play an important role and their opinions are often sought in relation to important decisions. Their traditional views on the role of women in the family and how to deal with family violence may be outdated and in conflict with the attitudes of younger women in the community and of society in general. Consequently, circle decisions may be skewed by both generational and gender differences (Griffiths and Hamilton 1996). On the other hand, a balanced circle provides a forum to discuss these differences in the relative safety of a court hearing. It provides an opportunity, not offered by court processes, to engage the community in discussion with a view to challenging outdated values.

Offenders

As in the case of diversion and mediation, there is a concern that offenders may feel coerced into participating in restorative alternatives such as circle sentencing. Some may perceive it as an opportunity to receive a lesser sentence and others may feel pressure from the community to participate (Levrant et al 1999). In the case of circle sentencing, this is a legitimate but overstated concern. It should be remembered that the criminal justice system is itself coercive. In every criminal prosecution, the defendant is subject to pressure. Young people in particular are subject to pressure from their family, their peers, the police and even their lawyer. Secondly, the criminal justice system offers many similar options, such as to pay a fine instead of going to jail and to plead guilty to a plea-bargained lesser sentence. Finally, unlike most diversionary alternatives, circle sentencing is open to the public and, because it is part of the court proceeding, it is subject to numerous safeguards, including the entitlement to legally funded counsel. The concern should not be whether the offender is subject to pressure to act in

a particular way, but whether the pressure was improper or so excessive as to render the offender's decision involuntary. In the case of impropriety, all of the remedies available in court are available to the offender if he or she chooses to be sentenced in circle sentencing.

Alternative sanctions create the possibility of net widening (Gendreau, Goggin, Cullen and Andrews 2000). Because of the time and cost involved, it is highly unlikely that minor offences that were previously not charged or were dealt with in a less intrusive manner would be referred to a circle. In any event, because circle sentencing is subject to judicial supervision and the offender receives legal advice from counsel, the likelihood of net widening is lessened. On the other hand, substituting a highly supervised community disposition for a period of incarceration will significantly increase the likelihood of detecting both technical and substantive violations. It is not uncommon for young offenders to breach their curfew, consume alcohol or drugs, or fail to attend school while on their sentence. This could, in theory, result in a revocation of the community disposition and the imposition of a longer period of incarceration than that which would have been imposed had the offender not elected circle sentencing. When breaches occur, however, the circle reviews them and, provided the offender continues to have the support of his or her community, the original sentencing plan is rarely terminated.

Aboriginal young offenders often come from dysfunctional homes. Family group conferencing, along with other restorative programmes, does not attempt to address the shortcomings of parents, such as substance abuse or substandard parenting skills. This limitation is shared with the criminal justice system, as courts are precluded from imposing conditions on the parents of an offender, even where parental limitations are identified as contributing to the young person's behaviour. Any benefit that may accrue to the young person from the conferencing experience or a court ordered disposition is likely to disappear after the young person returns to such a home environment.

The circle is also unable to impose formal obligations on the parents of an offender. But, as a result of discussions in the circle, parents may better understand how their behaviour has contributed to their child's misconduct and what they can do as parents to assist their child. As this discussion occurs in a non-adversarial and supportive setting, it is less threatening and more likely to be acted upon. It is not uncommon for offenders' sentencing plans to include attending a residential alcohol treatment programme with their parents and sometimes with their entire family.

The assumption underlying family group conferencing and other restorative programmes is that holding offenders accountable directly to the victim will create an awareness of the consequences of their behaviour and will deter similar offending in the future. But many young people who come before the courts charged with criminal offences are emotionally and psychologically wounded. This is particularly true of aboriginal youth. A closer examination of their social histories often reveals physical and emotional abuse or neglect, sexual victimi-

sation, early onset conduct disorder, foetal alcohol syndrome or effects, or a history of substance addiction starting at a very early age. Considering what is now known about changing offenders' behaviour, there is little reason to believe that family group conferencing or similar confrontations with victims will significantly reduce recidivism or promote rehabilitation for this category of offender (McGuire 1995; Leschied 1999).

Circle sentencing, in contrast with extra-judicial restorative programmes, can access professional resources, including assessments and treatment options by court order. Such programming, if directed at the specific criminogenic needs of the offender, could reduce recidivism significantly (Andrews and Bonta 1998; Anand 1999). In many cases, however, this professional help is not available in the community, and the court order will require offenders to attend a larger centre some distance from their family. That programme may also require some family participation, and this will make attendance difficult, if not impossible. In some cases, the needed programme may only be available in a custodial setting, and the judge may be faced with both a legal and moral dilemma: when, if ever, is it appropriate to impose a custodial disposition solely for the purpose of accessing treatment resources? As difficult as this decision is, it is by no means unique to circle sentencing as it also arises in court proceedings.

Circle sentencing relies heavily on the services of volunteers, and in small communities these individuals are in great demand. Without administrative and even financial support, these volunteers will, over time, "burn out" and the programme may disappear (Lilles 1997). At the same time, there are also risks associated with governments funding community based justice programmes. Invariably, such financial support will come with conditions attached. In the case of circle sentencing, it will create an opportunity for government and bureaucrats to control and thus disempower what must remain a community initiative if it is to be effective.

Role of the Judge

As circle sentencing is an integral part of the criminal court process, the presiding judge must impose the sentence and must be apprised of the reasons for it. Nevertheless, the extent of the judge's involvement can vary significantly. In some communities, the offender must first meet with a local justice committee and initiate a healing plan in order to receive community support for circle sentencing. The involvement of the court and the judge will thereby be reduced, as a rehabilitative plan will be in place and a community consensus will be well advanced prior to the circle sentencing hearing. In other cases, the community may not have been involved at all prior to court and the circle sentencing may take hours spread over two or more hearings on different days, sometimes weeks apart.

Although judges have been criticised for permitting certain cases to be dealt with by way of circle sentencing, no one has questioned the propriety of judges

presiding over such hearings. The primary concern is that circle sentencing takes more time than hearing the same case in court and, as a result, the judge and court staff are unavailable to conduct other cases. It is also difficult to predict how much time a particular case will require and so it can interfere with normal court scheduling.

Several questions have arisen regarding the judge's role at circle sentencing hearings. Is the circle merely advisory or is the consensus developed by the community normally adopted by the judge, provided it is not contrary to law? As a matter of law, the judge must make the final decision and is free to disregard the consensus of the circle. As a matter of practice, if the judge consistently rejects or modifies the recommendations from the circle, there will be little motivation for community members to continue to participate and the programme will certainly fail.

Does the judge participate actively in the circle discussion or is the judge's role primarily one of listening? Active participation by the judge, who is viewed as a person with stature and authority, will likely influence the outcome of the circle's discussions. As a result, the consensus will not be "owned" by the community. On the other hand, it is helpful, in most cases, for the judge to outline the parameters of an "appropriate" sentence to provide general guidance for the circle to minimise the possibility of the resulting decision being overturned on appeal.

Of greater concern is the role of the judge working with the community to develop circle sentencing as an alternative to court. In the Yukon and elsewhere in Canada, the judiciary has led this initiative (McNamara 2000b). It usually entails many community meetings and meetings with both Crown and defence counsel. The result is that the initiative may be associated more with the judge than the community. The public may rightly wonder whether the judge is truly dispassionate, independent and unbiased in these circumstances.

Judges, as a result of their training and experience, expect to control the court process and influence, if not determine its outcome. Circle sentencing insists that the judge surrender much of this authority and control to the circle and the community. Not all judges are comfortable or even capable of doing this.

If a consensus is not reached during the hearing, the judge can adjourn the case in order to obtain further information, to allow the parties to consider other options to resolve outstanding differences or to allow offenders to demonstrate their commitment to the rehabilitative plan. When it becomes obvious that there is no reasonable prospect for a consensus, the onus falls on the judge to make a sentencing decision. The absence of consensus should not be viewed as a failure, because the judge will have the benefit of detailed information and a full discussion of all outstanding issues and will thus be better equipped to make the sentencing decision (Stuart 1996).

APPLICATION TO DIFFERENT CULTURES

Canadian society, in common with most other developed countries, has become more culturally diverse over recent decades. Many minority groups have settled in larger centres and have difficulty relating to the criminal justice system because of differences in culture and language. These differences also create challenges for the justice system. Judges are mandated to impose dispositions that are meaningful, promote accountability to victims and society and are also rehabilitative. This requires the judge to be sensitive to the cultural differences between the court and the offender, the victim and their immediate communities. It is not practical, or even possible, for judges to become knowledgeable about the many different cultures represented by the diverse range of ethnic accused persons who appear in court. Involving members of the offender's or victim's cultural community in circle sentencing can bridge these cultural gaps and can result in dispositions that accommodate the different cultural expectations of victims, offenders and their families and satisfy their respective ethnic communities.

CONCLUSION

As a model of restorative justice, circle sentencing is unique because it requires a partnership between the community and the criminal justice system. Each gives needed legitimacy to the other. Community participation creates an opportunity to learn about the causes of crime and to take steps to prevent future offending. There is every reason to believe that this approach could be adapted to urban centres and to all cultures.

At the same time, many of the concerns associated with restorative justice and community justice programmes are alleviated. Offenders retain all of their due process protections. Communities can call on resources available in the criminal justice system as well as those in their community. Victims are given a voice and an opportunity to confront their offender in a safe and supportive environment. The court imposes the final sentence and, therefore, offenders' accountability is increased. Circle sentencing holds the promise of not only improving the delivery of justice to the communities, but also of influencing the criminal justice system to become more responsive and fair (Linker 1999). This will be accomplished when judges, lawyers and other justice system workers apply their experiences from circle sentencing in court.

Nevertheless, circle sentencing should still be considered a "work in progress". Much more must be done to increase victims' participation. Community participants require more support and training. Additional community based programmes for offenders and victims need to be developed. Finally, comprehensive evaluations that measure more than recidivism rates are needed in order

to make better decisions about what works best for victims, offenders and the community.

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Part 3

Critical Issues in Restorative Justice

10

Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration

HEATHER STRANG

INTRODUCTION

THE STORY OF the decline in the role that victims can play in Western criminal justice system is now a familiar one. A thousand years ago, victims' rights to compensation for wrongdoing was codified in written laws (Jeffrey 1957), though the implementation of these rights often depended on the threat of the kinship feud (Walklate 1989; Weitekamp 1999). Only with the rise of the modern state has the responsibility for the investigation, prosecution, and disposition of personal crime ceased to be the victim's responsibility, and become a matter for the Crown or state. The philosophical justification for this was that:

> "The wrong done to an individual extends beyond his own family: it is a wrong done to the community of which he is a member, and thus the wrongdoer may be regarded as a public enemy" (Pollock and Maitland 1898, quoted by Wright 1991:5).

The erosion of victims' rights over the centuries led eventually to their removal from any meaningful role in the justice system in common law countries (Hudson and Galaway 1975). The victim had become just another witness.

Victims were so comprehensively forgotten that it was not until the middle of the twentieth century that any academic or practical interest in them was revived. Indeed, it was the mid-seventies before researchers, justice policy makers and the broader community began to express concern about their predicament and before victims themselves began agitating about their own role, or rather its absence, in the criminal justice system. For example, Wolfgang (1972: 18) observed: "The whole criminal justice system—from police to parole—ignores the victim except as he contributes to the evidence against the offender." Even seventeen years later, when the role and status of victims were finally receiving some attention, Gottfredson (1989: 210) summarised their circumstances as consisting of "inconvenience, inattention, anxiety-provoking arrangements . . . a failure to validate the victim's status as the person harmed and a lack of information about what is happening in the prosecution of the case."

RESTORING VICTIMS: MATERIAL AND EMOTIONAL DIMENSIONS

The swell of activism around the plight of crime victims became, by the late 1970s, a fully fledged social movement with lobbies working towards the alleviation of the negative consequences for victims of both the crime and the criminal justice process, and towards legislative reform focused on victims' rights. Many early activities were directed towards the establishment of state-run victim reparation schemes, which, following the early precedent set by New Zealand in 1963, gradually became the norm in North America, Europe and Australasia. However, these schemes were rarely generously funded and were not usually associated in any way with the judicial processing of the offence which resulted in the injury (Barton 1996). But Shapland (1986) found that victims saw compensation as a proper objective of the court process and as integral to the criminal justice system: they did not see it as a kind of charity to be given by the state. More than that, compensation was seen as a means of making a symbolic statement about the offence. Indeed, victims revealed their concern with issues beyond the relatively simple question of material compensation with their strong preference for restitution directly by the offender rather than by the state. Shapland et al (1985) found that the amounts that victims suggested as appropriate restitution were often very small so as to make it feasible for the offender to pay. One victim was very plain about this: "It should be £50 from the court or £200 pounds from the CICB [Criminal Injuries Compensation Board]" (Shapland et al 1985:123).

This need for a symbolic statement about the legitimacy of the victims' status and an acknowledgment of the emotional harm experienced is an aspect of victimisation which has only recently been given attention. Beyond the calculable material loss the victim may suffer, these emotional dimensions to the loss have routinely been ignored by the criminal justice system and, I suggest, need to be redressed if the experience is to be satisfactorily resolved. Murphy and Hampton (1988: 25) explained the emotional impact of victimisation this way:

> "Intentional wrongdoing insults us and attempts (sometimes successfully) to degrade us. . . It is moral injury, and we care about such injuries . . . and it is simply part of the human condition that we are weak and vulnerable in these ways. And thus when we are treated with contempt by others it attacks us in profound and deeply threatening ways."

Indeed, there is evidence to suggest that victims may often see emotional restoration as far more important than material or financial reparation. For example, Umbreit et al (1994) found that a quarter of the victims who had experienced mediation spontaneously mentioned the importance of the process for resolving feelings of distress resulting from the crime; this is a higher proportion than mentioned material restitution as a primary benefit. They also found that, for many victims, restitution from the offender was important to them only as a ges-

ture of responsibility for the harm. Marshall and Merry's (1990) review of British victim offender mediation programmes found that often what victims wanted most was not substantial reparation but rather symbolic reparation, primarily an apology.

The Canberra Reintegrative Shaming Experiments (RISE) have also found that victims did not always regard material restoration as of primary importance: when they were asked why they decided to attend a conference, less than a third said that wanting to ensure repayment for the harm they had suffered was an important reason. This tendency to see material restitution as no more than secondary was well expressed by a victim whose babysitter had stolen from her family. In the conference, she said:

> "It's not just money, that's nothing, it's the way it's affected all of us. We aren't here because money's an issue at all. We aren't here for our pound of flesh."

Another victim had been assaulted while riding his bicycle by an angry motorist. He said that he felt he probably should have received some money from the offender but made a decision in the conference not to ask for it. This was not because he felt powerless to do so, but because the emotions in the conference had been so raw that he felt it was inappropriate to ask for it and also because he discovered that he and his assailant were in the same kind of employment so he felt a sense of solidarity with him. These cases support Braithwaite's (1999) argument that a real problem exists in evaluating how well restorative justice restores, even on the apparently straightforward dimension of material restoration, because the dynamics of a conference may result in some victims preferring to act generously rather than insisting on getting their financial just deserts.

In fact, RISE data indicated that victims were not often awarded money in either the conference setting or in court,[1] though more than a quarter of the conference group received other forms of material restitution from their offenders, usually voluntary work either for themselves or for a charitable organisation they nominated. But given that conferences appeared to be no more effective than court at delivering financial restitution to victims, it is interesting to discover that there was considerable difference between the two groups in terms of how much they wanted money awarded. More of the court victims than the conference victims said they wanted money as an outcome (46 per cent compared with 37 per cent). It appeared that the conference experience affected victims' opinions of whether financial restitution was an appropriate outcome.

In general, the victimology literature makes little mention of victims' desire for apologies from their offenders. This is a surprise for anyone who has observed the interactions between victims and offenders in restorative justice processes, where the offer and acceptance of a sincere apology seems natural and essential in resolving the offence. This absence is a consequence of

[1] Only about 15 percent of both groups were awarded money.

operating within the dominant retributive paradigm—what is the point in asking victims whether they want an apology when no opportunity exists for a direct exchange between the principals? The absence of a role for apology in Western justice systems may be related to the tendency for our legal system to reduce all harms to a monetary metric, even when no economic loss is entailed. This tendency can also be found in victim offender mediation programmes, with their emphasis on material restitution as the primary outcome. The opportunity to come face to face with one's offender presented by restorative justice programmes of all kinds enhances the likelihood of victims gaining emotional restoration too, as we shall see, though we must always be conscious of the attendant risks of this confrontation.

Apology and forgiveness are so familiar and so much a part of everyday interaction in our society, for offences trivial and serious, that it is worth looking more closely at the transaction to appreciate what Tavuchis (1991: 6) called "the almost miraculous qualities of a satisfying apology." It is also worth considering whether what victims really want even more than an apology is the opportunity to forgive and so to be relieved of the burden of anger and bitterness which may result from the sense that their emotional hurt is unacknowledged. Arendt (1958) made the point that forgiveness releases the victim from feelings of punishment and revenge and also works to limit the possibility of escalating dispute.

Tavuchis (1991: 3) suggested that apology must minimally entail "acknowledgment of the legitimacy of the violated rule, admission of fault and responsibility for its violation, and the expression of genuine regret and remorse for the harm done." However, the magic of apology is that, while it cannot undo the past, somehow this is precisely what is achieved. The goal of apology is the granting of forgiveness and, when both occur, the parties join in a ritual of reconciliation, with the apology as a gift accepted through an expression of forgiveness. Each party needs a response from the other before social harmony can be restored.

In writings on restorative justice generally, apology is usually seen as a goal to be sought and as a sign of victims' satisfaction when it is given. But more recently, in discussions of conferencing, the apology has come to be seen as central to the process of restoration. Retzinger and Scheff (1996: 316) place the phenomenon of apology and forgiveness within a theoretical framework that they refer to as "symbolic reparation", where these two steps are the "core sequence". They suggested that within conferences:

> "Without the core sequence [apology and forgiveness], the path towards settlement is strewn with impediments, whatever settlement is reached does not decrease the tension level in the room, 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 conferences from all other forms of crime control" (1996: 317).

In empirical studies, such as Stewart's (1996) detailed description of the process of New Zealand family group conferencing, apology was the centrepiece. McCold and Wachtel (1998) also found high levels of apology in their Bethlehem study, along with high levels of victims' satisfaction. As well, the significance of apology as an indication of a genuine desire for reconciliation was suggested by Morris and Maxwell's finding (1997) that offenders who failed to apologise were three times more likely to reoffend than those who did so. However, apology (and forgiveness), when it occurs, is most often the end result of a series of interactions between victims and offenders signalling various stages of emotional restoration that the parties experience. As Daly (2000: 42) said "one cannot begin a restorative justice process by announcing 'let's reconcile', 'let's negotiate', or 'let's reintegrate'." The RISE study provided an opportunity to examine what the elements of emotional harm and restoration were for the victims of the offences included in the experiments and how successful the conferencing programme was at giving them the emotional recovery they sought.

VICTIMS IN THE REINTEGRATIVE SHAMING EXPERIMENTS (RISE)

RISE involved the random assignment of middle-range property and violence offences to either court processing or to the restorative justice alternative of conferencing. All the offences were committed by young offenders who had made full admissions of responsibility, and all of them would normally have been dealt with in court. Most of the property offences were burglary, theft, car theft, criminal damage and fraud; and most of the violent offences were common assault, assault occasioning actual bodily harm, and arson. At the time of this analysis, 169 victims of these offences had been interviewed about the harm they had experienced and the way they felt about how their case had been dealt with by the criminal justice system. There was no significant difference[2] between the court and conference groups in the extent of either the material or emotional harm they had experienced, though, as would be expected, there were higher levels of emotional harm experienced by victims of violent offences than victims of property offences. This chapter reports on victims' responses to questions about the extent to which the way their case was dealt with had restored their emotional well-being.

FINDINGS FROM RISE

Fear of Revictimisation

An important measure of emotional restoration for all victims after their case was dealt with was a sense of safety or, conversely, a fear of revictimisation.

[2] All comparisons quoted are significant at the level of at least $p<.05$.

Significantly more court victims than conference victims expected to be revictimised by the same offender (19 per cent vs 3 per cent). This was especially evident with victims of violent offenders where more than six times as many court as conference victims believed their offender would repeat the offence against them. When victims were asked whether they believed their offender would repeat the offence on a victim other than themselves, over half (59 per cent) of the court victims thought they would compared with one third of conference victims. Fully two-thirds (69 per cent) of the victims of violent offences whose cases went to court were worried about this, compared with one third (33 per cent) of the victims of violent offences who went to a conference.

The opportunity to make a personal assessment of the offender seems to be important here. For example, a case involving an assault on a taxi driver by an intoxicated passenger demonstrated the capacity of the conference to calm fears about revictimisation. At the end of the discussion, each party remarked that the other was completely unlike the person they had imagined them to be; both also spontaneously said that they had each been fearfully looking out for the other since the incident, expecting further trouble if they met. The offender said:

> "Now I can see things from [the victim's] point of view. I thought you were totally different. I thought you wanted to fight me. I've been keeping an eye out for you in case you wanted to run me down."

In another case involving a drunken street assault, the victim's father said: "I wanted to see what kind of a fellow he was . . . I can see where he's coming from now."

Fear of the Offender

Conference victims were asked how afraid they felt of their offender before and after the conference (no comparable data are available for court victims because almost none of the victims in RISE whose cases were assigned to court actually attended their case in court). Overall, significantly more victims said they felt afraid before the conference compared with after (16 per cent vs 7 per cent). Most of them were victims of violent offenders: almost one third (32 per cent) of whom said they were afraid before the conference compared with afterwards (8 per cent), again a significant difference. Fear plainly was an important issue in these cases and these data indicate that meeting their offenders tended to be a reassuring experience, rather than one engendering more fear. For example, the victim in a drive-by shooting said: "Once I saw him that was it—he was just a young boy. I felt sorry for him, towards the end [of the conference] to tell you the truth."

The lack of opportunity for court victims to see their offenders means there is no chance for this kind of reassurance, as the following examples of court-

disposed cases illustrate. A young mother, whose car was stolen from her driveway with her housekeys in it, said that, while she was not upset about losing the car, she was consumed with fear about the possibility of the offenders coming into the house. Even after she had changed all the locks, she said she could not stop worrying. An elderly woman who had some garden ornaments smashed by a young offender was quite terrified by what had happened; her life was greatly affected because she was frightened to stay in her house alone and frightened to leave it. Even those not much affected by the experience of victimisation themselves may readily acknowledge that those they care about have been deeply affected; a Cabinet Minister's chief of staff, who was uncomfortable even with the idea of being a victim ("Well, I don't think I'm exactly that, am I?"), nonetheless spoke with feeling about the nightmares his seven year old son had experienced since their house was burgled.[3]

Anger and Sympathy towards their Offender

Conference victims were asked about their feelings of anger and sympathy towards their offender before and after the intervention (no comparable court data are available). About two thirds (65 per cent) said they felt angry beforehand compared with about a quarter (27 per cent) afterwards, a statistically significant difference. Only 17 per cent of victims said they felt sympathetic towards their offender before the conference, compared with 50 per cent afterwards. The victim of a drunken brawl said at the end of his conference: "I have to sympathise with you. Everything you've said I've experienced as well since it happened—feeling guilty, wondering how this is going to affect my career."

Anxiety

Conference victims were asked: "Before (and after) the conference, how anxious were you about the offence happening again?" (no comparable court data are available). While nearly two-thirds (59 per cent) said that beforehand they felt some degree of anxiety about the offence happening again, this declined significantly after the conference to 43 per cent. Victims of violent offences again were especially reassured. For example, the victim of a drive-by shooting incident said that her initial thoughts had been "Do they know me?" "Did they mean to do it?" Then she looked directly at the offender and said: "Why did you do it? Did you pick me?" The offender looked very embarrassed and said that he and his friends were "just mucking about", that his friend was holding the

[3] This accords with Morgan and Zedner's (1992) study of child victims which found that a significant minority of children whose households had been burgled were deeply affected emotionally.

barrel and he was firing the trigger at random and that he definitely hadn't meant to hit her. She visibly relaxed at that moment, a turning point for the conference.

Sense of Security

Victims who said that they had lost their sense of security after the offence were asked whether or not it had been restored after the conference (no comparable court data are available). More than two-thirds (71 per cent) of them said that, indeed, it had been restored. Conferences turned out to be more effective in this respect for victims of violent offences than victims of property offences (84 per cent compared with 62 per cent). Once again, the opportunity to make a face-to-face assessment of their offender in the conference setting seems to have been important for these victims.

Closure

Conference victims were asked about feelings of closure about the offence and about the repair of the harm it caused—perhaps the strongest signal of full emotional restoration (no comparable court data are available). When they were asked whether the conference had made them feel "you could put the whole thing behind you", two-thirds agreed that it had, and there was little difference between the victims of property and violent offences. The victim whose house had been broken into by her children's babysitter explained these complex and competing emotions this way:

> "I went to the conference for [the offender's] sake. I was terribly nervous and I didn't want to go. I was really surprised how much better I felt afterwards. I felt so much more settled—I could put it behind me. I felt I could forgive him for betraying my trust."

Apology and Forgiveness

I have suggested that acknowledgment of emotional harm and of the need for emotional restoration are central to the dynamics of a successful conference, and that the apology-forgiveness transaction is of great significance in restorative justice as it is in everyday life. It comes as no surprise, therefore, to find that, when RISE victims were asked whether or not they believed that they should have received an apology from their offender, around 90 per cent of both the court group and the conference group said that they should have. However, when they were asked whether in fact their offenders had apologised, almost three-quarters (82 per cent) of the conference victims said that they had done so, compared with only 11 per cent of the court victims. And, of those who had

received an apology, none of the court victims said that it was part of the court outcome, while 90 per cent of the conference victims said that it was part of the conference outcome.

Interestingly, there was also a significant difference between the court and conference victims when they were asked how they rated the sincerity of the apology: over three quarters (77 per cent) of the conference victims believed it was sincere compared with only 36 per cent of the court victims. Conference victims, it seems, not only got more apologies but also better quality apologies. This may be due to the circumstances in which they were offered: most of the apologies received by victims whose cases went to court seem to have been coerced by the offender's family, while apologies forthcoming at a conference usually emerged spontaneously as the discussion evolved. A shopkeeper victim of theft, who said he was not interested in conferences and who had, in any case, forgotten to attend, said that he had plenty of experience of the court system with shoptheft; he was, however, impressed with conferencing because this was the first occasion on which an offender had come into the shop and apologised sincerely (as was agreed as part of the outcome). The victim told the offender's mother that it took "real guts" to do this and that he appreciated it.

It is worth noting that possibly many offenders who go before the court experience genuine remorse for their behaviour, but there is no means available through the court system for victims ever to know of their offenders' feelings. For example, in a case involving a house break-in, the police incident report stated: "[The offender] stated that he did not know why he committed the burglaries and took the property. . . *He wanted to apologise to the people for what had been done*" (my emphasis). One of the victims in this case told me:

> "I got most of my stuff back—all except the roller blades. I really wanted the roller blades back as I'll never be able to afford another pair. But mostly I wanted an apology for all the mess."

But neither the police nor the court had conveyed to her that the offender wanted to apologise; nor was any compensation ordered for the loss of the blades.

Concern has sometimes been expressed that the restorative setting, with its focus on reconciliation, could inhibit victims and "harm victims who are not ready or willing to forgive" (Brown 1994: 1263). This does not seem to have been the case for most conference victims in RISE: almost half said that since the conference they had felt indifferent towards their offender, but a further 40 per cent said that they felt forgiving. The more emotional nature of the cases involving violent offences is reflected in the more emotional reaction by victims of violent offenders to this question: more of them remained unforgiving (20 per cent compared with 5 per cent of the property victims) and more of them felt forgiving (48 per cent compared with 35 per cent of the property victims).

A sense of forgiveness often accompanied the feeling that, after the conference, offenders had a proper understanding of the harm caused and a belief that

their offender had learnt their lesson and deserved a second chance. Indeed, 40 per cent of all conference victims indicated that "wanting to help the offender" was an important reason for their attending the conference at all. For example, the victim of a small-store shoplift said:

> "When everyone let their feelings out by talking I felt better. She [the offender] apparently learned by the conference which made me feel better about what happened. . . . Next day she came past the shop and saw me and waved hello. To me that meant she had learned from what happened. It was reassuring—she showed a bit of respect."

Finally, those who had *not* received an apology were asked whether or not they thought that an apology would have helped them to forgive their offenders. Fifty-six per cent of the court victims and 61 per cent of the conference victims said that it would have helped them to do so.

CONCLUSIONS

I suggested at the beginning of this chapter that one of the reasons courts fall so dismally short for victims is because the court system fails to recognise the emotional dimensions of the harm victims suffer and, in any case, has no means available by which victims can experience emotional restoration. Material restoration is important—and neither the courts nor the restorative justice alternative appear to be very successful in providing it, at least in our study—but the evidence from RISE is that conference victims attach less significance to this than court victims do. Conferences seem to provide much greater opportunities for emotional harm to be repaired. But we must be cautious here. Throughout the study, a minority of conference victims expressed dissatisfaction with their experience. When victims take part in a conference they may sometimes run the risk of greater emotional harm if the conference goes wrong. Courts provide little emotional restoration but, at least in uncontested cases, they do not cause much additional harm. Nevertheless, on balance, the evidence from RISE is that restorative alternatives may offer brighter prospects for victims to gain the emotional restoration they need than the court system has ever done.

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11

Just Cops Doing "Shameful" Business?: Police-led Restorative Justice and the Lessons of Research

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INTRODUCTION

POLICE INVOLVEMENT IN restorative justice conferences is a matter of some controversy. This chapter will not seek to recapitulate the various arguments and counter-arguments in fine detail.[2] Instead, it will discuss some of the core issues in the light of emerging research findings from three large-scale police-led initiatives: Bethlehem, Pennsylvania in the USA; Canberra, Australia; and the Thames Valley Police initiative covering the English counties of Oxfordshire, Berkshire and Buckinghamshire. In Bethlehem and Canberra, offenders facing prosecution for a range of "moderately serious" offences were randomly allocated to court or conference. In the Thames Valley, conferences were introduced for "low tariff" cases that would previously have been disposed of by way of a police caution.[3]

The reason for choosing to focus on these initiatives is three-fold. First, whilst there is a great diversity of police-led conferencing schemes in operation across the world, it is the scripted model which originated in Wagga Wagga, Australia (Moore 1995) that has proved the most influential.[4] It provides the basis for the protocols underpinning the Bethlehem, Canberra and Thames Valley initiatives, all of which are playing major roles in shaping thinking and policy in this

[1] I would like to thank Andrew Ashworth, Simon Beaton, Kimmett Edgar, Rod Hill, Carolyn Hoyle, Paul McCold, Heather Strang and Aidan Wilcox for helping me to eliminate some of the worst errors in earlier drafts of this chapter. My greatest debt is to Inspector Judith Johnson of Thames Valley Police for providing thoughtful and detailed comments on the penultimate draft.

[2] For critiques of police-led schemes see Polk (1994), Warner (1994), Sandor (1994), White (1994), Blagg (1997) and Cunneen (1997). Counter-arguments are set out in Braithwaite (1997a; 1999), McCold and Stahr (1996) and McCold and Wachtel (1998).

[3] These assessments of the seriousness of offences handled by the three initiatives may not always be shared by those affected by them, hence the use of quote marks.

[4] Although not in Australia itself: Daly and Immarigeon (1998: 28 and fn 12). The Wagga Wagga model is described in more detail in Young (2000) and by Kathleen Daly in her chapter in this book.

area.[5] There is a need, therefore, to subject this model to critical scrutiny. Second, these three programmes have all been subjected to large-scale independent evaluations, thus providing more reliable data than are available from other police-led schemes. Third, I am co-directing with Dr Carolyn Hoyle a three year action-research study of the Thames Valley initiative. This enables me to write about it with some assurance. I am much less confident in writing about the Canberra and Bethlehem schemes but have ventured to do so on the ground that the comparative insights to be gained outweigh the risks involved.

THE COMMITMENT OF THAMES VALLEY POLICE TO ACTION-RESEARCH

Because this chapter contains some critical observations concerning aspects of Thames Valley Police practice, it is important at the outset to set my comments in context. The findings on which they are based derive from an interim study of 23 restorative cautions and restorative conferences.[6] This study constituted the third of four phases of a research project which aims to intertwine evaluation with development. That this style of research was adopted with the enthusiastic cooperation of Thames Valley Police is a reflection of how keen it was to learn from the findings of research in order to develop and improve practice. Each phase is designed to build on the findings of the previous one and to contribute to the development of this police service's model of restorative . Phase one consisted of a survey of practices, based on interviews with key practitioners and managers, across all areas that make up this police service. A (confidential) phase one report was produced (Hoyle and Young 1998) which led to changes in the guidance provided by headquarters to the different areas. In phase two, we observed practices in three selected police areas, carried out informal interviews with practitioners, offenders, victims and their respective supporters, provided oral feedback to police facilitators, and refined our

[5] All three sites have attracted intense interest from policy-makers, practitioners and others, scores of whom have sat in on conferences as observers. Observers in the Thames Valley have included the Home Secretary, the Attorney General and members of the Youth Justice Board (a governmental agency set up in 1998 to address youth crime). In 1999–2000, the Youth Justice Board paid for the Thames Valley Police (in partnership with two other police forces) to deliver training in conference facilitation to several hundred youth justice practitioners across England and Wales. The experimental design of the research evaluations in Bethlehem and Canberra have resulted in those initiatives similarly maintaining a high profile. The Wagga Wagga model has also informed the training of several thousand practitioners carried out by the international organisation Real Justice, which now has offices in Australia, Canada, New Zealand, the United States and the United Kingdom, as well as "agency partners" in Hungary and the Netherlands (*Real Justice Forum*, issue 9). The director of the United Kingdom office, Les Davey, was previously a Thames Valley Police officer with responsibility for designing and running training in restorative justice. The director of the Australian office, Terry O'Connell, was previously a police officer in Wagga Wagga itself, and was the key figure in developing the "scripted model" used in police-led conferencing.

[6] In a restorative caution, unlike a restorative conference, no victim is present. In the former, the facilitator is trained to "theme in" the victims' views; virtually the same script is used in both types of process.

research tools. In phase three, we observed and tape-recorded the restorative process itself, as well as interviewed virtually all of the participants. The (confidential) phase three report produced in October 1999 was based on the transcripts of the 23 cases observed in this interim study and on the 135 interviews relating to these cases (Young and Hoyle 1999).[7] This report included 81 recommendations designed to close the gap we detected between the programme's protocols and the behaviour of the facilitators we observed.[8] After a pause to allow for the implementation of these recommendations, in phase four, we collected data on a further 56 cases, analysis of which should be completed by the summer of 2001.

Since the mid-1990s, the Chief Constable of Thames Valley Police, Charles Pollard, has been a high-profile supporter of restorative justice (Pollard 2000). Within Thames Valley Police, he has authorised the allocation of significant resources to innovation in this field. This allowed the creation within headquarters of a restorative justice consultancy comprised of officers committed to "getting restorative justice right" and delivering training courses that would meet that goal. Funding was also provided to each of the ten Thames Valley police areas so that they could appoint a full-time co-ordinating officer as well as a full-time administrator. Part of the brief of all these specialist officers is to monitor and raise the standard of local implementation.[9] The restorative justice consultancy has whole-heartedly supported our action-research project and prompted us to provide them with "warts and all" reports. They have also encouraged the dissemination of our findings to wider audiences so that others can learn the lessons of their ambitious programme. This chapter is one product of that encouragement.

POLICE POWER AND PUNISHMENT

Perhaps the core concern expressed by critics of police-led conferencing is that it is allowing the police to become "judge and jury in their own cases."[10] The police already control the processes of arrest, detention and investigation. Some argue (for example, Ashworth 2001) that to give them the right to oversee the outcome of their investigations through a restorative conference is to concentrate too much power in one agency and is wrong in principle. Underlying this

[7] Tape-recordings were made of the restorative process in 22 of these cases. 16 of the 23 cases were classified by Thames Valley Police as involving a victim and thus defined as restorative conferences.

[8] Of the 11 facilitators observed, nine were police officers and the other two had backgrounds in social services.

[9] This level of commitment compares very favourably with many other programmes. For example, a recent JUSTICE (2000) report noted that no training had taken place within the family group conferencing system in Auckland, New Zealand, for fully six years, and that coordinators, despite heavy workloads, were provided with no administrative support.

[10] This was expressed to me by David Dixon during the British Criminology Conference in 1997. See also the discussion in Braithwaite (1999).

concern is often the fear that the police are deliberately seeking to expand their punitive power (Sandor 1994).

What this latter concern assumes, however, is that conferencing *empowers the police* and that it produces *punitive* outcomes. This is the exact reverse of what many restorative justice adherents argue should be the case.[11] Conferences are designed to bring together those with a direct stake in the resolution of the offence, including the victim, offender and their respective supporters, so that the harm caused by the offence can be collectively addressed with a view to reaching a *restorative or compensatory* resolution. Conferences are meant to empower these participants. They are emphatically not meant to empower the persons facilitating the process, whether these be police officers, mediators, social workers or anyone else.

To an important degree, this depiction of conferencing is based on a narrow conception of punishment as something that is destructive, stigmatic, harsh or overly intrusive. A better definition of punishment is any practice which is unpleasant, burdensome, or imposed on the offender *and* which is engaged in because of the wrongfulness of the offending behaviour. I agree with Daly (2000) that compensatory or restorative *outcomes* are best conceived as alternative punishments, not alternatives to punishment, since they amount to impositions on an offender.[12] Thus, what restorative justice adherents should be opposed to is not punishment per se, but outcomes that do not connect with the harm caused by the offence in a way which is meaningful for participants (Daly 2000: 46). Similarly, Daly argues that the *process* of a restorative conference does and should encompass punishment, since the conference process aims to induce the pain of accepted censure and expressions of remorse or shame. It is clear, however, that this pain must come about from *exposure* to expressions of harm and hurt by victims and others directly affected by the offence; it cannot legitimately be *inflicted* by the facilitator. Moreover, this painful experience is regarded as a necessary step towards an ultimate goal variously described as restoration, reintegration or reconciliation, rather than as an aim in itself or as part of an individual deterrent strategy. Thus, restorative justice adherents should also be opposed to stigmatic, destructive or overly intrusive outcomes, even if these are meaningful for participants.

If one applies a broad definition of punishment then it is clear that the first Australian model of conferencing provided for in legislation increased police punitive power. The Young Offenders Act 1993 introduced to South Australia a New Zealand style of conferencing (Morris and Maxwell 2000) for moderately serious cases. Although not police-led, a police officer is legally required to be present at a conference and has the right of veto over any agreement reached. The Act also provides the police with the power in less serious cases to administer a formal caution coupled with a direction that the offender concerned

[11] See, for example, Walgrave (2000), and the critical reflections of Daly and Immarigeon (1998).
[12] For a critique of Daly's position, see Walgrave (2000) and his chapter in this book.

should pay compensation to the victim, carry out up to 75 hours of community service, make an apology, or other "appropriate" measures.[13] Seen in this light, it is not surprising that police involvement in restorative justice became so controversial in Australia. However, the Wagga Wagga model, far from providing the police with an explicit power to punish, requires that facilitators do not even recommend or suggest particular conference outcomes. As it is this model that appears to be meeting with most success in the international market-place of criminal justice, it might appear that the concern that the police are becoming "judge and jury" is overstated.

There are, however, more sophisticated claims that need to be considered when thinking about police power. One is that police-facilitation results in offenders (or others) experiencing the process as so intrusive as to amount to *state* inflicted punishment. Another is that police facilitators will be unable to resist the temptation to use the undoubtedly powerful role of the facilitator to exert too great a control over the outcomes reached in conferences. One obvious danger is that the norms of the traditional culture of front-line street-cops will come into play in this setting. At the core of this traditional cop culture is a commitment to the upholding of authority, not least through police or court-imposed control and punishment on individuals drawn from marginalised groups defined as disrespectful, threatening or criminogenic.[14] In assessing the possible influence of cop culture on restorative justice it will be helpful to analyse process and outcome issues in turn.

IS THE PROCESS THE PUNISHMENT?

An argument that the process of conferencing might be intrusive to the point of being experienced as punishment can be enriched by drawing on Foucault's perspective on power.[15] Power is not seen by Foucault as the property of particular institutions or individuals but rather as inhering in the "asymmetrical balance of forces which operate whenever and wherever social relations exist" (Garland 1990: 138). Foucault distinguished between sovereign and juridical forms of power (which would encompass formal state-imposed punishment) and the

[13] A good overview of the South Australian model is provided by Wundersitz and Hetzel (1996); for more critical reflections, see White (1994: 190).

[14] For discussion of the enduring features of cop culture, coupled with a recognition that it can vary from place to place, over time, and by police specialism, see Chan (1996), Waddington (1999) and Sanders and Young (2000).

[15] The key text is Foucault (1977). Minor and Morrison (1996) contains a useful discussion of how Foucault's ideas can be applied in critiquing restorative justice. As Garland (1990: 163) notes, Foucault's perspective is best used not as a general explanatory theory but as a heuristic device, "producing questions and interpretations which can later be balanced against the weight of evidence and alternative explanations." The adoption of a Foucauldian perspective suits my particular objective in this chapter, which is to expose the forms of power-knowledge at play in police-led conferencing so that the potential dangers can be more successfully guarded against.

much less tangible notion of disciplinary power. Discipline is here conceived of in corrective terms (aiming to induce conformity) rather than as punitive in the sense of revengeful retribution. Lacey (1999: 144–5) usefully elucidates disciplinary power in the following manner:

> "Disciplinary power inheres in particular discourses and practices, and operates (rather than being exercised) in a subtle and diffused way throughout the social body. . . . this discipline which is at the core of the modern power to punish inheres as much in the micro-details of prison regimes, uniform, staff attitudes and so on as in the formal sentence of the court and the other more obvious indices of state power."[16]

She further notes (1999: 160) that the development of a range of community justice initiatives over the last twenty years, including those based on reintegrative shaming, has brought this distinction to the fore:

> "Because many of the relevant institutions operate not primarily in terms of instrumental penalties or by means of sovereignty or juridical power but rather by mobilising pre-existing norms and discourses within which it is sought to reintegrate or rehabilitate offenders or 'at-risk' groups."

As we are examining police-led initiatives in conferencing (rather than conferencing per se), the relevant question is whether police involvement has produced a particular kind of disciplining within restorative conferences. This needs to be analysed at the level of the design of the Wagga Wagga model (since the design may influence the discourses typically mobilised within a conference), as well as at the operational level (since it is not safe to assume that a design will be implemented as intended).

THE PUNITIVE DESIGNS OF THE POLICE?

There is no doubt that the three police-led initiatives considered here are heavily influenced (to varying degrees) by Braithwaite's (1989) theory of reintegrative shaming. This argues that crime is best controlled through shaming criminal behaviour whilst simultaneously seeking to avoid the long-term stigmatisation of those who offend (with its consequential pushing of offenders into criminal sub-cultures or deviant identities and commitments). Shaming should ideally terminate with forgiveness and reintegration. The Wagga Wagga model posits that shaming is best done by people whose opinion the offender is most likely to care about (such as their family or friends or the victim) and who are best placed to effect reintegration into the "law-abiding community" (such as their family, friends and, perhaps, a forgiving or understanding victim). It further posits that forgiveness and reintegration are most likely to take place if the offender accepts responsibility for the harm caused by the offence and makes

[16] Lacey draws here on the study by Carlen (1983) of the nature of women's imprisonment.

restorative gestures, such as a commitment to desist from further offending, apology, victim-compensation or community service.[17]

An important discourse likely to be mobilised within the reintegrative shaming model of conferencing is that of individual responsibility for crime. Polk (1994) argues that it is assumed in this model that delinquency represents a symptom of individual or family malfunction rather than reflecting powerlessness, institutional racism and sexism, or attenuated access to recreational and educational facilities, public space, health care, and decent jobs and housing. In short, reintegrative shaming "could easily become a complex form of 'victim blaming', where the most vulnerable are identified as the cause, rather than the effect, of social inequalities" (1994: 131). Polk further notes (1994: 132–3) that because the model is operated by the criminal justice system exclusively for offenders it cannot help but confer institutional stigma. In his view, the psychological processes facilitated in a conference can do no more than alleviate the negative effects of a fundamentally coercive and stigmatic institutional experience.[18]

For my purpose, what is notable is that Polk makes these observations in relation to both the (non police-led) New Zealand model and the Wagga Wagga model. This implies that *police*-led conferencing models are not inherently more stigmatic than those conducted by youth justice co-ordinators in New Zealand. By contrast, Morris and Maxwell (2000: 216–7) argue that the New Zealand model is not based on reintegrative shaming, a theory which they contend could be at odds with restorative ideals. They note that, in Canberra, community participants are invited to conferences where there is no direct victim, thus indicating, in their view, that the primary role of victims generally within that model is to deliver shame. They write:

> "It seems unlikely that young offenders see shaming by the police (who were the facilitators in many of these conferences) or by members of a community to which they may have no connection as reintegrative and hence as restorative. It also seems unlikely that the potential power of meetings between offenders and victims to move towards a reconciliation is realized where the primary role of the victim is scripted as 'shamer' " (2000: 216).

The point here is not that shaming is inappropriate in a restorative justice conference, but rather that it should neither be inflicted by authority figures nor be seen as an end in itself. Whether police facilitators, community participants or victims actually do place too much emphasis on individualistic shaming is, of course, an empirical question. But the design of the Wagga Wagga model certainly appears to prompt the explicit shaming of behaviour in a way that the New Zealand model does not. Moreover, there is a danger that such encouragement will lead to a shaming of the offender as a person or "shaming

[17] The case for employing the theory of reintegrative shaming within conferences is best put by Braithwaite and Mugford (1994).

[18] See also White (1994). For a response to Polk, see Braithwaite (1999).

as intimidation" (White 1994: 189). This might occur if the participants (other than the offender) fail to maintain the distinction between the doer and the deed called for by Braithwaite's theory. Even if they do remain faithful to this distinction, offenders, through having their behaviour shamed to a disproportionate degree, may come to feel that they are shameful people. It is thus arguable that the theoretical commitment to shaming within police-led models is likely to reduce the extent to which the institutional stigma conferred by a criminal justice conference can be alleviated by the reintegrative psychological processes taking place within it. In addition, the attribution of responsibility for crime at the level of the individual may be somewhat sharper, and thus have greater punitive bite, in a model committed to a notion of criminal behaviour as shameful. As Sherman and Strang (1997: 3) put it, in discussing the Canberra model, "conferences put the offender under the spotlight of critical examination far longer than court proceedings."

THE PRACTICE OF SHAMING AND DISCIPLINING

To what extent are these theoretical concerns about punishment and discipline borne out by empirical observations? The research studies of the Canberra and Bethlehem initiatives will be examined first. The reason for considering them together is that both adopt an experimental design in which the key concern is to compare court processes and outcomes with those of a conference.[19]

Canberra and Bethlehem

Sherman and Strang (1997a: 2) report that in Canberra:

> "Observations of hundreds of conferences show that police officers who lead them have generally succeeded in preventing any participants from condemning offenders as bad people. While the conferences have been far more emotionally intense than court, most of the anger and shame have been aimed at offenders' acts and not their character. Canberra police are succeeding in making offenders *feel* ashamed of what they have done without making them into shameful people" [emphasis in the original].

The negative way of expressing the same findings would be to say that police officers have sometimes not succeeded in preventing participants from condemning offenders as bad people, and that some of the anger and shame gener-

[19] Canberra adopts the classic experimental design in that random allocation to courts or conferences occurs only after offenders have expressed their willingness to attend a conference. In Bethlehem, random allocation occurred before offenders were asked if they would be prepared to attend a conference, and this method resulted in not just control and treatment groups (court and conference respectively) but also a conference declined group.

ated by conferences has been directed at offenders' characters.[20] There is nothing, however, in the results so far released by the Canberra team to suggest that the police are *intensifying* the discipline which is inherent to reintegrative shaming. Moreover, it is possible that a non-police facilitator would have been even less successful than were the Canberra facilitators in the task of maintaining the distinction between doer and deed called for by the model. It is difficult to go further than this because the Canberra study was not designed to provide data on these specific questions.

In McCold and Wachtel's (1998) report of the Bethlehem evaluation, based on structured observation of 56 conferences involving juvenile offenders, there is somewhat more discussion of the police facilitator's influence on the process. Soon after the twenty facilitators began running conferences they were brought together to be given critical feedback on their performance by an officer in charge of in-service training. McCold and Wachtel (1998: 27) reveal that:

> "In spite of the [initial three day] training the officers had received, some seemed surprised that they were not supposed to lecture the offender or affect the conference agreements . . . the officer with the poorest performance evaluation withdrew from the program and a total of five officers never conferenced a second case."

Not surprisingly, police compliance with the programme's protocol showed subsequent improvement. In particular, the "authoritarian tone of the conferences was dramatically reduced by providing the corrective feedback" (1998: 33). The percentage of facilitators who themselves failed to maintain a stance of censuring the offence whilst avoiding stigmatisation of the offender fell from 21 per cent before the feedback session to 7 per cent afterwards. Nonetheless, some lecturing by the police facilitator was observed to take place in about a third of the conferences observed following the in-service training. The arresting officer took part as a participant in a quarter of all observed conferences. The researchers judged that the facilitator had been the most punitive participant in 4 per cent of all cases, and that it was the arresting officer in a further 4 per cent. There were no doubt other conferences in which the police present were punitive,[21] albeit to a lesser degree than other participants. But it would be wrong to conclude that the police are inevitably going to take a harsh stance in conferences: in 35 per cent of the conferences observed "no participant could be identified as punitive at all" (1998: 35).

Other research findings from Canberra and Bethlehem suggest, however, that offenders do not find the conference oppressive. Nor do they generally appear to perceive police-facilitation as problematic or illegitimate. Thus 96 per cent of offender-respondents in Bethlehem indicated that they found the tone of

[20] See also the acknowledgement by Sherman and Strang (1997a: 3–4) that drink-drivers sent to conferences were more likely than those sent to court to feel ashamed of themselves "as distinct from what they had done."

[21] This term is not defined at this point in McCold and Wachtel (1998) although a reasonable inference is that they mean "stigmatic", or "seeking a harsh outcome" rather than meaning disciplinary in a Foucauldian (corrective) sense.

the conference to be "generally friendly".[22] In Canberra, 60 per cent of drink-drivers and 47 per cent of young offenders said that they had gained respect for the police after attending a conference, and the vast majority of all offenders said the police had been fair to them during the proceedings (Sherman and Barnes 1997: 3–4).[23]

These findings must be treated with care, however, not least for methodological reasons. In both Canberra and Bethlehem, participants' satisfaction with the conference process is measured by means of a structured questionnaire. Thus respondents are typically asked to express their degree of agreement (or disagreement) with statements such as "the police in Canberra enforce the law fairly", or to tick a yes/no box in response to questions such as "do you care what the victim thinks about you?" Similarly, the observations carried out by the researchers in both research sites were fairly tightly structured in nature, making use of such devices as checklists and rating scales. This choice of methods reflects the experimental design of both research studies, allowing for robust comparisons to be made between the experiences of those attending conferences and those attending court. These methods are not well suited, however, to exploring the disciplinary nature of conferences in Foucauldian terms.[24] In order to explore the subtle and diffuse nature of discipline, an approach is required which allows both for discourse analysis and an in-depth exploration of how conferences are experienced by participants. The interim study carried out in the Thames Valley employed just such an approach.

Thames Valley

In an important respect, the findings in the Thames Valley mirror those of Canberra and Bethlehem. Our open-ended interviews with participants revealed a high degree of support for the practice of police-led restorative justice. There were few objections to the use of police stations as a venue for cautions and conferences, and most people saw the police as best-placed to run the restorative process for cautionable offences. The most common reason behind this support for the strong policing character of these encounters was a belief that offending should be responded to in an authoritative way.[25] On the other

[22] Although McCold and Wachtel (1998: 61) report that 96 per cent "said the tone was friendly", the instrument they used (1998: 118) shows that offenders were asked a tick-box question of a less clear-cut nature: "Would you say the tone of the conference was *generally*: friendly, hostile, or other (specify)" [my emphasis].

[23] Similar findings have been reported in more recent progress reports from Canberra. See Strang et al (1999: Tables 5–9 to 5–12).

[24] See, for example, footnote 30 and accompanying text. There are other obvious difficulties with these findings, which include that participants may have low expectations of the police and thus be easy to please; or that their evaluations may be critically affected by the fact that they have avoided court, and so on. See the related discussion under the sub-heading Procedural Fairness and Accountability.

[25] In addition, some victims saw the police station as a safe place to hold a restorative encounter.

hand, participants were critical of some elements of facilitators' practices which seemed to them over-bearing or misplaced. In addition, the tape-recordings of cautioning sessions illuminated some of the ways in which the police can make a distinctive contribution to the dynamics of conferences and their disciplinary character.[26] To date, the literature on police participation in restorative justice has tended to make rather vague and generalised claims about the issues involved.[27] In what follows the aim is, in part, to bring some specificity to the debate. Given the vast quantity of data collected as part of the Thames Valley research, the discussion is necessarily highly selective.[28]

Echoing the police interview

Police facilitators in the Thames Valley are trained to ask a few open-ended scripted questions designed to help offenders tell their stories, such as "what were you thinking at the time of the incident?", "what have you thought about since?" and "who do you think has been affected by this?". Some police officer facilitators instead engaged in detailed and judgmental questioning that forced offenders to dwell upon aspects of the offence that the latter clearly found unpalatable. Here is a short example drawn from a conference transcript:[29]

f: . . . At what point in your own mind then did you decide that you were going to take that and not pay for it. Was it before you went into the shop?
o: No, it wasn't. . .
f: No.
o: . . . pre-planned or anything.
f: OK, so once you're in there then, so did you have any money on you at the time, did you have enough money to pay for it?
o: Yeah I did.
f: You did. [Checks police file and states value of item—under ten pounds.] So you did have enough money on you to pay for that. [Pause—no verbal response] How did you go about concealing it, how did you actually steal it?
o: I think it was just, putting it in my pocket or sleeve or, I don't [trails off]
f: You put it in your sleeve in fact.

[26] From a Foucauldian perspective, all restorative practices discipline, by teaching offenders victim-empathy, how to repair wrongs, and so forth (Minor and Morrison 1996: 126–7). The police-led sessions we observed were no different in this. In this chapter, however, my main concern is with the particular forms of discipline that are attributable to the involvement of the police.

[27] There is a more developed, and empirically-based, critical literature on police involvement in the handling of disputes. See, for example, Kemp et al (1992), Leng (1993), Walter and Wagner (1996) and Hoyle (1998).

[28] Some of the more praiseworthy aspects of the Thames Valley initiative are discussed in Young and Goold (1999) and Young (2000). This chapter contains more critical observations than my earlier writing because its aim is to highlight some potential pitfalls of police-led restorative justice in order that these may be anticipated and guarded against by those working in this field.

[29] In quoted extracts from restorative cautions and conferences, and from interviews, the following key is used: o = offender; os = offender supporter; v = victim; f = facilitator; oic = officer in charge of the case; int = interviewer. Names and minor factual details have been changed in order to preserve anonymity.

In total, some 40 questions of similar style were put to the offender by the facilitator at this point in the process. Subsequently we interviewed the offender in this case and asked him one of our standard questions:

int: At the time you were actually describing the event, how were you feeling then?
o: The worst bit is telling them what happened, 'how did you take it?', that's the worst part.
int: How does that feel?
o: You have to feel like, you feel like a real, you know, convict; well not a convict but like scum of the earth. It's like they make you feel that it's something that you do all the time. It's like 'so how do you do it?' I don't know, it made me feel they thought it was something that I do regularly, because I have a routine to how I steal things. And that's not true.

This questioning style seemed to us to have been adopted partly out of habit (the style was that of a standard police interview) and partly as an attempt to understand or categorise an offender's behaviour. But from the offender's point of view, the police discourse was seen as implying that they were committed to offending and thus shameful in character. In other words, questions of this nature can undermine the conference goal of avoiding stigmatisation.[30]

Police authority and police knowledge

One of the most prominent discourses observed at play within restorative processes facilitated by police officers was that of police authority. The imperative to maintain this authority as a bulwark against disorder is a key feature of street-level cop-culture (Sanders and Young 2000: 76). Whilst the theory of conferencing is that the participants are empowered, there was no doubt that the institutional background of police facilitators placed the latter in a particularly authoritative position. This authority was intimately linked to police knowledge. From a Foucauldian perspective, knowledge is key to the operation of disciplinary power because the more the characteristics of an individual are known the more controllable they become (Garland 1990: 138–9).

The police facilitators' knowledge of offenders derived from a number of sources. Most notably, they had often spoken to the officer-in-charge of the case and they invariably had access to the investigative file.[31] In practice, facilitators were frequently observed to invoke the institutional police knowledge of the particular offence or offender. In ten of the twenty-three cases observed, police facilitators referred to the official version of the case at a point when offenders

[30] It is unlikely that a tick-box questionnaire would have uncovered these perceptions adequately. Thus, for example, the offender who said the process made him feel like "scum" answered our specific questions on procedural fairness by saying that he had been treated fairly in the meeting "because I was allowed to talk"; that the facilitator's way of running the meeting had been "fine"; and that since his arrest the police had been "really nice and helpful".

[31] The facilitators we observed were never directly concerned in the investigation of the case that had resulted in a restorative justice process.

were supposed to be telling their stories without interruption or correction. In several cases, facilitators kept the police file open throughout the cautioning session and occasionally drew on it to verify or add to the offender's story.[32] The police file became the source of a narrative which competed (on uneven terms) with the offender's story. This increased the risk of offenders becoming defensive as a police account was related which might be seen as inaccurate in various ways.[33]

Use of the police file was also seen to be of critical importance when a police facilitator asked offenders about their involvement in offences other than the one for which the restorative justice session had been arranged. This might be done by asking them whether or not they had any prior involvement with the police, by inquiring whether or not they had committed other offences, or by checking whether or not their involvement in the present offence extended further than they had previously admitted. When combined with the tactic of leafing through the police file this puts offenders in an awkward situation, as it can seem to them that their veracity is on trial. This sometimes led to the disclosure of information not already known to the police:

f: Had you had any previous involvement with the police before this?
[Pause, the facilitator leafs noisily through the police file]
o: Yeah. [Reluctant admission]
f: What was that for?
o: It was for something that this man, another man did. The police came round and straight in; the man came down and accused me of it, because my arms had like tattoos like the bloke he attempted to stop, so he thought it was me.
f: Yeah.
o: Like that, so. . . .
f: [Interrupting] Right. But you've never been into a police station, having been arrested or anything like that before.
o: No.

What the above extract illustrates is that facilitators may ask about previous involvement with the police even when they have no objective ground to suspect there has been any. In the following example, the facilitator does know of previous police involvement, but probes the issue anyway:

f: Right, OK. So you were taken back to the police station?
o: Yeah.
f: And, what was the procedure like there, cause, have, have you had any involvement with the police before now?
o: Yeah.
f: What was that for?
o: Um, criminal damage.

[32] For one example see the extract from the transcript quoted above under the sub-heading: *Echoing the police interview* on p. 205.

[33] Studies such as McConville, Sanders and Leng (1991) have shown that these files do not contain the unvarnished truth but rather are constructed so as to further police goals.

f: And what happened on that occasion?
o: Basically the same.
f: So, the, the procedure at the police station, then, wasn't something entirely new to you.
o: No.
f: You were twelve then weren't you, according to this. [Looking down at the police file]
o: Yeah, think so.

It seemed that the facilitator asked these questions in order to gauge how much of an impact the arrest and detention of the offender was likely to have had in the current case. But one effect was to diffuse the restorative justice model's focus on a specific offence and the harm it caused. Indeed, one might argue that it undercut the effort to avoid people making judgments about whether the offender was a "good or bad person".

In four of the sixteen conferences observed the officer-in-charge of the case (usually the arresting officer) was present. This brought new forms of power-knowledge into play. The Thames Valley training emphasises that any professionals should be treated by the facilitator as peripheral to the conference. However, in two of these four conferences, the arresting officer played an active role from an early point in the process. In one conference, concerned with aiding and abetting a theft, the offender mentioned that the principal offender had dumped the stolen goods at a particular place. This prompted an indignant intervention by the officer-in-charge:

o-i-c: Are you actually saying that you know where it went, when the lot was taken?
o: Yeah, he said that he dropped it near, I think he said that he dropped it near the bus station.
o-i-c: Mmm, cos you omitted to tell me that at the time I arrested you. [seems annoyed] . . . So did you find this information out, because you were arrested on the day and questioned, so you must have found this out after I originally arrested you, didn't you?
o: Yeah, cos like I walked home from here [police station] didn't I?
o-i-c: Right, but why didn't you actually bring that extra information to me, after I'd arrested you, because obviously you was on bail you could have actually brought that to my attention and we'd maybe find [the item] maybe sitting in the found property office at the bus station. You could have actually made an effort to, maybe, highlighted that to me at a later date, couldn't you?
o: Hmm. [Sounds doubtful]
o-i-c: [pause] Yeah? [pause] Hey?
o: Yeah, I dare say I could have, but I didn't see the point in it, didn't think of it.
o-i-c: Believe it or not people round here if they find abandoned property they don't all go round nicking it again—they actually do bring it in to the police station and possibly say, "I've found this", and obviously we'll make inquiries to see if it's stolen or lost property.
o: It could have been anyone, couldn't it, not me, don't have to be me [that told you].
o-i-c: Yeah, obviously you might have done.

Amongst other things, the officer's intervention communicated the judgement that the offender was someone who could not be expected to understand the norms of the law-abiding. It also censured the offender for failing to be a model citizen by returning to the police station to report the whereabouts of the stolen goods.

Finally, it is worth making the obvious point that police authoritarianism can intrude into a restorative process in non-verbal ways. One officer-in-charge sat outside the circle of participants and played the role of an observer. But this is not how it seemed to the young offender in this conference, whose mother told us in interview:

> "The only thing I didn't agree with, well, he [offender] told me after the meeting, that the copper who'd actually arrested him was giving him dirty looks all through the meeting, and that. And so I don't think he should have been there, and that. But that's like what [my son] said to me. Whether it's true or not I don't know 'cos I wasn't looking at the police officer. That's all he went on about on the way home—the way the copper kept giving him dirty looks."

Whether this allegation is true or not is, in one sense, irrelevant.[34] The danger of placing an observing officer in the offender's line of vision is that the former's presence may be experienced as intrusive or disciplinary, whatever the officer's intentions might be.

On the other hand, it was clear from interviews with participants, including offenders, that many of them wanted the process to include police officers who had a good knowledge of the case. This was because these participants sought an authoritative disposition of the matter and/or because they saw such knowledge as important if the process was not to founder on arguments about factual details, such as who had done what to whom. The issue is not, therefore, whether police knowledge should be deployed in restorative conferences, but rather how it is deployed and to what end. There will be situations in which a restrained injection of *relevant* information will further restorative goals. The trick is to avoid using the police "version of events" to set the agenda, to dominate the interactions, or to undermine someone's story when this is not being contested by other participants.

It would be possible to discuss other aspects of police-led conferencing under the heading of disciplining and shaming, as these diffused concepts are also implicated in such areas as procedural fairness and conference outcomes. However, process and outcome issues will be dealt with under separate headings in order to facilitate a re-engagement with the Canberra and Bethlehem studies and the wider literature.

[34] Our observational data are inconclusive on this point. One of the difficulties of observing conferences (typically organised in circles) is that it is impossible to see everyone's face. In addition, so as not to be obtrusive, we usually placed ourselves so that we were not observing the participants face-on.

PROCEDURAL FAIRNESS AND POLICE ACCOUNTABILITY

Amongst a cluster of inter-related concerns about procedural fairness, Warner (1994) questions whether or not police malpractice at the investigatory stage will become less visible and whether or not the police will become less accountable in the absence of judicial oversight. Braithwaite (1999) argues to the contrary that police accountability to the community is enhanced by the conference process. This is because conferences allow more time and space for participants to voice opinions and concerns and because the police know that, if relations break down in the conference, the case may go to court. In addressing these issues it is important to take into account relevant empirical findings.

Canberra and Bethlehem

The Canberra team have reported findings on procedural fairness that place conferences in a favourable light when compared to courts, although the difference is less pronounced for juvenile offenders (Sherman and Barnes, 1997: 3). Respondents were, for example, asked if they felt they could have corrected errors of fact during the course of the respective proceedings. Among drink-drivers, 80 per cent of those who attended a conference answered in the affirmative, compared to 55 per cent of those sent to court. The difference for juveniles, while in the same direction, was not statistically significant. Similarly, 85 per cent of drink-drivers and 75 per cent of young offenders answered that they had been treated with respect in a conference, compared to roughly 63 per cent of all offenders prosecuted. From Bethlehem, McCold and Wachtel (1998: 59) report that significantly more of the conferenced offenders than those sent to court said they experienced fairness in their case.

It is doubtful whether or not concerns about procedural fairness in police-led schemes can be conclusively allayed by findings produced through the structured methods employed at these two sites. So much turns on the wording of the question and the suggested responses. For example, the Canberra question on feeling able to correct errors of fact may produce affirmative answers on the basis that participants felt they could correct mistakes made by other participants (with whom they may have been on a roughly equal footing). A high score could thus be obtained even if offenders did not feel able to correct the police.

More fundamentally, offenders who attended a conference may say they experienced fairness in their case, but that is not to say they actually were treated fairly. Of course, we should attach considerable weight to the fact that people *felt* they were dealt with fairly—especially when, as in Canberra, a large number of questions on fairness produce answers consistently pointing in that direction. But there is room for an analysis of fairness that extends beyond such

perceptions. For example, participants are not necessarily in a good position to judge whether or not the police are adhering to due process standards embodied in law. Ironically, it is possible that the higher ratings of procedural fairness achieved by conferencing in the Canberra experiment is, at least in part, a function of the lack of formal due process safeguards in that setting. Those who went to court may have received advice from their advocates that their police treatment was unfair in some respects. Those who go to conferences will not have experienced the same degree of legal representation and are thus badly placed to judge this matter. This is admittedly a speculative line of analysis, but my point is that people's perceptions of fairness need to be understood as generated within a specific context, as influenced by prior expectations, and as based on what is often incomplete information and understanding. The need to contextualise participants' assessments emerged strongly from the Thames Valley data.

Thames Valley

Generally speaking, the participants interviewed saw the restorative cautioning process as fair. The open-ended nature of these interviews allowed exploration of the underlying reasons for this perception. The main element of fair process as comprehended by all the key participants was being allowed to have their say on an equal footing with everyone else present. The more a cautioning session adhered to the principles of restorative justice, the more offenders, victims and others were likely to describe the session as fair. Offenders were particularly impressed when other participants listened carefully to what they had to say, an experience they were unfamiliar with in the context of criminal justice.

This finding of general satisfaction regarding procedural fairness should nonetheless be interpreted in a circumspect manner. Offenders and their supporters, in particular, had low expectations of the cautioning session. Many of them had previously experienced non-restorative old-style cautioning (Young and Goold 1999) or poor treatment on arrest and detention, and were thus pleasantly surprised by even minor gestures of fairness during the cautioning session. Those treated in accordance with high standards of procedural fairness sometimes reported feelings of amazement. Moreover, behind these general appraisals lay some specific concerns about particular features of some cautions and conferences. In illustrating these concerns, I am not suggesting that such features are inevitable in police-led restorative justice; rather they highlight the need for stronger accountability mechanisms than are inherent in the semi-public nature of the process and its systemic setting in the shadow of the court.

Investigative fairness

In several cases, the offender was asked by the facilitator about their recent and current offending behaviour (as opposed to questioning in relation to behaviour that had led to police involvement in the past—a practice discussed above). Any evidence obtained in this way might be admissible in court, as exclusion is not necessarily mandated in this type of situation.[35] At the very least, information secured by this means becomes part of the stock of local police knowledge. None of the safeguards which normally apply to a police interview, such as the right to have a legal adviser present, were in operation. It is true that all offenders will have been offered free legal advice when first formally interviewed at the police station, but few of the offenders in our phase three sample had taken up this offer and only two out of the twenty-six we interviewed had received advice on whether to accept a restorative caution.[36]

Here is one example of how restorative justice can become transformed into an investigative tool:

f: Right. So who found the [stolen goods] then, the store staff?
o: Yeah.
f: Yeah. OK, and I think there was a knife found, nearby, wasn't there, do you remember that?
o: [eight second pause] Yeah there was, yeah, there was, uh, something like that, yeah.
f: Yeah.
o: Supposedly put there by me.
f: Right.
o: Which it wasn't.
f: Which it wasn't?
o: No.

The pursuit of such extraneous matters places the perceived legitimacy of police-facilitation in jeopardy. When interviewed, the offender's mother took objection to the way the cautioning session had taken on this aspect of a re-interview:

> "Yeah, I was a little bit miffed with the bit to do with the knife, but I wasn't going to jump in, start kicking it around. I felt that it was slightly unjustified in being brought

[35] Restorative cautioning in England and Wales has developed without any specific legislative or judicial authority or intervention. The position is thus governed by the Police and Criminal Evidence Act 1984 under which a court would have to exclude such evidence if it thought it had been obtained in conditions which made it unreliable (s.76) and would have the discretion to exclude if it took the view that to admit the evidence would have an adverse effect on the fairness of the proceedings (s.78).

[36] One often encounters in the literature the suggestion that offers of legal advice amount to a safeguard against unfairness (see, for example, Morris and Young 2000: 23). But offers in themselves may do little to safeguard the rights of either offenders or victims, as the extensive literature on the provision of legal advice to persons arrested shows (Sanders and Young 2000: chapter 4). Most notably, offers are turned down more often than they are accepted.

> up because it was a silly situation. I doubt very much if it was [offender]'s and he's turned round to him [original interviewing officer] and said 'no it wasn't mine'. And he wasn't charged with that. I was just a bit miffed about that."

In other cases, participants were asked to provide details on the extent of the involvement of other people in committing offences, or to supply general criminal intelligence, as in the following extract:

> v: Trouble is he's in with the wrong gang.
> f: Is he?
> v: The wrong gang, they're all troublemakers, the gang that he's in with.
> o: It's not a gang, it's just some friends.
> f: Who do you hang around with then Matthew?

This exchange continued until all the relevant names had been provided. In another case, an officer-in-charge intervened to ask the offender whether he had committed the offence recklessly, as he had admitted in interview, or intentionally, as the officer obviously suspected. This under-cut the most recent offender supporter's contribution, which had been to express some pride in the fact that the offender had been honest about the offence and taken full responsibility for what he had done.

It is important to stress that no police facilitators or officers-in-charge we spoke with gave any indication that they purposely set out to use the process to gather criminal intelligence. Moreover, the script used by Thames Valley Police can itself be seen as requiring facilitators to tread a fine line in that they must tease out the offender's story whilst avoiding questions that could be perceived as investigatory in tone or nature. Indeed, forgetting to leave personal and professional baggage outside of the conference room is something that all facilitators need to guard against, not just police officers. Thus, in the four of our twenty-three cases which were facilitated by social workers, there was a distinct tendency for the facilitator to turn the session into an assessment of the offender or to engage in individual or family therapy.

The concern of Warner (1994) that police malpractice at the investigative stage will be swept under the conference carpet is thus revealed as too narrow. Conferences provide a new opportunity for inappropriate or counter-productive professional behaviour. The kinds of problems documented above are to be expected in any new initiative which is grafted on to an existing criminal justice structure (Daly and Immarigeon: 1998). What is important is to recognise and accept that this is so, and then to take remedial action once the anticipated problems have emerged and their precise nature is documented.

Challenging police behaviour

As for Braithwaite's suggestion that inappropriate police behaviour will be challenged in the conference setting, the Thames Valley research found much evidence to the contrary. In one sense this is surprising, given that some police

facilitators made a point of asking offenders detailed questions about their treatment when arrested and detained in the police station. But the purpose of such questioning was not to encourage complaints but rather to focus the offender's attention on an unpleasant experience in what seemed to be an attempt to maximise the deterrent aspect of the encounter. When, during these exchanges, criticisms were made by an offender, however faintly or implicitly, the typical reaction of the facilitator was defensive, as in the following example:

f: Did you spend any time in a cell?
o: Yeah.
f: How long were you in there for?
o: Five hours.
f: Were you? What was that like?
o: Boring!
f: Boring! [half laughs]. Oh right. And that was probably because there was more than just you and it takes time to process all of you and these things do take time don't they?
o: Yeah.
f: And then to interview you all as well and decide what's going to happen.

Such defensive comments achieve little other than conveying to offenders that criticisms of the police will not be welcomed. This problem, again, is something to be expected given that a key aspect of traditional cop culture is solidarity with colleagues in the face of external threats (Waddington 1999: 302).

Another structural disincentive to raise criticisms is the facilitator's use of the police file as an authoritative source of "the facts". This is unlikely to document inappropriate police behaviour, while offenders may feel it trumps their own version of events. This possibility was raised most starkly in our data by the cases where the police were the victim (that is to say, offences of drunk and disorderly, public order, or assault on a police officer). In one restorative caution, the facilitator, reading from the police file, gave a graphic account of the offence from the police victim's point of view:

f: [The police officer] says they've been called, because of this incident inside the disco, so they were there legitimately to try and find out what was going on. Apparently you refused to get off the bus, you were telling him to "fuck off" and similar language. And then you were seen by several people actually grabbing a police officer around the throat and having to be sort of dragged off and restrained. You then had to be forced really to the ground so that they could try and get handcuffs on you, this [police officer's] there using distraction blows in the form of knee strikes on your legs, I don't know you if you had any bruises after that but, [laughs]. . .
o: Yeah I had a few there.
f: . . . that would explain those maybe. You were quite aggressive, you were telling people to "fuck off and leave me alone", "do you fucking want some?" [Pause—turns over a page in the file] At one point one of the police officers actually drew his CS spray, you know the spray that we all carry these days. I think in view of the

> fact that there was so many people around it wasn't possible to actually use it but I think things were so bad that it obviously went through his mind that, you know, if he felt justified in using it, he could have done. [Pause, flicks through the police file to garner more details] Yeah, continued to struggle on the ground, refused to follow any instructions that were put to you, they had to get the transit van, they had to take you back to the police station and then again you had to be restrained in a cell while they searched you to see what you had on, on your body, so all in all, [sighs] it's a bit of a, a disappointing evening, as, you know, certainly as far as we were concerned.

This statement reminded the offender of a violent and humiliating encounter with the police in a way which discouraged him from challenging the official version of events. There is a total identification here between the interests of the facilitator and the interests of the victimised police—as when the facilitator notes that "we all carry CS spray these days." In substance, the facilitator is defending the police actions throughout the entire passage. One offender was asked in interview if there was anything he had not felt able to talk about in the cautioning session. He replied:

> "Yeah, there was one thing. When he [facilitator] said about the need to restrain me on arrest. When I got home that morning, all my face was cut and bruised up. I had marks all down my legs and back. I'd certainly taken a bit more of a battering than I should have done—unless I was that much of a handful. But I'll say again, I can't remember, because I was drunk. But I was certainly covered, head to toe."

One negative side-effect of intimidating offenders in this way is that it makes it less likely that they will speak openly about their feelings more generally. In consequence, it will be hard to encourage them to take a proper degree of responsibility for their actions and the harm they caused.[37] That, in turn, will undermine the chances of victims finding the conference experience a satisfying and reparative one.

One conclusion to be drawn from this sub-section is that cases in which the police feature as victims need to be handled with particular care. Whilst defensive solidarity with colleagues may be a matter of unconscious instinct, it will normally be present and these cases would be better facilitated by someone from another agency. A similar difficulty arose in our sample in a case in which a social worker facilitated a case in which the victim was a care home run by social workers. Here, also, there was too great an identification with the interests of the victim, thus illustrating that professional solidarity is not only a problem for police facilitators.

Finally, there is little sense in the Thames Valley that cases on the restorative caution or conference track may end up in court. It is theoretically possible but extremely unlikely to occur. None of those observed made any attempt to withdraw from the process. Offenders are usually told at the start of a conference that they can leave at any time but "that the matter might then have to be dealt

[37] That police victim cases can be handled by police facilitators in a way which is much more consistent with the tenets of restorative justice is illustrated in Young (2000: 240–2).

with differently". Interviews with offenders, nearly all of whom had yet to experience a court appearance, show that one of their strongest concerns is to avoid prosecution. Thus the notion that the police will behave in more accountable ways because of the fear that a conferenced case may end up in court is not borne out in this setting. On the other hand, it is arguable that accountability has been enhanced in the Thames Valley in a way which is not true of Canberra or Bethlehem. In the latter two sites, cases have been diverted away from the public court into a semi-private setting. In Thames Valley, by contrast, cases that were previously disposed of by the police in an almost wholly private and unsupervised ad hoc manner (old-style cautioning) are now handled in a more open, standardised way.[38]

ARE POLICE-LED OUTCOMES DISPROPORTIONATE OR UNFAIR?

The spectre raised in the critical literature concerning conference outcomes is one of vengeful adult, institutional, or middle-class victims heaping additional (and illegitimate) burdens upon those least able to bear them (Carlen 2000). By contrast, restorative justice adherents argue that for them a key value is parsimony in the resort to punishment (Walgrave 2000: 174). One pertinent question to ask is thus whether police-led conferencing brings about increased severity in the response of the criminal justice system to alleged offending.

Canberra and Bethlehem

In the Canberra drink-driving cases conferences, when compared with courts, have been found to produce much less severe outcomes in terms of monetary fines and loss of drivers' licenses, but much more severe outcomes in terms of community service (Sherman and Strang 1997b). Blood donations are a common outcome of drink-driving conferences, and this can be linked to the fact that someone from a pool of twenty or so community representatives participated in each of these conferences (personal communication, Heather Strang, 19 July 2000). Wherever such "repeat players" feature in decision-making one can expect "repeat outcomes". Police facilitators are also repeat players although their role is meant to be quite different to that of a community representative. Nothing published in relation to the Canberra study touches directly on the question of the police influence over conference agreements. Heather Strang has commented, however, that "the one piece of training that the police seem to carry with them is that they simply must not get involved in the outcome

[38] For a discussion of the practices that made up old-style cautioning, and of the degree to which these were transformed by the introduction of restorative justice in one Thames Valley Police area, see Young and Goold (1999).

agreement, despite the frequency with which participants plead with them to do so" (personal communication, 30 June 2000).

By contrast, McCold and Wachtel (1998: 31) report that in Bethlehem: "59 per cent of all facilitators suggested reparation 'not at all', 21 per cent 'a little', 7 per cent 'somewhat', 7 per cent 'mostly', and 5 per cent 'completely' ". About one in five facilitators were adjudged to have affected the conference outcome either "mostly" or "completely". Unfortunately, the nature of this influence is not spelt out so it is unclear whether police intervention on this issue led to more or less severe outcomes. What is clear is that the Bethlehem scheme, like that in Canberra, often generates reparation agreements involving community service. Twenty-nine per cent of violent crime cases and 77 per cent of property crime cases resulted in such an outcome. The average amount of such agreed service was 24 hours.

There is a need to look behind labels such as "conference agreements" and "community service". As White (1998: 6) has pointed out, to know whether or not restorative justice represents a fundamental break with the existing criminal justice system: "we need to know the precise articulation of punitive, welfare and restorative approaches at a system level." We need, for example, to test empirically whether community service consists of de-stigmatising activities or rather involves "the wearing of 'I am a thief' T-shirts' " (White 1998: 6). This kind of data is not available from Canberra in published form.[39] In relation to Bethlehem, McCold and Wachtel (1998: 37) note that two of the large retail stores "regularly asked for 40 hours of community service and included new security personnel in their conferences as victim supporters as part of their in-service training." A thirteen year old girl is reported by them to have completed 40 hours of community service for the theft of one candy bar (1998: 95). They also mention, in passing, that one offender "failed to comply with washing ten police cars" in a case that involved a personal victim. These outcomes do not sound particularly restorative or de-stigmatising although it is difficult to make any firm judgements given the lack of detail provided about the negotiation (if any) that produced them. In some cases, however, it is clear that no negotiation took place: "some retailers were constrained by their company policy to seek compliance with the civil claim and did not have the authority to alter that condition" (1998: 37). These stores insisted that offenders paid a standard 150 US dollars "civil demand" (1998: 92). The researchers also record their general sense that "at least for property cases, offenders were agreeing to harsher outcomes than they would have received at court" (1998: 95). While the extent

[39] Heather Strang writes that " in Canberra community service is well-defined as hours of work for charitable institutions such as the Salvation Army, the Red Cross, the RSPCA, Meals on Wheels or local favourites such as the National Brain Injury Foundation. Not even blood donations—a common outcome in the drink driving conferences—are defined as community service" (personal communication, 30 June 2000). Whether such community service involved stigmatising or reintegrative experiences would still be an empirical matter of course.

of police influence over these outcomes is uncertain, at best their role as facilitators offered scant protection against them.[40]

Thames Valley

Bethlehem and Canberra are operating at a higher point on the tariff than is the case in Thames Valley, where the restorative process has been used to transform police cautioning rather than as an alternative to court processing. One consequence is that monetary payments or community service are much less frequently built into conference agreements. Indeed, the most typical outcome of a Thames Valley process was an oral or written apology.

Nonetheless, it is arguable that observed conference outcomes were often problematic. In particular, with regard to 11 of the 27 offenders observed, facilitators failed to follow the instructions given in their training that they should not directly solicit an apology. Moreover, in roughly two-thirds of the interim study cases, facilitators played a highly directive role during the negotiation of reparation. Rather than enabling the key participants to achieve a resolution of the case, the facilitators pursued their own individual agendas and occasionally simply imposed the outcome. What should have been an inclusive, discursive and open-ended stage of the process often amounted to little more than a request from the facilitator that a specified form of amends be made to which the offender (often reluctantly) acquiesced. These problems also arose in the four cases in our interim sample facilitated by those from a social work background. This suggests that these deviations from protocol stem from professional domination rather than deriving from the police background of the facilitators per se.

However, some inappropriate outcomes were clearly police-related. In making this point, a broad definition of outcome has been adopted so as to include any longer-term implications of the encounter that were specifically raised within the restorative process. This can be justified on the basis that these implications might have turned out to be far more burdensome for the offender than any formal reparation agreement. In one such case, the offender had apologised and agreed to reimburse the victim for her losses, but had provided only a feeble explanation of the drink-related offence during the conference. The officer-in-charge present seemed to suffer from "moral indignation" on behalf of the still obviously frustrated victim:[41]

> o-i-c So is it, another side to this drinking of yours Martin, your van is quite often seen parked up at the club.

[40] For a persuasive argument that facilitators of restorative justice processes should attend to the public interest by guarding against disproportionate conference outcomes, see Cavadino and Dignan (1997).

[41] See Retzinger and Scheff (1996: 322) for discussion of "moral indignation", something they see as "a particular manifestation of shame and anger."

o I usually leave it there if I've . . .

o-i-c [interrupting] Yeah, all the same, it may well be that one day a colleague of mine will have a little stop-check on the way home, just to keep you on your toes, for everybody's sake, because drinking and driving's quite a serious offence and you can't afford to lose your licence.

o No.

o-i-c I'm sure you have been drinking and driving in the past . . .

o Mmm.

o-i-c We've heard from this and that, and we understand, that that had been going on. And you would be well advised not to do it in the future because my colleagues may well [stop you], after the problem that has been going on, and that may be another little way of resolving the way you can be accountable.

The kind of accountability the officer-in-charge has in mind is not that which restorative justice aims to achieve. The facilitator, however, passed no comment on this exchange. If officers-in-charge are legitimately present at a conference as an affected party, and the other participants understand this, then it is inappropriate for the facilitator to discourage them from making contributions, however indignant.[42] But, in this instance, the officer-in-charge was present merely as an interested professional. The case illustrates that professionals are susceptible to feelings of injustice and anger when they perceive an offender to have taken insufficient responsibility and that this can lead to them playing an improper role in determining the outcome of the case. This is something that facilitators need to guard against by ensuring in their initial preparation that professionals understand the boundaries of the role they are meant to play in a restorative process.[43]

Once that process has begun, it is probably unrealistic to expect *police officer* facilitators to stop officers-in-charge from injecting their concerns into the discussion. Certainly, in settings in which traditional cop culture was still strong, openly to reproach a colleague might well be regarded as something akin to treachery. Moreover, it would be odd if there were no overlap in views concerning appropriate outcomes to conferences amongst police officers sharing similar professional backgrounds. In fact, in one case, the officer-in-charge behaved more in accordance with the restorative justice model than did the facilitator. This can be seen from the following exchange drawn from a conference in which the offender had found the conference process so gruelling that, by the conference resolution stage, he had lapsed into a tear-choked silence:

o-i-c: [to offender] Just to say that, I'm always about and I'll remember your face so, I mean, I'm not your enemy. I might well be your friend. So if you see me it will be nice to say hello. I'm there to help you as well. I mean this has happened, and

[42] As noted above, however, it would be wiser for a police officer facilitator to decline to run a conference where a colleague takes on any kind of victim status.

[43] The role professionals are meant to play in restorative processes varies from model to model but in Thames Valley their allotted role is essentially to advise on the follow-up services available should the key participants raise this as an issue.

you made a big mistake basically. But you've owned up to the mistake. So if you do see me about you don't have to sort of turn round and walk away. You can always say 'hello'. Yeah?

f: [Pause] And, you never know, you might be able to do something for Simon at some point in the future.
[To o-i-c] And I'm sure that would make it worthwhile wouldn't it?

o-i-c: Yeah, yeah.

f: [to offender] Bits of information that you hear, and you never know, when you might be able to do him a favour so. . .

o-i-c: [to offender] It's the [ ] School you go to, isn't? [offender nods]
Yeah, ok.

Here the facilitator has transformed what could have been a positive message (that the police will protect everyone in an even-handed manner and that the offender should not feel uptight about seeing this particular officer in future) into a request that a young offender act as a low-level police informer.

It is evident from the above examples that the police can bring something to the negotiation of conference agreements which other professionals could not. They can use this part of the process to invoke and reproduce wider policing strategies such as stop-search and the cultivation of informants. Facilitators from other institutional backgrounds can similarly be expected to reproduce strategies that chime with their own professional mind-sets. Thus, in one case, after all the other participants had departed, a social worker facilitator put a great deal of pressure on the offender to supplement her oral apology (fully accepted by the victim) with a written apology (not raised as an issue during the conference). This is another example of a professional deciding what would be the "right outcome", although here, unlike the previous illustration, the intervention stems from a therapeutic rather than a policing perspective.

Braithwaite (1999), in reviewing the dangers of powerful individuals dominating restorative processes, argues that the formal negative performance indicators for facilitators should include: (1) how much they talk; (2) whether they dominate proceedings; and (3) participation in setting the terms of the conference agreement. Plenty of qualitative examples of (2) and (3) have been provided in this chapter. As to (1), it was found that facilitators contributed an average of half of all the words spoken during the twenty-two cautioning sessions tape-recorded for the Thames Valley interim study. There was, however, great variation around this mean. The lowest facilitator contribution was one-fifth and the highest was four-fifths. Interestingly, the only two cases (out of twenty-three observed) that we adjudged to have been handled in a fully restorative manner were both facilitated by police officers rather than by social workers.

CONCLUSION

This chapter has shown empirically that police-led conferencing is prone to some distinctive pitfalls. Traditional police culture, and the authoritarian and

questionable practices it can generate, present a significant obstacle to the successful implementation of restorative justice. By no means all of the Thames Valley Police facilitators we observed subscribed to the values of this culture. Some have clearly adjusted their norms, practices and commitments to fit more closely with restorative values. The clear lead given by the Chief Constable that such a shift is required throughout the organisation has been important here.[44] Nonetheless, such shifts can be expected to be contingent, patchy and thus in need of constant reinforcement, especially in the early stages of an attempt to transform practice. Thus there is nothing surprising about the finding that some police officer facilitation has been heavily shaped by a traditional policing outlook.

The extent to which restorative justice can be successfully implemented by the police is something that we are currently examining in phase four of the Thames Valley research. There is reason for optimism in this particular setting, given the commitment of this police service to learn the lessons of the first three phases of this action-research project. In particular, all 81 recommendations made in our phase three report were willingly accepted. The action that directly resulted included the revision of the conference script and training manual, and the provision of top-up training for facilitators designed to eradicate the non-restorative elements in their practices. All training carried out by Thames Valley Police since 1 January 2000, both for its own officers and for staff from other organisations, has taken into account the findings of the interim study. Other developments which have been influenced by the research include the introduction of a more rigorous selection procedure for would-be facilitators, the adoption (with slight modification) of a set of practice standards by the leading mediation organisation in the UK, and moves towards ongoing monitoring (and, possibly, accreditation) of facilitation practice.

At this juncture in the development of restorative justice, it is important that some of the critical lessons of the Thames Valley research reach a wider audience than hitherto. Otherwise, the risk is that the implementation problems encountered in the Thames Valley will be repeated by other police services in magnified form *and* without any structures in place to identify and remedy poor practice. Whatever the arguments of principle against police-led schemes, there can be little doubt they will spread, not least because they appear to be relatively cost-effective (McCold and Wachtel 1998: 100). Moreover, it is reasonably clear that there is a high degree of generalised support for police-run schemes amongst victims, offenders and their respective supporters.[45] The danger is that this level of support could lull senior police officers into a complacent and self-serving belief that police facilitation is unproblematic and can be carried out on

[44] See Chan (1996) for a discussion of how shifts in a police organisation's sense of mission (or "axiomatic knowledge") can, but need not, achieve shifts in front-line cop culture.

[45] It is unlikely that such high levels of support would be found amongst communities with a historically rooted distrust of the police, such as Catholics in Northern Ireland or Aboriginal people in Australia.

the cheap. Public support could quickly dissipate, however, if particular instances of gross misconduct were to attract widespread publicity.

It would thus be in the interests of police services who are innovating in this field to monitor the day-to-day practice of their officers and ensure that mechanisms of accountability and procedural safeguards are strong in both theory and practice.[46] While feedback should be sought from participants through self-completion questionnaires, police services need to be aware that high approval ratings obtained in this way often mask underlying problems. Police organisations need to take proactive steps to ensure good implementation. Those steps should include thorough initial training for facilitators and their line managers,[47] accreditation schemes, spot-checks on practice and corrective top-up education. In addition, police services should follow Thames Valley's example by creating area and headquarter units dedicated to achieving a high standard of restorative justice. Formal evaluation by independent researchers should also be built in to the design of innovatory police-led schemes. Such research should evaluate process as well as outcome issues in order to find out whether or not the label of restorative justice can justifiably be attached to any negative or positive results, and to contribute to the continuing task of securing successful implementation.

Careful thought should be given to the structures within which police-led restorative justice takes place. The involvement of other agencies and interest groups in managing and delivering such initiatives would help protect against practice being pervaded by a traditional police mentality.[48] This needs to amount to something more than just a multi-disciplinary approach if by that is meant no more than the coming together of criminal justice professionals such as police, social workers and educational welfare officers. Such an approach runs the risk of simply substituting one form of professional domination for another. As this chapter has suggested, all professionals can be expected to inject their own concerns and perspectives into the design and implementation of restorative justice.

Consideration must also be given to the philosophical underpinnings of particular police-led models. If clarity cannot be achieved here, practice on the ground is bound to be inconsistent, incoherent and, at worst, indefensible.[49]

[46] The need for checks and balances within restorative justice is discussed from the standpoint of republican theory in Braithwaite (1997b: 343–4). For a discussion of the need for limits and safeguards within restorative justice by a prominent just desert theorist, see Ashworth (2000: 192–6). For a compelling argument that legal advice should be provided to offenders in advance of diversionary restorative interventions, see Crawford (1996: 331–2).

[47] If line managers are not encouraged to understand and support restorative justice they are unlikely to provide the support (in terms of time and resources) that facilitators need in order to prepare and carry out conferences to a high standard.

[48] For discussion of the organisational framework within which restorative justice should be managed and delivered, see Jackson (1998: 45), Dignan (1999: 55–7) and Ashworth (2001).

[49] The difficulties for the police (or anyone else) of achieving such clarity when working within a legislative framework which expresses a contradictory set of penal policies and principles, such as that recently enacted in England and Wales, should not be underestimated. See further Dignan (1999), Morris and Gelsthorpe (2000) and Fionda (1999).

Whilst reintegrative shaming seems to offer a sound theoretical basis for restorative justice (Dignan 1994), the emphasis on shame does seem to cause problems in practice. Allison Morris (1999) has recently suggested that a better foundation for restorative justice would be the concept of reintegrative remorse. My view is that the key to good practice is for facilitators to acknowledge that their role is to empower those directly concerned by an offence to express their views on the matter and its resolution. Any genuine shame or remorse should arise naturally from the restorative process rather than be coerced or dictated by the person facilitating the process. Moreover, sometimes neither shame nor remorse will be sought by participants or warranted by the circumstances.[50] If Morris's proposal was adopted in isolation, the danger is that the police would switch from *doing* shameful to *doing* remorseful business. In other words, any ingrained tendency of front-line police facilitators towards authoritarian control would merely be directed towards a new end. What seems to be needed is a mind-set change so that the police see themselves, within this context, as *just* cops *facilitating* a fair process of restoration and reintegration.[51]

Finally, as Heather Strang (personal communication, 23 June 2000) has noted, probably the best safeguard against any form of professional domination within conferences is to ensure that an adequate number of non-professionals are present.[52] In the Thames Valley interim study, the average number of participants (other than the facilitator) in the cautioning and conference sessions was four, compared with an average of six participants in Bethlehem. In both sites, professionals such as arresting officers sometimes took up some of these participant berths. Compare this to Canberra, where the average number of participants is eight, and where there is a condition that conferences will not be convened unless the offender can muster five supporters. The question this raises is whether or not the Canberra model has much in common with the Thames Valley model other than its use of police facilitators and a script derived from the Wagga Wagga model. The danger is that police forces now emulating the Thames Valley initiative may opt for an even more watered down version of conferencing in which police officers remain first among unequals. If the lessons of research are not heeded, community empowerment may yet turn out to be little more than legitimising rhetoric for unaccountable extensions of police disciplinary powers.

[50] Examples might include offences where these aspects have already been dealt with by the time the conference is arranged, offences committed as part of a political protest, strict liability offences, and offences committed as a result of wretched social circumstances (such as stealing food when hungry, breaking in to an empty house for shelter when homeless and so forth).

[51] Precisely who is to restore what to whom (and why) are key questions within restorative justice which cannot be satisfactorily discussed here, but for persuasive arguments that the offender has a right to forms of restoration, integration and reintegration (such as the provision of fair criminal justice processes, work opportunities and decent housing) see Carlen (2000) and Morris and Gelsthorpe (2000: 19–20).

[52] See Braithwaite and Strang (2000) for elaboration of this point.

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12

Aboriginal Youth and Restorative Justice: Critical Notes from the Australian Frontier

HARRY BLAGG

INTRODUCTION

ABORIGINAL PEOPLE IN Australia are amongst the most imprisoned people in the world, and Aboriginal people in Western Australia are the most imprisoned of the imprisoned. While the restorative justice movement has been anxious to claim lineage with the dispute resolution practices of indigenous peoples, it has tended to remain on the margins of debates about the contemporary social, economic and political aspirations of living indigenous peoples. No amount of anthropological knowledge of the dispute resolution methods of ancient indigenous peoples can substitute for direct dialogue with living Aboriginal people, with all their present deprivations, crises and aspirations. Restorative justice needs to broaden its horizons beyond the narrow confines of the "conference" and develop a "restorative vision", meaning a commitment to mapping out a new decolonised terrain, where genuine reconciliation with indigenous peoples can take place. Current restorative practices around indigenous juvenile justice, while offering some illustrations of good practice, are hamstrung by a broader systemic failure to acknowledge indigenous people as equal players, including accepting the jurisdiction of Aboriginal customary law. They are also buffeted by populist "law and order" policies that are tending to sharpen, rather than reduce, the differential impact of the criminal justice system on indigenous people.

INDIGENOUS YOUTH OVER-REPRESENTATION

In states such as Western Australia, Aboriginal youth remain over-represented in the criminal justice system. There was a slight decline in the number of Aboriginal people arrested between 1991 and 1997—from 142 per 1,000 to 137 per 1,000—and the arrest rate for non-Aboriginal people also declined during

this period—from 21 per 1,000 to 16 per 1,000. However, this means that that the differential risk of arrest had actually increased. From being 6.9 times more likely to be arrested in 1991, Aboriginal people were 8.3 times more likely to be arrested in 1997 (Aboriginal Justice Council 1999: 28). The main source of the decline in the rate of arrest was in the area of juvenile arrests. However, even with a slight decline in the arrest rate, Aboriginal youth between the ages of 10 to 14 were still 25 times more likely to be arrested than a non-Aboriginal youths of the same age and, between the ages of 15 to 17, they were 9.3 times more likely.

Indigenous youth represent less than four per cent of the youth population of Western Australia (WA). However, they constitute 19 per cent of offenders and 32 per cent of all offences heard[1] in the Children's Court; and, of those convicted, 35 per cent received a custodial order as opposed to 27 per cent of non-Aborigines. In relation to juvenile detention, WA is behind only the Northern Territory in relation to the rate of juvenile detention and has the highest Aboriginal to non-Aboriginal ratio: 38.3 compared to 32.2 in the Northern Territory, 27.2 in New South Wales and 29.8 in Queensland (Australian Institute of Criminology, cited in Aboriginal Justice Council 1999). It is against this massive rate of over-representation at all levels of the system (arrest, court and detention) that the introduction of family conferencing has been established. However, only around 16 per cent of Aboriginal youth are referred for conferencing through the Juvenile Justice Teams: small in proportion to their rate of involvement in the system as a whole.

Successive reports by the Western Australian Aboriginal Justice Council (AJC) (Aboriginal Justice Council 1997, 1999) have been critical of the lack of progress by government in implementing key recommendations of the *Royal Commission into Aboriginal Deaths in Custody* (1991) (RCIADIC), particularly in relation to police contact with indigenous youth, imprisonment as a last resort, and the introduction of diversionary options (Recs, 234–245).[2] The Council's concerns echo other reviews (see Blagg and Ferrante 1995; Cunneen and Macdonald 1996; Aboriginal and Torres Strait Island Commission 1996) which expressed similar concerns about the lack of progress. In relation to the key RCIADIC recommendations urging "arrest as a last resort" for juveniles, the Council (1999: 54) reported that the "picture continues to be bleak." The Council expressed considerable disappointment that the conferencing system was not being used sufficiently for indigenous youth and their families, and pointed to the effect of police attitudes as well as an administrative system unsuited to indigenous people. Indeed, indigenous people in Australia are frustrated by the juvenile justice system. A recent consultative inquiry in Queensland reported continuous "failure" by the system: "the term justice (in juvenile

[1] The ethnicity of defendants was, however, recorded in only 59 percent of cases.

[2] Aboriginal Justice Councils have been set up in each state of Australia, under Recommendations 2 and 3 of the RCIADIC, to monitor progress of the implementation of the RCIADIC's recommendations.

justice) was . . . a misnomer in light of the escalating numbers of young people in the juvenile justice system" (The Aboriginal and Torres Strait Islander Women's Task Force on Violence 2000: 237).

"LAW AND ORDER" AND ABORIGINALITY

Aboriginal people have a history of early involvement and long term enmeshment in the criminal justice system in Australia. This systemic entrenchment has been further exacerbated in recent years by the drift towards "law and order" politics, itself part of a global trend towards more "expressive and intensive modes of policing and punishment" (Garland 2000: 349). These shifts have spawned a diversity of "tough on crime" policies consistent with this global trend, including: longer maximum penalties for a range of violence and property related offences; "three strikes" style mandatory sentencing and other strategies to reduce judicial discretion (such as a proposed sentencing matrix); a (failed) boot camp established in a remote desert region of Western Australia; stricter parole laws; restrictions on eligibility for bail (including requirements for juveniles to be released only to the care of a "responsible adult"), and zero tolerance policing. The three strikes mandatory sentencing laws are especially problematic given that they "redistribute" discretion to the pre-trial decision making stage (Morgan 2000), thereby increasing the already powerful gatekeeping powers of the police and, essentially, eliminating judicial checks on discriminatory and capricious police powers.

While there have been important reforms introduced as part of Western Australia's 1994 Young Offenders Act, these reforms, including those intended to increase the rate of diversion from the system, have not benefited indigenous youth to the same extent as non-indigenous youth (discussed further below).[3] It is as though some ineluctable law of indigenous over-representation was at work, ensuring that whatever the "law and order" issue and the style of the "tough" response, indigenous people will inevitably be caught up in the hard end and subject to its most extreme consequences: homologously, whatever criteria exist for access to new "softer" options (such as diversionary programmes, family conferencing and alternatives to custody), Aboriginal people will fail to meet them and remain subject to the old options (such as arrest, trial and incarceration).

There is a curious irony here, given the extent to which the images of the *Indigene* enjoy wide circulation within the discourse of restorative justice. A typical example is provided by Bazemore and Waldgrave (1999: 2), who argue that restorative justice in Canada, New Zealand and Australia is: "used to

[3] The Act did provide a number of juvenile justice principles (see s. 7.), including a stress on the need to ensure fairness, to use informal means where feasible and to employ detention on as a "last resort."

describe a variety of *ancient indigenous dispute resolution practices associated with Aboriginal groups*" (my emphasis). Practices which, they suggest, "are being updated and somewhat cautiously integrated into dominant European-style criminal and juvenile justice systems." This statement complements previous observations by advocates of restorative justice (see, Blagg 1997, 1998a) who, similarly, collapse together a diversity of indigenous justice practices into a singular "Aboriginality" and assign the heading "restorative" to them. Such tendencies perpetuate a history of what Spivak (1996) calls "epistemological violence", where the cultural practices of the colonised are concerned: a practice I have previously linked (Blagg 1997) to an enduring tendency by Western scholars to appropriate the cultural products of colonised, or neo-colonised, societies. Edward Said (1995) referred to this as a form of Orientalism, meaning a set of ideological and cultural practices that constructed and subordinated the colonised as Other. Through the Orientalist lens, distinctive and historically embedded cultural practices are essentialised, reduced to a series of discrete elements, then reassembled and repackaged to meet the requirements of the dominant culture.[4] This occurred in relation to the "discovery" of conferencing when a curious kind of cargo cult seized the collective imagination of Western justice professionals, police and criminologists, and turned many into avid collectors and aficionados of ancient indigenous cultural practices. Suitably scrubbed up and sanitised for presentation, they provided an exotic adornment to any discussion of alternative justice, and provide an almost semi-mystical authority, or authenticity, to the product.

What was lacking in these sanitised representations of traditional dispute resolution, according to critics such as Juan Tauri (1999), was any reference to the realities of indigenous life (New Zealand in his example). Blagg (1998a) similarly suggests that the restorative justice movement has tended to selectively appropriate certain elements of traditional practice without acknowledging the wider universe of obligation, reciprocity and meaning that gave these elements their purpose and significance to the actors involved. And Cunneen (1997) has criticised tendencies to develop a "one size fits all" approach to conferencing—assuming that all indigenous peoples are the same irrespective of local circumstances.

Paradoxically, while the imagery of the conference may be redolent with wholesome and holistic Aboriginality, the process itself continues to deny Aboriginal people a place. Indigenous youth in Western Australia continue to be under-represented in conferencing. While many Aboriginal people believe that the underlying *principles* of conferencing can be adapted to their needs, they also maintain that the institutional and administrative *processes* are "un-Aboriginal" and depend on the discretion (or whim and prejudices) of unreformed criminal justice agencies.

[4] I have called this a food-hall cosmopolitanism—meaning that, irrespective of the label, the product served up has the same bland quality, suited to the western palate (Blagg 1997: 487n.).

A PROBLEM OF LEGITIMACY

While references to pre-modern forms of dispute resolution liberally embellish the texts of many restorative justice advocates, the actual practices of conferencing tend to be highly modernistic in content, privileging established forms of justice discourse, official modes of communicative reasoning, and reflecting non-indigenous patterns of community association. Seen from an Aboriginal perspective, the fact that family conferencing has been established, so to speak, within the shadow of the criminal justice system, means that it inevitably suffers from the same problems of legitimacy as the system. This legitimation problem has been exacerbated in many schemes in Australia by the early leadership role taken by the police, as gatekeepers, co-ordinators and conveners of family group conferences (Blagg and Wilkie 1995; Bargen 1996; Cunneen 1997; Blagg 1997).

Historically, Australian Aboriginal people have lacked the rudiments of citizenship and have been, in a real sense, *a priori* criminal in dealings with the non-Aboriginal system. Having no existence in law—being, as it were, a "non-people", existing entirely outside the boundaries of community—the law (and its agents and agencies) has been able to treat them in a capricious, arbitrary and racist manner. The over-policing of the indigenous community has been a considerable barrier to the legitimisation of non-Aboriginal legal processes by Aboriginal people. The *Royal Commission into Aboriginal Deaths in Custody* (1991) and investigations by the *Human Rights and Equal Opportunity Commission* (1991) have already drawn attention to the discriminatory nature of policing in indigenous communities (including acts of violence, harassment and intimidation) and the criminalisation of indigenous youth. A national study of police youth relations (Blagg and Wilkie 1995; 1997) found widespread concern about the discriminatory policing of indigenous youth, including the over-use and mis-use of arrest powers, the denial of due process rights of young suspects, summary punishments and "kerb-side" justice.

An inquiry into children and the legal process in Australia found compelling evidence of the "discriminatory impact" of the legal process on indigenous youth, and it was particularly concerned about the lack of controls over the police's use of discretionary powers (The Human Rights and Equal Opportunity Commission and The Australian Law Reform Commission 1997: 485–487). The inquiry commented that diversionary programmes in Australia failed to take adequate account of the particular needs of indigenous youth and argued that "the level of police involvement in most conferencing models is particularly problematic for Indigenous youth" (The Human Rights and Equal Opportunity Commission and The Australian Law Reform Commission 1997: 485).

Similar observations were made in the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Human Rights and Equal Opportunity Commission 1997), known as the *Stolen*

Children inquiry.[5] A key theme in this inquiry related to the historical role played by the police in the removal of children and in the implementation of discriminatory government policies against indigenous people, and the ways in which contemporary police practices have perpetuated this role through an over-reliance on arrest and prosecution. In relation to police involvement in conferencing, the report argues that "the conferencing process has particular significance for indigenous communities given the history of removals and prior police intervention" (Human Rights and Equal Opportunity Commission 1997: 525). Police involvement also "increases the reluctance of Indigenous people to attend meetings and contributes to a non-communicative atmosphere for those Aboriginal youth who attend" (Human Rights and Equal Opportunity Commission 1997: 525). These official inquiries based their evidence on the testimonies of indigenous people and their organisations across Australia and, as such, reflect grass roots concern about the direction of government policies. The identification of the sustained "over-policing" of indigenous people as actual or potential offenders and the relative "under-policing" when they themselves are victims, remains one of the core findings of contemporary police research in Australia (Cunneen and McDonald 1996).[6]

It is against this background that debates about indigenous involvement in the conferencing process need to be conducted. This is so not simply in relation to the individual misdeeds of indigenous offenders and how these may be atoned for, but in the context of profound beliefs that the system is itself fundamentally weighted against them and that they cannot expect it to deal with them justly and fairly.

Patrick Dodson's sombre appraisal of Aboriginal disenchantment with the system, garnered from numerous consultations across Australia for the *Royal Commission into Aboriginal Deaths in Custody*, is also immensely revealing. He recalls:

> "What became apparent during consultations, was that Aboriginal people felt powerless to change the situation, felt that the police, the courts, the inquiry processes were not just inadequate, but were in direct conflict with, or in opposition to, Aboriginal people. They felt there was no justice anywhere and the police, being the first wave of interaction with the criminal justice system, were very much to blame for this situation" (Dodson 1991: 215).

[5] As part of the ongoing culture of denial in Australia, the Prime Minister and the Minister for Aboriginal and Torres Strait Islander Affairs have registered their opposition to the terms "stolen children" and "stolen generation" to describe the Aboriginal children forcibly removed from their families under assimilationist state and federal policies. Objections have focused on whether the term "stolen" was appropriate and whether the numbers involved amounted to a "generation".

[6] This phenomenon has also been uncovered in the context of the policing of First Nation people in Canada: McMullen and Jayewardene (1995: 40) report a practice of police "trivialisation of victimisation, resulting in the under-policing of the Native people", which needs to be set against a tendency to focus heavily on them as a threat to law and order.

Set against this dismal background, it becomes clear that the criminal justice system in states such as Western Australia lacks legitimacy for many Aboriginal people.

COMMUNITY CRIME PREVENTION INITIATIVES

It follows also that there are certain inherent disadvantages in any intervention in indigenous communities employing "crime" as the key point of departure and the police as the lead agency. Round-ups of Aboriginal people in country towns, the removal of Aboriginal youth from public places, the increasing use of street offence legislation by police in cities to regulate indigenous people's access to public space have all been identified as serious problems by researchers (Blagg and Wilkie 1995). As Homel et al (1999: 192) point out, crime's "social and historical associations with police racism and violence, deaths in custody, dispossession, and colonisation" tends to generate suspicion from Aboriginal people. For many indigenous people, police lock-ups and watch-houses, the courts and the prisons are surviving—indeed, flourishing—remnants of a distinctive carceral archipelago (encapsulating missions, orphanages and feeding stations) developed to warehouse the dispossessed. To adapt a recent, and highly pertinent, observation by Wacquant (2000)—comparing the black ghetto and the prison in the USA—the policing, judicial and correctional systems, and the infrastructure of control, removal, assimilation and cultural genocide perfected under colonial policies, were "kindred institutions of forced confinement" (Wacquant 2000: 377). While much of the old apparatus of "forced confinement" has fallen into disuse (such as missions and churches), others (such as watch-houses, lock-ups and correctional facilities) continue to loom large in the lives of indigenous people. Moreover, there has been no clear break between the past use of the justice system as a tool of dispossession and a new orientation towards fairness and equality; no ceremony marked the transition—if indeed there was one—from the instrumental and explicitly partisan use of the apparatuses of justice as a colonial weapon in the pacification of the native, to a new system of partnership and mutual respect. Some form of family conference here, where apologies for past wrongs were offered and suitable reparation made, may go some way to healing the hurts.

Dodson's (1991) observation regarding the role of the police, in particular, has a number of implications for reform strategies where indigenous people are concerned. Many community crime prevention strategies in Australia are led by the police. In Western Australia, for example, *Safer WA* is chaired by the Commissioner for Police, and the police tend to chair regional forums. However, good practice in crime prevention in many parts of Australia has been achieved by pro-active measures against indigenous communities. Consultations with indigenous people and their organisations undertaken for a

number of research projects (see Aboriginal Justice Council 1999; Blagg 1998b) found that indigenous people felt estranged from such community crime prevention structures or felt that they were essentially targeted at them and their young people. A number reported attending meetings where community crime prevention issues raised by local tradespeople and citizens involved demands for more police, tougher sentences for juvenile offenders, curfews, forced expulsions of "problem" Aboriginal families from the town, and so on.

The point here is that references to "community" in policing initiatives and crime prevention strategies may not signal, for Aboriginal people, a shift away from repressive strategies or resonate with the same images of care and concern. As Cunneen (1989) has demonstrated, the increased play on "community involvement" and "community safety" in contemporary crime prevention discourse has often rationalised punitive "law and order" campaigns against Aboriginal people, as *the* essential "law and order" problem. Similarly, Blagg (1997) suggests that references to community in the discourse of justice can intensify, rather than reduce, the identification of racial differences; the very notion of "community" is heavily coded with images of communal singularity. Images of purity, established through the discourse of community, can become a screen against which narratives of racial difference are projected.

The paradox, as far as Aboriginal involvement in alternative forms of dispute resolution, victim offender mediation and family conferencing is concerned, lies in the forms of discourse employed to construct "the community" as a moral force. Pavlich (1999) describes the imagery of community employed by advocates of restorative approaches as deferential to an "identifiable, shared and integrated community capable of being restored and reintegrated" (Pavlich 1999: 3). Acts of community "restoration" and the "reintegration" of offenders are achievable only in so far as participants have some notions of community in common. Blagg (1997; 1998a) and Cunneen (1997) have questioned the extent to which the forms of conferencing being developed in Australia could achieve this goal in relation to indigenous offenders and their communities. Historically, the creation of an Australian community was achieved through the destruction of indigenous community and the deracination of Aboriginal people.

The rediscovery of community in new communitarian philosophies has been influential in providing a set of images of "the good community" for the restorative justice movement. It has been given a radical and progressive gloss within debates about non-bureaucratic and localised solutions to conflict. The nourishing imagery of community as the "true home of humanity" (Bauman 1997: 31) is, however, fraught with danger:

> "To be a born-again communitarian is widely considered today as the sign of a critical standpoint, leftism and progress. Come back community, from the exile to which the modern state confined you; all is forgiven and forgotten—the oppressiveness of parochiality, the genocidal propensity of collective narcissism, the tyranny of communal pressures and the pugnacity and despotism of communal discipline."

The belief that community involvement can deliver justice may be misdirected when the only community perspectives articulated are those of the "populist" authoritarianism, that tend to be anti-youth and anti-black.

ABORIGINAL YOUTH: THE BLACK FOLK DEVILS

Contemporaneously, the stereotype of the Aboriginal juvenile offender (particularly in states such as Western Australia) has been a signifier of criminality and disorder. The notion of community has been employed in narratives underpinning this moral panic to engender a sense of collective danger, with indigenous youths representing the external threat *ante portas*.

In relation to states such as Western Australia, two key dimensions of the "black crime" problem are, in a sense, being joined together. Sutured onto the traditional frontier issue of black criminality (legitimating invasion, dispossession, the introduction of non-indigenous economic relations and governance, law and land ownership), there is now a contemporary, urban problem of black juvenile crime. Colonial anxieties about treacherous natives threatening to overwhelm the vulnerable enclaves of white civilisation and necessitating "extreme' and "exceptional" measures (such as shootings, floggings, mass incarceration and relocation) have been supplemented by modern forms of moral anxiety typical of "high crime societies" (Garland 2000: 359). Aboriginal youth have become a source of urban fear and targets of the kinds of "law and order backlash" aimed at black youth in the UK and USA.

Fear of victimisation at the hands of black youth in Western Australia directly stimulated the introduction of tough selective incapacitation and repeat offender laws (Harding 1992) and, more recently, has been influential in mandatory sentencing legislation (Morgan 2000). Racial fears have rarely been far from the surface of debates about crime, and particularly juvenile crime, in the last twenty years or so. The body politic of Western Australia has been convulsed and paralysed by periodic bouts of crime terror based on fears of Aboriginal youth. As Sercombe (1995) observed, the "face of crime" was clearly an Aboriginal face, as narratives of Aboriginal juvenile criminality continued to bombard the public mind via the media. His study, based on a collection of articles published in the *West Australian* newspaper from April 1990 to March 1992, found that "*85 percent of articles which refer to Aboriginal youth are principally about crime*" (1995: 78, emphasis in the original). Sercombe (1995: 78) came to the "inescapable" conclusion, that:

> "The news about Aboriginal young people is crime news. The newspaper is not interested in, or does not have access to, accounts of Aboriginal young people who are high achievers, or accounts of the homelessness or unemployment of Aboriginal young people."

So pervasive has been the association between youthful Aboriginality and crime in Western Australia that it has tended to block from public gaze criminal acts

perpetrated against, rather than by, Aboriginal people.[7] It was against this background that family conferencing was introduced in Western Australia.

ABORIGINAL YOUTH AND FAMILY CONFERENCING—WESTERN AUSTRALIA'S JUVENILE JUSTICE TEAMS

The origins of family group conferences in Australia have now been well rehearsed (see Alder and Wundersitz 1994; Blagg 1997; Hudson et al 1996) and so I will restrict myself to a few observations. The Wagga Wagga scheme developed by Sergeant Terry O'Connell in New South Wales is generally credited with being the first family group conference style programme developed as part of front end diversion in Australia: a model loosely based on the system in New Zealand established under the Children Young Persons and their Families Act 1989. The scheme no longer exists in its original form, having been superseded by the creation of a state-wide programme under the auspices of the Department of Juvenile Justice. However, the high profile of the programme's founder and the linkages created between the scheme and the reintegrative shaming theories of John Braithwaite (1989), as well as the attention given to it by criminologists and justice practitioners, ensured that it has remained a firm fixture of the restorative justice landscape.

Other Australian states developed an interest in family conferencing as part of reviews of their juvenile justice systems and as a response to key recommendations of the *Royal Commission into Aboriginal Deaths in Custody*. Many schemes, such as that developed in Western Australia, followed on from new initiatives—for example, police cautioning—designed to introduce diversion into the system. Several local, relatively *ad hoc,* victim offender reparation schemes had existed previously, including a court based programme in Midland Magistrates Court in Western Australia, structured along the lines of court based schemes in England. The Juvenile Justice Teams, set up on a pilot basis in 1991, and mainstreamed as part of the implementation of the 1994 Young Offenders Act, were designed to introduce restorative principles into the system and complemented those principles set out in section 7 of the 1994 Act which focused on diversion and reparation. The teams were intended to be multi-disciplinary—with representation from the police, the justice ministry and education (there was also provision for indigenous community workers). The model for the composition of the teams (with the obvious exception of the indigenous worker) is close to the juvenile liaison schemes established in England and Wales in the 1980s, designed to enhance the rate of diversion from the criminal justice system. A key difference—and one that was to have implications for Aboriginal involvement in the process and on the rate of indigenous

[7] This is despite the fact that Aboriginal people remain the most victimised section of society. In 1997, the risk of being a victim of violent crime was 4.6 times greater than for non-Aboriginal people (Aboriginal Justice Council 1999: 23).

diversion—was that in the Western Australia scheme the police essentially retained their primary gatekeeping role. This factor also distinguished the Western Australian model from the original scheme in New Zealand, where greater steps were taken to minimise police discretion to prosecute young people and, thereby, to increase the rate of diversion for Maori youth.

Amongst the aims of the Juvenile Justice Teams was a commitment to ensuring young people were held accountable and made amends to victims (and/or communities), to empowering parents by involving them in the resolution of the offences, and to providing victims with an opportunity to be part of the process (Cant and Downey, 1998). The Teams, the 1994 Act, and the police cautioning scheme were actually, however, introduced in a climate of increasing demands for stiffer penalties for juvenile offenders, rather than demands for increased diversion. This may not be the contradiction it first appears. The system in Western Australia was undergoing a process of modernisation, including the introduction of a more bifurcated approach to juvenile offenders. Bifurcation ensures, at least in theory, that only those serious and/or repeat offenders who require judicial punishment and strict controls are brought into the criminal justice system; the rest, who do not pose a threat to the community, can be safely diverted into "softer" options. The focus in Western Australia, from the late 1980s, was on the identification and control of "repeat juvenile offenders", principally those recidivist offenders who stole motor vehicles and engaged in high speed chases with the police. Many of these repeat offenders were assumed to be Aboriginal (Harding 1992; Morgan 2000).

The diversionary mechanisms that emerged in Western Australia around the time of the 1994 Act ensured that few restrictions were placed on police powers to arrest, process, and prosecute juveniles. The police remained the sole gatekeeper and referrals to Teams remained the prerogative of the arresting officer. Blagg and Wilkie (1995; 1996) observed that controls over police practice in relation to children and young people in Western Australia were the weakest in Australia and, as such, breached important UN conventions to which Australia was a signatory, as well as recommendations of the *Royal Commission into Aboriginal Deaths in Custody*. Such controls that existed were in the form of police Routine Orders and Commissioner's Orders,[8] rather than enshrined in legislation, a notoriously haphazard mechanism for attempting to regulate police practice, as there are no sanctions for not complying. Cant and Downey's (1998) evaluation of the 1994 Act is critical of the lack of safeguards for children's rights within the ambit of the legislation. These include the lack of an

[8] These are internal police regulations that cover a range of activities from detention of suspects, treatment in custody, questioning, identification, and search and seizure. They provide guidelines for police activity and place restrictions on police powers. Blagg and Wilkie (1995) provide evidence of significant variation in Australian jurisdictions in terms of the balance between what is contained in legislation and what is contained in Police Orders. In Western Australia, they found that the orders were often seen by the police as just guidelines to be employed with wide discretion: this meant that rules governing interviews with children and young people (enshrined in legislation in other states and in New Zealand) were weakly enforced.

automatic right to legal representation and of the right to have an independent third party present in police interviews. Not surprisingly, many police officers surveyed for the review felt they did not need to bother abiding by regulations relating to young people's rights at the time of arrest:

> "Only 52% of the police surveyed . . . considered that contacting a responsible adult prior to questioning was a reasonable requirement. Further only 54% agreed that it could be met on most occasions. This suggests that young people may well be questioned without the presence of a responsible adult despite the Commissioner's orders and lends some urgency to including a statement of rights in the Act (or in other related legislation)" (Cant and Downey 1998: 14).

While the rules governing police contact with juveniles are vague and frequently breached, those governing access to the diversionary process are clear and restrictive. Schedules 1 and 2 of the Act itemise a large number of offences for which a caution and referral to a team *cannot* be considered. These include most forms of assault, drug related offences and many traffic violations: offences that could be diverted to a conference under legislation in New Zealand, South Australia and New South Wales.

On the other hand, Cant and Downey's (1998) evaluation highlights many of the positive developments since the Young Offenders Act was introduced and, in particular, they note the high levels of satisfaction with the conferencing process expressed by participants. The areas of disquiet centre around the vexed question of indigenous involvement in the process, the lack of Aboriginal workers involved in the conferencing system, and the negative attitudes of many police—who remain the key players, retaining wide discretionary powers and having a major role in the conference process itself.

MAKING RESTORATIVE JUSTICE RELEVANT: COMMUNITY HEALING AND CUSTOMARY LAW

Restorative justice needs to transcend the obsessive focus on the "small crimes of juvenile delinquents" (Braithwaite 1999: 7) to have relevance for indigenous people. Restorative justice practitioners may need to think outside the criminal justice paradigm and engage with a range of justice issues of concern to indigenous people. There may need to be a greater focus on generating styles of conferencing that suit the needs of specifically local indigenous groups (including urban, rural and remote groups). Indigenous people in remote communities, for example, may wish to develop conferencing systems as part of their own community justice plans—a practice which is showing some positive signs in a number of Queensland communities (Chantrill 1997).

This practice would ensure that Aboriginal communities are empowered to administer their own systems. Many have rejected programmatic responses to problems in their communities which, they argue, have tended to extend the

power base and the skills of agencies and government, rather than en-skill communities themselves to deal with their issues (Aboriginal Women's Task Force and the Aboriginal Justice Council, 1995). Government and state agencies may talk the language of empowerment, but may not wish to give up their own monopoly of administrative, legislative, cultural and economic powers.

Cunneen (1999: 4) maintains that initiatives involving indigenous people must start out from clear principles that acknowledge indigenous rights to negotiate, that accept Aboriginal self determination and that recognise and respect indigenous culture and sovereignty. Programme implementation, he suggests, should be underpinned by principles of effectiveness and equity and should balance individual and group rights. Finally, Cunneen continues, good process should entail secure funding, accept the limitations of any community initiative, and evaluate the programmes within parameters appropriate to indigenous people. The legitimation crisis that haunts the criminal justice system can only be resolved by making indigenous people partners in the design and delivery of services, in the way Cunneen suggests, and by linking the criminal justice process to broader concerns of social justice for indigenous people, in particular, strategies of family and community healing. Focusing on "the crime problem" alone will tend to perpetuate Aboriginal people's perception that *they* are the problem.

There is a growing belief within Aboriginal communities that greater recognition needs to be given to Aboriginal customary law by the mainstream justice system. It is now widely accepted that elements of Aboriginal law survived the imposition of non-indigenous forms of justice and punishments and that many Aboriginal communities practice this law despite its lack of formal status or recognition (Australian Law Reform Commission 1986).

Restorative justice movements should support an enhanced status for Aboriginal law, either as an alternative to, or in partnership with, the non-Aboriginal legal system, as opposed to simply appropriating those elements that suit their own aims and objectives. The revitalisation of Aboriginal law may serve as a means of increasing Aboriginal people's sense of ownership over many issues underpinning the over-representation of indigenous people in the criminal justice system.

There are signs that, albeit in a fragmented and embryonic form, specifically identifiable indigenous justice processes are developing in the post-RCIADIC era in Western Australia. Although poorly funded, Aboriginal street patrols and community wardens schemes, as well as sobering-up shelters and family healing centres run by Aboriginals, continue to gain the support and backing of indigenous communities. Family conferencing has tended to be a "top down" process, managed and convened by powerful state agencies with little input from indigenous people. I have suggested elsewhere (Blagg 1998a) that we need to construct some "liminal" spaces between our own systems of justice and those of relevance to indigenous people and that we need to permit a process of constructive hybridisation to take place. For such a process to take place in states such as

Western Australia, there would need to be legislative change to remove discriminatory laws aimed at indigenous youth (such as three strikes laws), better resourcing of Aboriginal self policing initiatives, legislative support for Aboriginal customary law and a commitment to recruiting and training indigenous people to run family conferences. Amendments would need to be made to the 1994 Act to enshrine young people's rights in the legislation and to restrict police powers to arbitrarily stop, question and detain young people. The police should not be the sole gatekeepers of the system.

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13

Family Group Conferences and Reoffending

GABRIELLE MAXWELL and ALLISON MORRIS

INTRODUCTION

FAMILY GROUP CONFERENCING began in New Zealand with the passing of the Children, Young Persons and Their Families Act in 1989. This Act set out a series of principles that guide the conduct of youth justice proceedings and which are consistent with restorative justice.[1] In summary, these are: involving those most affected by the offending—specifically the offender, the victim and the community of care of both the victim and the offender—in determining appropriate responses to it; reaching decisions about these responses in a facilitated meeting with key participants; holding the offender accountable for his or her actions; and taking the interests of the victim into account in determining appropriate responses. The plans agreed to are meant to take into account the views of the victims, the need to make the young person accountable for his or her offending, and any measure that may prevent future reoffending by enhancing the well-being of the offender or strengthening the family. The most usual outcomes are apologies and work in the community, and rarely involve court orders.[2]

Although there was an evaluation of family group conferences in New Zealand soon after the introduction of the 1989 Act (Maxwell and Morris 1993), at that time there was only limited information available on reoffending. The data were based only on cases coming to the notice of the police and it was not

[1] Wherever possible, young offenders are dealt with by means of warnings or informal police diversionary processes or by means of referral for a family group conference. In addition, all Youth Court cases are referred to a family group conference for recommendation on the outcome before any decisions are taken by the Youth Court which is required to be guided by agreements reached at a family group conference. In practice, we estimated that about three quarters of cases involving young people are diverted from court through police actions, about 12% are dealt with by direct referral for a family group conference and about 12% are dealt with by the Youth Court, usually along the lines recommended by the family group conference. Thus, in New Zealand, family group conferences deal with the most serious offending by young people and effectively determine decisions in most of these cases.

[2] For more information see Maxwell and Morris 1993. Other chapters also point to what restorative justice can offer offenders and victims.

possible to compare these data with a control sample of offenders with similar characteristics and who committed similar offences. Approximately four years after the original family group conferences, the conviction records of the same young people were examined. The data showed that just over a quarter had a conviction registered against them by the courts and that nearly two thirds had been convicted at least once, although only a little over a quarter had been persistently reconvicted (Morris and Maxwell 1997). These data are not dissimilar to an early study of offending in a cohort of New Zealanders tracked from the age of 10 until they were 24 (Lovell and Norris 1990) and in a study of reappearances among young Australian offenders (Coumarelos 1994). However, neither of these samples provide a very suitable comparison group as they both report reoffending in a total sample of young offenders over a given time period. In contrast, in the Maxwell and Morris (1993) study, those referred to a family group conference would normally have committed a greater number of and more serious offences than the larger group of all young people who come in contact with the police but are dealt with by more informal means. Thus these data do not provide a stringent test of the impact of family group conferences on reoffending.

METHODOLOGICAL ISSUES IN MEASURING REOFFENDING

Morris and Maxwell (1997: 5–7) provide a detailed account of the difficulties in determining criteria for reoffending, determining the significance of a given reoffending rate, comparing data when follow-up lengths differ and choosing appropriate groups for comparison. Some of this discussion is briefly reviewed here.

Selecting Criteria

Reconviction is a commonly used yardstick for measuring the success or otherwise of criminal justice sanctions. However, reconviction is only a partial measure of reoffending: some people will have offended but will not have been detected, others may have been detected but will not be charged or convicted of an offence. Police actions can also skew conviction rates. If the police focus on particular individuals, particular groups within the community, particular crimes or particular localities, some people's reoffending will be more likely to be detected than others'. This has sometimes led researchers to using other indicators of reoffending such as self report reoffending. In this study we use conviction data but we also compared this with self report data on offending.

Determining Significance of Offences

(Re)conviction is often treated as a dichotomous variable: the offender either has or has not been (re)convicted. This fails to take into account either the relative seriousness or frequency of subsequent offending. It is therefore important, if one is relying on reconviction, to attempt to distinguish the pattern of reconviction. In this study we developed criteria for distinguishing different groups of offenders who differed with respect to both frequency and seriousness of offending.

Determining the Length of Follow-up

The most common follow up period in research on reoffending seems to be two years. Some researchers, however, have used only one year, commenting that a short follow up period may tell us as much as we need to know on the basis that, if reoffending is going to occur, it tends to happen relatively quickly (see, for example, Morris et al 1995), and that the effectiveness of any particular intervention may be greatest in the period immediately following it. On the other hand, if effective interventions slow the rate of reoffending, then a significant number of those who do re-offend may not do so until after a year or more. Further, it is only possible to determine persistence in reoffending over the longer term. It is therefore important, wherever possible, to examine (re)conviction data at different points in time. In this study we examined reoffending over a period of four and then six years in order to develop reoffending categories that reflected changes over time.

Determining Groups for Comparison

Random allocation or matched controls are usually seen as the optimal design for comparison but these are rarely possible. Alternatively one can, as in this study, use an evidence-based approach in an attempt to identify the characteristics of those who do and do not reoffend. By collecting data on the young person's childhood experiences, family history and experiences after the family group conference, it is possible to determine what aspects of family group conferences are associated with reoffending independently of the other variables which have been previously related to reoffending.

PREVIOUS STUDIES OF REOFFENDING AND FAMILY GROUP CONFERENCES

Difficulties in finding an adequate comparison group are associated with most of the Australian studies of reoffending after a family group conference and

different studies use different methods of assessing reoffending. In Queensland, Hayes et al (1998) could not directly compare conferencing to court but reported that only 7 per cent of those who had been referred to a conference reoffended over a period of approximately four months.

In presenting results from South Australia, Daly and Hayes (2001) report on the percentage of young people who re-offended following a conference. Using official police records, they found that 57 per cent of the 89 offenders in their sample had been in some form of "official trouble"[3] before the conference but that only 37 per cent had been so during an 8 to 12 month period following the conference. However, their data suggest that pre- and post-conference offending is highly correlated. On the other hand, it appears that indicators of the degree of the offender's remorse in the conference and feeling sorry for the victim are predictive of re-offending. Further analyses are planned with data on reoffending over a longer period, and with data gathered from interviews conducted with the young people themselves.

Data that compares a court and a conference sample with respect to reoffending comes from the RISE experiment (Sherman et al, 2000). This study dealt with four separate samples of offenders—young violent offenders under the age of thirty years, drink driving offenders, juvenile property offenders where there was a personal victim, and juvenile shoplifters—who were randomly assigned either to a conference or to court. Thus comparisons were able to be made between the two randomly assigned samples. This study reported one year before-after differences in offending rates rather than frequency of offending. The data indicated that there were significantly lower rates for the young violent offenders but that differences were slight or insignificant for the other three groups. These results from the RISE experiment are only preliminary, but they are interesting as they indicate that conferencing may have a different impact depending on the type of offending of the person referred. The final results from RISE will provide a more detailed and complete analysis of reoffending.

A MODEL FOR UNDERSTANDING REOFFENDING

In the study we report here, we take a different approach to the assessment of reoffending. We try to identify the characteristics of conferences that are more likely to be associated with less reoffending. Our starting point was to develop a model for understanding reoffending, based on previous research findings, in particular, those that indicate the importance of factors relating to early childhood, family and education,[4] those that explore "what works" in terms of inter-

[3] That is, their lawbreaking had been detected by or reported to the police, and they received a formal caution, attended a conference, or their case was finalised in court.

[4] Early childhood factors have included such factors as not being wanted or cared about, a lack of support for parents while their children are young, frequent changes of home and school, a lack of parental supervision, family violence and harsh physical punishment and a poor relationship with

ventions aimed at preventing reoffending,[5] and research on the potential effects of subsequent life events such as establishing relationships, finding employment, and having a stake in life.[6] This model is set out in Figure 1.

This model is organised around several groups of variables. The first consists of those variables that are related to early life experiences and these can be further subdivided into: "significant deficits" in the family's circumstances and the child's environment, such as poverty, inadequate parental support, high mobility, frequent changes of school, family criminality and alcoholism and inadequate supervision; and "early negative experiences" such as bullying, violence and abuse. Together, these have been shown to be responsible for "early negative outcomes" such as offending, anti-social behaviour, absconding, school failure and psychological problems.

The second group of variables is related to family group conferences: including the presence of victims, families and offenders; participation by all of these; apologies to victims; remorse by offenders; the completion of tasks by offenders; and feelings of shame on the part of offenders and families. The third group of variables is related to subsequent life events including indicators of offender's reintegration such as training, employment, a lack of criminal associates and close relationships with others. The fourth group of variables is related to ultimate outcomes measured in terms of life satisfaction and reoffending. A fifth group of variables likely to be important in understanding reoffending is the provision of effective programmes.[7] This study, therefore, represents an attempt

parents while growing up. Family related factors such as having criminal parents and siblings, having parents who abuse alcohol and or drugs and growing up with little money have all been related to offending and reoffending. School related factors linked with offending and reoffending include not succeeding at school, truanting and being suspended or expelled from school (see, for example, Loeber and Stouthamer-Loeber 1986; Fergusson 1992 and 1998; Farrington 1994, Graham and Bowling 1995; Hawkins et al 1998; Lipsey and Derzon 1998; Le Blanc and Loeber 1998).

[5] It is, for example, suggested that: programmes should be intensive and targeted at high risk offenders; factors that contribute directly to offending behaviour should be differentiated from those which have a less direct relationship with reoffending; programmes should be carried out by trained staff in accordance with definitive aims and objectives; teaching styles should match offenders' learning styles and require active, participatory approaches rather than use unstructured, didactic methods; interventions should be skill based, improve problem-solving and social interaction, and include a cognitive component addressing attitudes, values and beliefs supporting criminal behaviour; and programmes should be community based, although programmes in other settings may be successful if they adhere to the above principles (see, for example, Utting 1996; McLaren 992; Goldblatt and Lewis 1998; Loeber and Farrington 1998; Sherman et al 1997; Sherman 1999; Hawkins 1999).

[6] For example, Zamble and Quinsey (1997) in their study of recidivist offenders, found that, post-release and before their subsequent reconviction, most lived in temporary accommodation; only a minority lived with a family; roughly two thirds were unmarried; more than half were unemployed and most of those who were employed worked part-time; and just over one fifth said they received income from illegal activity. Desistance was influenced by: being able to obtain what was wanted through legal means; having a partner/spouse; and decreased criminal opportunities because of spending less time with criminal peers (see, for example, Harris, Rice and Quinsey 1993; Farrington 1994; Moffitt and Harrington 1996; Bonta et al 1997; Zamble and Quinsey 1997; Warr 1998; Baker 1998).

[7] This is represented in Figure 1 by a box with a dotted line since we were not able to assess the impact of effective programmes in this research because of the limited provision of rehabilitative services to the young people in our sample and the lack of information on them.

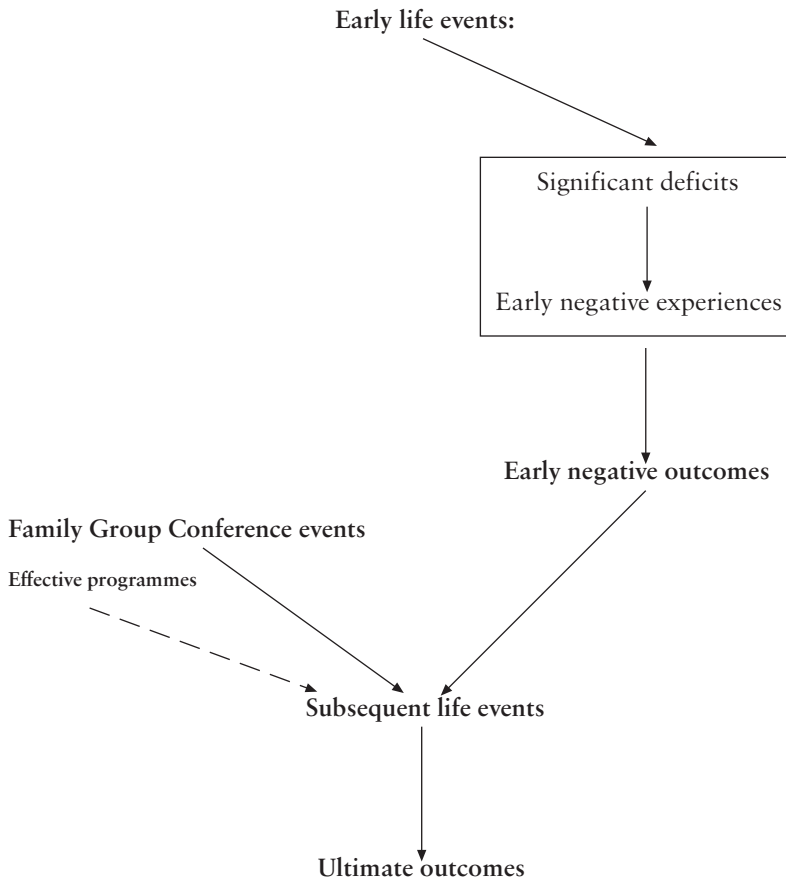

Figure 1: Proposed model of reoffending

to identify the factors and, in particular, the conference related factors, which protect young people from further offending.

METHOD

The reconviction records of a sample of young people who had taken part in family group conferences in 1990–91 were obtained from police records. Wherever possible, young people and their parents were located and interviewed. Interview schedules were developed to collect the type of information identified in Figure 1 as relevant in understanding reoffending including: offender's demographic, family and early background factors and personal characteristics; offending history including self reported offending; experiences

associated with the family group conference; and ongoing life circumstances. The interviews took place over the period August 1996 to December 1997.

Refining the Recidivism Categories

We identified five different reconviction categories (compare Morris and Maxwell, 1997). These were:

—**the persistent reconvicted**—they were characterised by the frequency and volume of their offending in criminal matters;[8]
—**the improving reconvicted**—they had offended persistently for a time but had not been reconvicted in the 12 months prior to our interview with them;
—**the occasional reconvicted**—they had appeared in court more than once but had committed less than five offences;
—**the once only reconvicted**—they had appeared in court and been convicted on one occasion only;[9] and
—**the not reconvicted.**

The data presented in the rest of this chapter relate to these five categories. The cut off point for determining the young person's reconviction category was the date of the interview some five and a half to almost seven years after the date the young person came into the original sample. The average time period between entering the original sample and the interview taking place was six and a half years. Table 1 shows how the sample is made up in these five categories.

Table 1 also shows that similar proportions of young people—over a quarter—were not reconvicted at all over this period and were persistently reconvicted. Reconviction, however, is only a partial measure of reoffending. In order, therefore, to test the validity of relying on the reconviction categories, we asked the young people whether or not they had committed any undetected offences and, if so, what kind of offences they had committed. As there were only two cases in which the original classification was questioned and these discrepancies could be explained, we decided not to alter the original conviction based classification (we return to this later).

[8] They were defined as having appeared in court on criminal matters (excluding breaches of orders) on five or more occasions or, where they were eligible to re-offend for less than four years (because of a period of custody), as having appeared on at least three occasions and/or as having been convicted of five or more offences.

[9] Young people who were dealt with through police warnings or who had appeared in court but who were subsequently discharged were excluded from this category. They were categorised as not reconvicted.

Table 1: Reconvictions over approximately six and a half years for those young people aged 14 and under 17 at time of offences leading to family group conference in 1990/91

		N	%
	Not reconvicted	31	29
	Once only reconvicted	15	14
	Occasional reconvicted	23	21
	Improving reconvicted	9	8
	Persistent reconvicted	30	28
Total		108	100

Sample

In all, 108 young people (67 per cent of the original sample) and 98 parents were interviewed. Twenty-nine young people (12 per cent of the original sample) and 41 parents were able to be contacted but refused to be interviewed. Overall, this means that we were able to collect information on 72 per cent of the young people in the original sample.[10] The majority (85 per cent) of the young people contacted were male. In 1996, the young people were all in their early twenties.

Dataset Development

Cross tabulations of each of the variables by the reconviction categories enabled the production of preliminary results which indicated that, on a large number of the variables, there were differences depending on the reconviction category. The number of variables was then reduced to 38 for the young people in the sample and to 27 for the parents by eliminating irrelevant items and creating, wherever possible, composite variables which allowed for a range of scores that could be approximately normally distributed. This enabled multivariate analyses to be conducted despite the relatively small samples.

[10] We examined both the refusal rates and the proportion traced and not traced in terms of the reconviction category of the 161 people in the original sample. This indicated that a greater percentage of the persistent reconvicted were able to be traced and were interviewed: three quarters of the persistent and improving recidivists were traced and interviewed compared with just under two thirds of the remainder.

Predicting Reconviction Category

Three procedures were chosen to attempt to identify the effectiveness of the dataset in predicting reconviction category and in identifying the variables that were most effective predictors: stepwise discriminant analysis (chapter 39, SAS Institute 1990) was used to identify a reduced dataset, followed by a discriminant analysis on the reduced dataset (chapter 20, SAS Institute 1990) and a canonical discriminant analysis on the full dataset (chapter 16, SAS Institute 1990). The canonical discriminant analysis gave the solution that best differentiated among the five reconviction categories for the young persons' dataset and for the parents' dataset. For the combined dataset, which had a smaller number of respondents on which data were available, a discriminant analysis using the Canon option was used because, as this procedure used a reduced dataset, it was compatible with the fewer degrees of freedom available.

Confirmation of the validity of the analyses was tested using procedures described in chapter 20 of SAS (SAS Institute 1990): the results from a subset of variables on a subset of cases were used to cross validate the findings on the remaining cases, and a logistic regression model was used to determine the most important variables. The results of both these procedures indicated that, despite the caveats about the small numbers and potential problems around the normality of the distribution of some of the variables, the findings seemed to be stable regardless of the type of analysis used and when derived from or applied to different subsets of cases. Furthermore, the same variables emerged as those that appeared to be most important from all the alternative strategies used to explore the predictive power of the data. These analyses were carried out separately for the young persons' data, the parents' data and the combined data from both parents and young people.

Modeling the Impact of Various Factors on Reconviction over Time

The final task was to attempt to model the impact of various factors on reconviction over time. Path analysis (SAS Institute 1990 chapters 11 and 14) can be used for these purposes, although the dataset is smaller than that usually required for such an analysis. Figure 1 set out a theoretical model which defined a number of potential factors relating to different aspects of the young persons' experiences. The path analysis tested this model using only the young persons' data and using a combination of data from the young person and their parents where it was available.

RESULTS

A full account of the variables associated with reconviction in this study is reported in Maxwell and Morris (1999). Other findings about the relevance of early life events are, for the most part, not unexpected or novel. The remainder of this paper, therefore, focuses on three questions:

—What aspects of family group conferences reduce the chances of reoffending?
—To what extent are conference factors independent of other early life and post conference factors in predicting reoffending?
—Is the particular model proposed in Figure 1 an accurate representation of the pathways to reoffending?

We deal with each of these questions in turn.

Aspects of Family Group Conferences that Reduce Reoffending

We asked young people and parents a number of questions about the family group conference. These included whether or not young people and parents agreed with the decisions and felt involved in the process, whether or not remorse and shame were felt, and whether or not the tasks agreed to were completed. Box 1 provides a summary of the variables that were predictors (at the level of $p < 0.10$ or more) of not being reconvicted.

We have named the critical factors that emerged: remorse, shame, participation, acceptance and meeting. For both parents and young people, remorse was the the most important of these. The variables that were the markers of remorse are described in Box 1 and serve to define it. Remorse is about feeling sorry for what one has done and showing it, and this is also closely associated with feeling that one has repaired the damage, completed the tasks agreed to, and reporting that the conference was a memorable event. In many respects, remorse has many of the characteristics that Braithwaite (1989) associates with reintegrative shaming and is a critical value in restorative theory which emphasises both repentance and the repair of harm. The fact that remembering the conference is also closely associated with this cluster is an indicator of the relatively emotional nature of the event that has contributed to a change in the thinking of the offender.

The second most important factor for both parents and young people was being shamed, as indicated by young people saying that they were "made to feel a bad person" and families saying that they were "made to feel a bad parent". We have interpreted this variable as reflecting what Braithwaite describes as "stigmatic shaming": the young people and parents were left with feelings of shame, blame and low self esteem as a result of the conference.

Box 1 Variables associated with not being reconvicted

From parents' dataset

- remorse: feeling your son/daughter was sorry;
- not shamed: not being made to feel a bad parent;
- participation: participating in the conference decision-making;
- acceptance: agreeing with the conference outcome and perceiving it as fair.

From young people's dataset

- remorse: remembering the conference, completing tasks, feeling sorry and showing it, and feeling they had repaired the damage;
- not shamed: not being made to feel a bad person;
- participation: feeling involved in the conference decision-making;
- acceptance: agreeing with the conference outcome;
- meeting: meeting the victim and apologising to him/her.

The third factor is that of participation: feeling that one was involved in the decisions made at the conference. This is also seen as a critical value in restorative justice processes. The fourth factor is acceptance of the outcome as indicated by both parents and young people reporting their agreement with the decisions that were made. Although the importance of acceptance has not received the same prominence in restorative justice theory as some of the other factors that emerge here, there is some evidence that mediated solutions are more likely to be successfully complied with when the parties accept them as appropriate.[11] The final factor, "meeting", emerged as significant for young people but was not asked of parents. It is based on replies to the question about whether or not the young person met the victim and apologised to him or her—again a critical value in restorative justice theory.

Thus, the results from this study provide evidence that family group conferences, when they are effectively restorative, can have an impact on future offending. However, it is important to note that having a family group conference is, by itself, not necessarily effective. We have identified here the critical variables that make for a *successful* family group conference. Furthermore, factors identified by the parents, who are potentially the supporters of the young

[11] For example, only about 3% of agreed compensation had to be written off after mediation in a Northampshire study compared to 12% of compensation ordered by magistrates being written off in an earlier study (Wright 1999: 194). A similar finding is reported with respect to victim offender mediation in the Umbreit et al chapter in this book: VOM youth were more likely to pay restitution than others.

person, added to the predictive power. Reoffending was less likely not only when the young person expressed remorse, but also when the remorse was recognised and perceived to be real by the parents. Not only were enduring feelings of shame in the young person a predictor of reoffending, but so too was the fact that the parents also felt shamed. Such feelings may well reduce the parent's capacity to be effective supports for the young person and thus act to make them less likely to be effective in preventing reoffending. Finally, it is worth noting that acceptance of the outcomes of the family group conference by the parents is also closely related their endorsing them as fair.

Factors Predicting Reoffending

Many factors are associated with reoffending and they are also related to one another: for example parental criminality is associated with a young person's early involvement in crime, and both these factors are associated with reoffending. Because of this, it is difficult to know which factors are important independently of others. As well as knowing the independent predictive factors, it is also important to know how well they account for reoffending. In this particular study, the best possible outcome was to identify a set of factors which accurately classified everyone in the sample into one (and only one) of the five reoffending categories.

We used canonical discriminant analysis to attempt to do this. A canonical discriminant analysis searches out sets of variables which, taken together, are able to predict critical outcomes—in this case reconviction status. The first question to be asked when undertaking the analysis is whether or not people in the different reconviction categories can really be distinguished from one another by the variables that have been included in the analysis. If the reconviction categories can be distinguished, the next question to be asked is what particular variables are most likely to predict the differences between groups. Finally, if there is more than one set of variables that emerge as predictors, is it possible to see some common pattern that relates the variables in each set to one another and distinguishes them from the other set or sets.

Can Reconviction Category be Predicted?

The first question examined was whether or not the different reconviction categories can be distinguished. The results of a canonical discriminant analysis on the young persons' dataset produced two significant canonical correlates which, together, accounted for 69 per cent of the variance in reconviction category. Analysis of the parents' dataset produced one significant canonical correlate which accounted for considerably less of the variance in reconviction category: 48 per cent. Analysis of the combined dataset resulted in three significant canonical correlates accounting for 90 per cent of the variance. The distributions of

the sample by reconviction category on the two most influential canonical discriminants are plotted in Figures 2 and 3.

These Figures provide a graphic illustration of the power of the discrimination achieved using the first two canonical variates. Figure 2 shows that, using the young persons' data, all those not reconvicted occupy, with one exception, a totally different space from those "persistently" reconvicted and from the mixed group of "others". The "once only" reconvicted are positioned, for the most part, amongst or adjacent to those not reconvicted. Those "persistently" reconvicted also occupy a separate space from the mixed group of "others", with the "improving" reconvicted positioned amongst or adjacent to them. Figure 3 shows the results from the combined analysis. Although it only uses two of the three significant canonical correlates, it too shows a fairly dramatic separation between the groups and, in particular, shows a more marked separation between the "improving" reconvicted and the "persistently" reconvicted than did Figure 2.

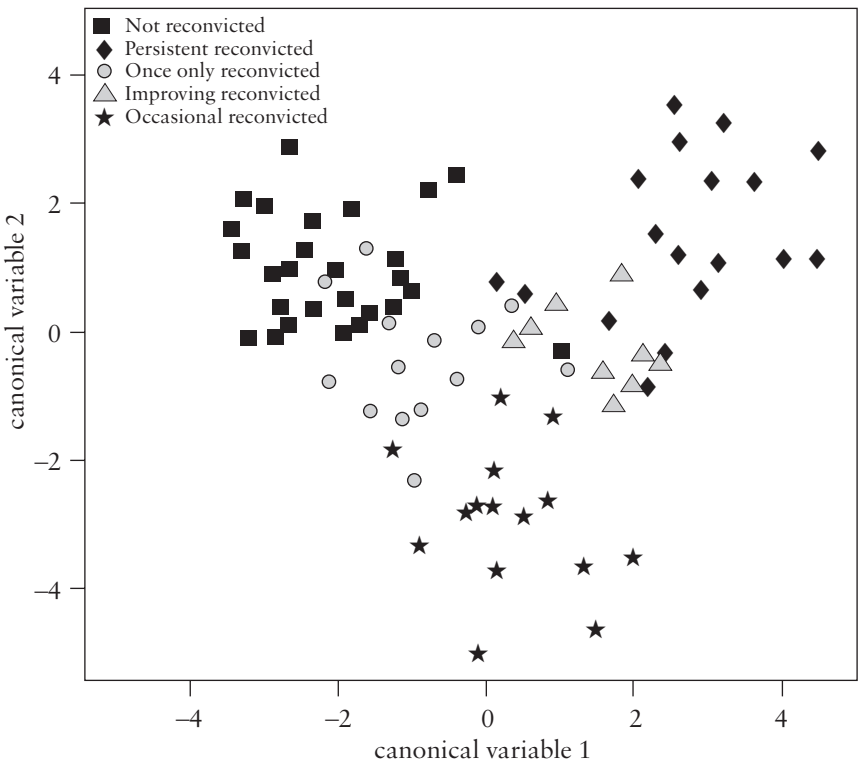

Figure 2: Predicting reconviction category: graph of the two most influential canonical discriminants: young persons' dataset. N = 88

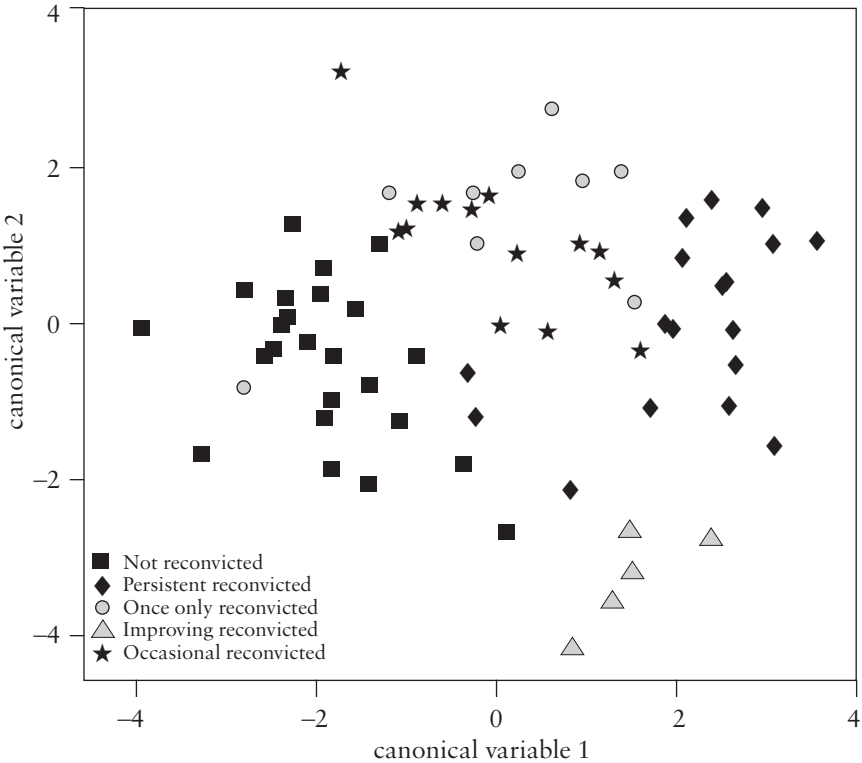

Figure 3: Predicting reconviction category: graph of the two most influential canonical discriminants: combined dataset. N = 71

Further cross validation analyses (see Maxwell and Morris 1999 for more information) confirmed the stability of the solutions despite the relatively small numbers. The impact of potential misclassification of those who reported undetected offending was also examined. The one "non reconvicted" case that stands out from the rest of the cluster in Figure 2 is an offender who reported that he had appeared for violence in the District Court and had done community service (although we did not find any mention of this on his official record), and he is also one of the two young people who reported a lot of undetected offending. The other person who reported a lot of undetected offending is embedded in the cluster of "non reconvicted" cases. He was a person who the interviewer felt was, at this point in the interview, "pulling his leg". All other cases reporting minor undetected offending who were classified as "not reconvicted" or "once only reconvicted" are in the clusters in the graph to which they were assigned on the basis of their official record. From this, we have concluded that the impact of undetected offending on the results of these analyses was minimal.

These findings are of crucial importance because they indicate that it is possible to distinguish young people who reoffend persistently from those who do not reoffend at all and from those who reoffend occasionally. Furthermore, as we have already seen, some of the crucial predictor variables include factors related to the family group conference. And, as we will see in the next set of analyses which describe the particular items that are important predictors, variables that discriminate reoffending groups also include not only the factors related to previous life experiences but subsequent life events that can potentially be affected by the flow-on effects of the family group conference decisions and any changes of attitudes in both the young person and his or her parents.

What Variables Distinguish the Reconviction Categories?

The second question examined was whether or not it was possible to identify the variables that distinguish the various reconviction categories. Inspection of the relative importance of particular items reported by the young person as predictors in the canonical discriminant analyses showed that a wide variety of individual and composite variables from different aspects of the young person's life history emerge as the most useful predictors of reoffending. The most important variables in the first and second canonical variates are set out in Box 2 for the young people and in Box 3 for the parents. Most of the prior and subsequent history variables identified on the two canonical correlates are already well documented in the criminological literature referred to earlier. Risk factors on the first canonical correlate include early detected offending, not having people who cared about you as a child, showing signs of psychological disturbance, and having young parents who were not living together. Risk factors on the second canonical correlate were criminal parents, early self reported involvement in crime, being a victim of bullying, living in many places as a child, being vulnerable to crime triggers such as material gain, peer pressure and excitement, parental poverty and failure to supervise their children, harsh punishments as a child and witnessing family violence, and early sexual experience. It is difficult to see why some of these variables should come out in one cluster rather than another.

A number of preventive factors also emerged. On the first canonical correlate these include having school qualifications, being involved in sport, and having constructive spare time occupations. On the second canonical correlate, preventive factors included one general factor (being good at school work) and two post conference factors (having close friends since the conference and gaining employment after the conference). Again there is no really clear differentiation between the variables that emerged on the first and second canonical correlate, but all echo previous research findings.

What is important in this analysis is that the variables identified included not only factors identified in previous research on reoffending, but also three family

Box 2 Variables reported by young people that were associated with each canonical variate[12]

First canonical variate
- early detected offending,
- not having school qualifications,
- not being involved in sport,
- feeling shamed at the conference,
- not being cared about as a child,
- not having constructive spare time occupations,
- showing signs of psychological disturbance,
- having a young parent and the parents not living together, and
- not being remorseful.

Second canonical variate:
- parental criminality,
- not gaining employment after the conference,
- early self reported involvement in crime,
- being a victim of bullying,
- living in many places as a child,
- being affected by such triggers of offending as material gain, peer pressure and excitement,
- not being good at school work,
- not having close friends since the conference,
- the family having little money and not knowing where their children were when they went out,
- harsh punishment as a child and witnessing family violence, and
- early sexual experience as a young person.

group conference factors which were discussed earlier in this chapter: feeling shamed, not being remorseful and parents feeling shamed.

Pathways to reoffending

The final stages of the analysis involved testing the model of reoffending that emerged from the analysis of the data discussed so far. Figure 1 presented a simple model which suggested a number of levels of influence. In order to test this model, the first step was to define new variables representing the main

[12] All these variables have canonical scores of an absolute value of 0.50 or above on one of the significant canonical variates.

Box 3 Variables reported by parents that had high absolute values and were associated with at least one canonical variate[13]

- the child not having a relationship with their father,
- being a problem child at home and school,
- not having parental supervision of leisure activities,
- parents' involvement in the use of drugs,
- the child having been abused and
- the parents feeling shamed at the conference.

conceptual clusters in the model. This was done by creating scores that combined the separate variables relating to each of the clusters.

Having created measures that represented the clusters in the model, a series of path analyses were undertaken. These were done in several ways:

—using "feeling good" and the "reoffending category" separately and together as measures of "ultimate outcome";
—using the clusters of variables specified in Figure 1; and
—allowing models which fitted one, two or three intermediate latent[14] factors summarising a group of measures selected by the multivariate analysis.

Figure 4 below presents the best fit obtained for the original model set out in Figure 1 and this resulted in an SBC = –37.46.[15]

Figure 4 shows that the paths that were selected were, with one exception, confirmed by the analysis. The most important finding from a restorative justice perspective is that family group conference events emerge, as predicted, as important independent clusters which determine ultimate outcomes of not reoffending and "feeling good".

Figure 5 presents the one latent factor model result. In this model, fewer paths were significant in the final analysis and the result provided higher negative SBC values (SBC = –50.24).

This model is different in two important respects from that in Figure 1. First, all the events prior to the family group conference and the family group conference itself defined an underlying latent factor which can be conceived of

[13] All these variables have canonical scores of an absolute value of 0.50 or above on one of the significant canonical variates.

[14] A latent factor is one which does not correspond to any particular variable or group of variables originally entered in the analysis but one which the multivariate analysis is suggesting can be inferred from the results.

[15] Schwarz's Bayesian Criterion (SBC) is a general criterion for choosing the best number of parameters to use in a model when generalised least squares estimation is used. The model that yields the largest negative value of SBC is considered the best (SAS Institute 1990, Vol 1; 341).

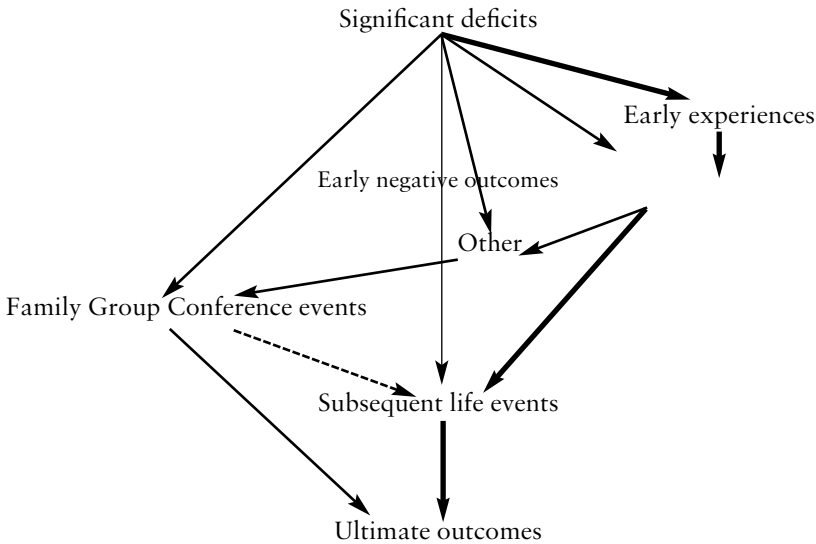

Figure 4: Results of testing the proposed model of reoffending[16]

as a single group of "past events". This model suggests that the point in time of earlier events is not necessarily important—all the earlier factors continue to have an impact on what happens next. And, second, the latent factor representing "the past" predicted both the subsequent life events and hence, indirectly, the ultimate outcome; it also predicted the ultimate outcome directly regardless of subsequent life events. While this model looks as if it is fundamentally different from the previous one, from a restorative justice perspective, the conclusions are still very similar. Family group conference events continue to exert an independent influence and so too do subsequent life events. Other models produced slightly different results but all reinforced the findings that come through all phases of these analyses: the family group conference was having an impact on what happened regardless of other factors such as adverse early experiences.

What then can we conclude from the path analyses? Although the results need to be tested on additional and larger samples, the various models fitted appear to be relatively stable and they confirmed the known finding that negative past events predict reoffending. This provides support, therefore, for the new finding that family group conferences can moderate the patterns of the past and can contribute to the prevention of reoffending.

[16] The darkest lines represent confirmed paths, the dotted line represents a path that was not confirmed and the other solid lines represent additional paths emerging from the analysis.

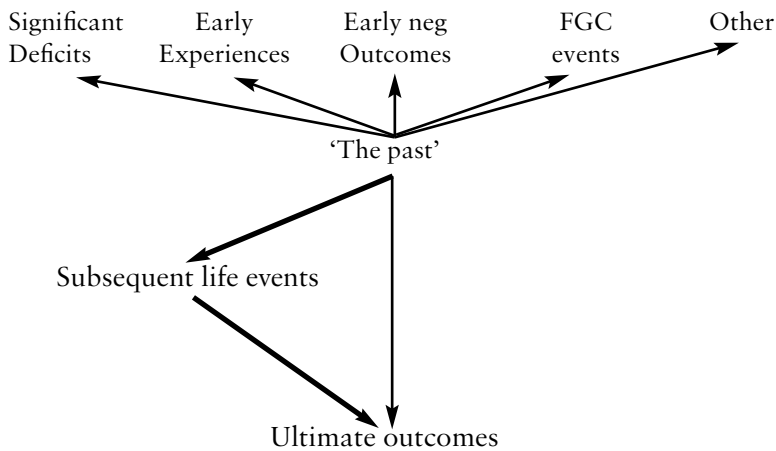

Figure 5: Model including one latent factor

CONCLUSION

The results reported here are based on a relatively small sample of offenders. Research on a larger sample is, therefore, necessary to establish their reliability. And, as noted before, because few of the young people in this sample had rehabilitative programmes arranged for them, the data from this study cannot examine the extent to which effective interventions can contribute to reducing the likelihood of reoffending. Further research to incorporate an assessment of interventions into our understanding of reoffending is necessary so that statements might be made about the characteristics of effective interventions and about whether or not effectiveness is related to what happened at the family group conference generally and to restorative outcomes in particular.

Nevertheless, important conclusions emerge from this study. First, some six years after their family group conference in 1990/91, more than two fifths of the young people were not reconvicted or were convicted once only, and not much more than a quarter were classified as being persistently reconvicted.

The most important findings, however, are that family group conferences can contribute to lessening the chance of reoffending even when other important factors such as adverse early experiences, other events which may be more related to chance, and subsequent life events are taken into account. Critical factors for young people are having a conference that is memorable, not being made to feel a bad person, feeling involved in the conference decision-making, agreeing with the conference outcome, completing the tasks agreed to, feeling sorry for what they had done, meeting the victim and apologising to him/her, and feeling that they had repaired the damage. These factors reflect key restorative values, processes and outcomes.

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Part 4

What Next for Restorative Justice

14

Implementing Restorative Justice: What Works?

ALLISON MORRIS and GABRIELLE MAXWELL

INTRODUCTION

THE VARIOUS CHAPTERS in this book presented a series of case studies of restorative justice in practice and have demonstrated that restorative justice can be implemented in a variety of formats: conferencing, mediation and circles. Not all of these examples operate in the same way. As we have seen, there are differences in the extent to which restorative processes are recognised by statute, in the point at which restorative processes are available, in where the management of the processes is located, in the type of offences that are dealt with, in who facilitates the restorative processes, in their underlying theoretical rationale and in the extent to which cultural differences are able to be accommodated. By examining the operation of conferencing, victim offender mediation and circles in this book, we are able to explore these diverse practices, identify their strengths and weaknesses and assess their potential. It goes without saying, therefore, that this book does not advocate one model of restorative justice practice over another: there is no 'right way' of delivering restorative justice. The key questions are not "does the New Zealand model of conferencing work better than the Wagga Wagga model, RISE, Thames Valley or whatever?" or "is family group conferencing better than victim offender mediation and circle sentencing?" Rather they are "are the values underpinning the particular model chosen, and the processes, outcomes and objectives achieved, restorative?" and "what are the consequences of adopting restorative justice processes compared with those associated with the continued endorsement of retributive or conventional criminal justice processes?"

As noted in previous chapters, restorative justice reflects different values and sets out to achieve different objectives, and it is on these that we must judge its effectiveness. In brief, these critical values, processes, outcomes and objectives are: the primacy of victims, offenders and communities of care through their inclusion in decision-making processes about how best to deal with the offending and its aftermath; acceptance by victims, offenders and communities of care of the outcomes reached as appropriate; recognition and acceptance of some

community or collective as well as individual responsibility for the offending and/or the reasons underlying it; an increased understanding on the part of victims, offenders and communities of care of the reasons for the offending and its impact on others; respect for all the parties involved in the process and the avoidance of stigmatic shaming; acknowledgment of responsibility for the offending through making amends; the reduction of reoffending; the reintegration of offenders and victims within their communities of care; and healing victims' hurt.

Accordingly, in this chapter, we will summarise the research findings presented in earlier chapters and assess whether or not restorative justice "works" on the basis of offenders' and victims' sense of empowerment and inclusion in and satisfaction with restorative justice processes, whether or not victims feel better as a result of participating in them, whether or not offenders are held accountable in meaningful ways and make amends to their victims and whether or not restorative practices impact on reoffending and reintegration. We are not always able to give definitive answers and clearly much research has still to be done. But research is already pointing the way to how best to implement restorative processes, and what good practice in restorative justice involves.

DOES RESTORATIVE JUSTICE "WORK" FOR VICTIMS?

Generally speaking, the chapters in this book have consistently shown that restorative justice processes can more fully involve victims than conventional criminal justice processes. Victims whose offenders are dealt with in restorative justice processes have more information, are more likely to meet with and confront "their" offender, are more likely to have some understanding of reasons behind the offending, are more likely to receive some kind of repair for the harm done (for example, through an apology, reparation or community work), are more likely to be satisfied with the agreements reached, are more likely to feel better about their experience and are less likely afterwards to feel angry or fearful than those victims whose offenders were dealt with in courts. Furthermore, Heather Strang in her chapter underlined the importance for victims of affirming the legitimacy of their concerns, of receiving apologies and of enabling a sense of closure: outcomes much more likely to be achieved in conferences than in courts.

Obviously, restorative justice processes do not always "work" for victims—some angry or distressed victims will remain so, and some victims will find it difficult to cope with what will happen in the restorative justice meeting and the range of emotions—anger, hurt, sadness, fear and so on—which they are likely to experience there. They may, therefore, leave the meeting feeling revictimised and unsupported. But these failings are likely to be the result of poor practice or of differences in the circumstances or attitudes of particular victims, rather than the result of some inherent defect in restorative justice processes. We will return to these good practice issues in the final part of the paper.

DOES RESTORATIVE JUSTICE "WORK" FOR OFFENDERS?

Again the various chapters in this book have shown that the participation and involvement of offenders is achievable through restorative justice processes: they get a better understanding of what they have done by hearing about the consequences of their offending either directly from victims or indirectly from others; they are held accountable for their offending in meaningful ways (through, for example, making reparation, doing community work or apologising); they complete the tasks agreed to, are satisfied with the agreements reached and may feel remorse for what they have done. Significantly too the research reviewed by Mark Umbreit and his colleagues and the project described by Gabrielle Maxwell and Allison Morris showed the impact of restorative justice on reconviction. Especially relevant in Maxwell and Morris's research were: the presence of the victim, the young person making an apology, the young person feeling involved in the decision, the young person agreeing with the outcome reached, not being made to feel a bad person or a bad parent (not feeling shamed) and the young person feeling remorse. These findings on inclusion, the encouragement of remorse, the avoidance of shaming, and reintegration all have important practice and policy implications for implementing restorative justice practices and we will return to these later in this chapter.

DOES RESTORATIVE JUSTICE WORK BETTER FOR SOME KINDS OF OFFENCES AND OFFENDERS?

In some jurisdictions, because restorative justice processes are part of police diversion, they are used selectively and primarily for first and minor offenders (as in the Canberra experiment and in the Thames Valley police restorative conferencing project). In other jurisdictions, in the main, it is property offences and less serious violent offences which are, again selectively, dealt with through restorative justice processes because certain offences are excluded by statute. For example, in West Australia most forms of assault, drug related offences and many traffic violations are excluded from conferencing and, in New South Wales, sex offences, offences that result in death, certain drug offences, and certain violent offences are similarly excluded from conferencing. However, as Kathleen Daly makes clear, South Australia is holding conferences for relatively serious offences. Also, in the New Zealand youth justice system, the only offences excluded by statute from family group conferences are murder (where the penalty is fixed by law) and manslaughter. South Africa also decided, in light of experience in the pilot conferences which focused on minor offences, to pitch its legislative scheme at a higher level of offence seriousness. And, although most victim offender mediation programmes have traditionally dealt mainly with property offences and minor assaults, Mark Umbreit, Robert Coates and

Betty Vos indicate in their chapter that this is no longer the case and that victim offender mediation can now take place with respect to serious offences.

In our view, given the practicality of limited resources, restorative justice processes should be aimed at the more serious offences. It is here that the impact of the offending on victims is greatest and that victims are most in need of closure (though we acknowledge that some objectively minor offences can have a major impact on some victims). Indeed, the fact that some examples of restorative justice schemes report very low rates of attendance by victims may be related to the low level of seriousness of the offences that the processes are aimed at. In our view also, restorative justice processes are most appropriate for repeat offenders. It could be argued here that, if restorative justice processes have been tried once and have already "failed", then there is little point in a further restorative process. But the question which needs to be asked here is whether or not the previous processes were truly restorative. For example, were the right family members there? Was the victim or his/her representatives present? Did the offender feel involved in and agree with the decisions about the outcome? Were the agreed outcomes reparative and so on? Clearly, simply labelling a process "restorative" does not necessarily mean that restorative justice values are reflected in that process or that restorative justice objectives are being met. The real question, then, is whether or not restorative justice processes offer more *potential* than conventional justice processes to impact on offenders and to effect change. The research on re-offending referred to in Maxwell and Morris's chapter, and the research reviewed in the chapters by Heather Strang and Mark Umbreit and his colleagues, seems to point to that potential.

ARE RESTORATIVE JUSTICE PROCESSES BETTER DELIVERED IN PARTICULAR LOCATIONS?

Restorative processes have been delivered in different formats and by different agencies in different jurisdictions. Research on police-led conferences has produced a range of positive findings, especially in the comparisons between conferencing and courts in terms of victims' and offenders' inclusion, levels of satisfaction, and the like. However, in these jurisdictions, the police are usually also the facilitator and there is considerable debate about the appropriateness of this. On the one hand, it can be argued that the skills of the facilitator and his or her understanding of and commitment to the values of restorative justice are the key issues rather than his or her professional background, and that the availability of diversionary options within the police allow for a low level and quick resolution of matters. On the other hand, it can also be argued that it is difficult for many offenders, especially Aboriginal or indigenous offenders, to view the police as neutral facilitators, or police stations as neutral venues for conferences. The chapter by Harry Blagg explored these tensions. The chapter by Richard

Young also pointed to some of the difficulties which police facilitators have had in reflecting all (or most) of the critical values of restorative justice, and in meeting all (or most) of its critical objectives. His and other research points to: the dominance of police officers at the meetings and the lack of participation by offenders; outcomes perceived as disproportionately severe for relatively minor offending; the potential for bringing into the system young offenders who would otherwise have been dealt with informally or by warning (net widening); the lack of proper attention to procedural safeguards; and the tension between traditional police values and restorative justice values. This apparent difficulty in translating restorative justice values into reality is particularly important, and is evident from the failure in some police-led schemes (at least in their early days) to move from an emphasis on stigmatic or degrading shaming to an emphasis on reintegrative shaming (that is to say, the failure to move from condemnation of the offender to condemnation of the offence but acceptance of the offender). Additionally, and perhaps more importantly, research on relationships between young people and the police (and between some communities and the police) suggests that these relationships are ambivalent to say the least, and that relationships between young offenders and the police (and between some adult offenders and the police) are even more problematic. This does not augur well for locating restorative justice practices for offenders with the police.

Locating restorative justice processes with social work/ social welfare, as in New Zealand, has also, in our view, not worked particularly well either for a number of reasons. First, many families have already had fairly negative experiences with social welfare since the same department was previously responsible for administering the benefits system and still is the department responsible for managing notifications of child abuse and neglect. Second, the urgency of child abuse and neglect cases tends to be given priority over youth justice cases. This is understandable, but it has also meant that insufficient resources have been devoted to youth justice services. Third, although youth justice co-ordinators (the convenors and facilitators of the conferences) are meant to be independent, they are employees of the department and are, in the main, supervised by social work managers. And, finally, social welfare and restorative justice values are not necessarily reconcilable. For example, social welfare practitioners tend to make decisions for and about people on the basis of their "best interests", whereas restorative justice is about empowering people (through information) to make decisions for themselves. It is interesting to note in Richard Young's chapter that this happened in the Thames Valley police conferences too when social workers facilitated conferences there. Overall, practice in New Zealand amongst co-ordinators has also been variable. Impressionistically, to the extent that family group conferences in New Zealand have reflected restorative values and met restorative objectives, this has happened despite being placed in social welfare rather than because of it.

Courts provide another possibility for the location of restorative processes. However, currently they are seen by many young offenders as coercive and

punitive. Locating restorative practices there also arguably sees the courts (and judges) as playing too central a role in youth justice. In Canada, circle sentencing occurs at the discretion of judges and is managed by them. Lilles points to the potential danger of this if the judge who makes the final decision continues to be free to disregard the consensus, and the pressure that could be put on the process because of concerns over the time spent by judges in what appear to be lengthy hearings in contrast to court. He also touches on the potential conflict if judges are not comfortable with surrendering their authority to the circle and the communitiy.

To avoid the kinds of difficulties mentioned above, it might make sense to locate restorative justice processes in a new statutory organisation. This is what happened in New South Wales. Although the Attorney General's Department there has overall responsibility for the statutory system, an independent unit—the Youth Justice Conferencing Directorate—located in the Department of Juvenile Justice is responsible for youth justice conferences. However, there, it seems to have been recognised that not all responsibilities should be located within this unit. Thus responsibility for convening conferences is delegated to local conference convenors who are not public servants and who live in the communities in which the offenders and victims also live. This reflects the critical fact that restorative justice is about limiting the role (monopoly) of the state and transferring power to those most directly involved in the offence and its consequences, and in finding solutions. This takes us to a discussion of partnerships between the state, the voluntary sector and communities.

The voluntary sector is likely to be seen by victims and offenders as more independent than a statutory organisation and it is not likely to be contaminated by some of the value conflicts mentioned above. A further acknowledged strength is that the voluntary sector can also receive referrals from those victims who do not wish to have their victimisation dealt with within the criminal justice system, but who nevertheless want some resolution. We need to acknowledge here that research (for example, crime surveys) shows that the vast majority of victims in all communities do not report their victimisation to the police. Restorative justice processes located within the voluntary sector could equally well involve offenders not known to the police, provided the offender admitted the offence and agreed to participate. But the role of the voluntary sector in the provision of restorative justice within a criminal justice context will remain marginal (and marginalised) unless it works in partnership with the state in order to receive referrals from it. Victim offender mediation demonstrates both these strengths and weaknesses. Mediation has remained outside the mainstream of the criminal justice system, and advocates of mediation have seen this as advantageous in gaining the trust of victims, offenders and other members of the community. However, as we noted above, independent organisations can find it difficult to encourage and develop the trust of the state gatekeepers who determine referrals, especially when the process has no legislative base. Elmar Weitekamp referred to this in his discussion of offender victim mediation in

Germany. This was also the experience of the pilot projects described by Ann Skelton and Cheryl Frank in their chapter on South Africa, and by Jim Dignan and Peter Marsh in their chapter on England and Wales. On the whole, it seems unlikely that governments will see it as appropriate to delegate such a central function as the resolution of criminal offending to voluntary agencies.

The community also, arguably, has a legitimate role in the delivery of restorative processes, though there is considerable debate about how this should be translated into a practical context. Some examples of restorative justice processes make use of community representatives as decision-makers. However, there are issues here about the extent to which so-called "community representatives"—whether elected, nominated, or volunteers—actually do represent their community, and questions can be raised about the "right" and the suitability of such people to make such decisions about others (Maxwell et al 1999).

Involving the community of care in decisions is quite a different matter. These are the collection of people with shared concerns about the offender, the victim, the offence and its consequences, and with the ability to contribute towards a solution to the problem which the crime presents or represents. This community of care might include the extended family, friends, neighbours, workmates, local programme providers, teachers, clergy and so on. It is the people who can support victims and offenders before, during and after the meeting, who can negotiate with them about appropriate outcomes and who are in a better place than judges and other professionals to identify what might prevent future crime. In this way, victims and offenders know that they are part of a community which is not only affected by the offence but which cares about them, wishes to address both the causes and consequences of the offending and which will provide support in the future.

However, there is also a role for communities in a wider geographic sense. This involves working to create a climate of public opinion which accepts and endorses the values of restorative justice and providing additional supports and programmes which victims and offenders generally can access. Thus restorative justice programmes could be located in specific communities or with community members acting as facilitators, information providers, support givers, monitors and the like. This is the model now being followed with respect to restorative justice processes for adults in New Zealand, though standards are still to be developed (and in some pilot projects community members are the decision-makers rather than the participants (Maxwell et al 1999)). Judges in certain areas can remand offenders to community based restorative processes who either deal with the case themselves (and that is the end of the matter if the agreement is subsequently completed satisfactorily) or make recommendations to the judge about sentence. Some of these have been funded by the state (through the Crime Prevention Unit and the Department for Courts), and some rely on charitable or trust funding. Community based restorative justice schemes have the additional advantage referred to earlier with respect to

voluntary organisations, that they can receive not only referrals from the youth or criminal justice system, but also from the parties themselves (that is to say, from victims and offenders). As yet, there is no clear consensus on which type of state agency should have responsibility for the management of restorative justice process or about the potential role of independent facilitators who derive their authority from their communities. Our view is that the best approach is for a newly created state agency to develop partnerships with community facilitators or organisations. This seems to offer the best of both worlds: it offers safeguards to the protection of individuals rights and recognises community responsibilities.

DOES RESTORATIVE JUSTICE WORK BETTER IF IT HAS A STATUTORY BASIS?

A primary decision that affects many other decisions is whether or not restorative justice should have a statutory basis and, if so, whether referrals should be mandatory or discretionary. In New Zealand, for example, if the police want to take an offender to court, they *must* refer her/him to a family group conference, and judges *must* refer cases to family group conferences before sentence and *must* take into account any recommendations made. On the other hand, in jurisdictions where there is no statutory basis for the process or where the statutory provisions allow for discretionary use of restorative justice processes, referrals seem to occur haphazardly and arbitrarily. For example, pilot projects without statutory authority in South Africa (Branken and Batley 1998; Ann Skelton and Cheryl Frank's chapter in this book), in England (Jim Dignan and Peter Marsh's chapter in this book), and in Canada (Longclaws et al 1996) have all reported that they received only a small number of referrals. In the pilot project involving First Nations people in Canada, even when cases were referred by the courts for a family group conference, not a single sentence reflected the outcomes of the conference (Longclaws and Galaway 1996).

Similarly, in jurisdictions where there are discretionary statutory provisions for the use of family group conferences (as in South Australia and Sweden), there also appears to have been selective referral of less serious cases and the number of referrals has varied over time (Wundersitz and Hetzel 1996; Sundall 1998). Weitekamp in his chapter in this book describes just how dependant even a state funded victim offender mediation programme is if referrals to it depend on the decision of an individual prosecutor. And, in Canada, the use of circle sentencing is at present entirely dependant on the judge who hears the case.

The voluntary nature of victim offender mediation can be seen as a strength in that it may increase the likelihood of reaching outcomes that are satisfying for both victims and offenders. And in some jurisdictions, victims have a veto over whether or not a conference will take place. While acknowledging the importance of always allowing victims to choose whether or not they wish to be present at restorative processes, there is much to be said for ensuring victims'

voices will be heard and including their views about an appropriate sanction. In addition, as Lode Walgrave argues, denying an offender access to restorative justice processes simply because the victim does not wish to take part may be unjust. Indeed, most of the contributors in this book who have written about conferencing do not see mandatory referral as problematic.

CAN RESTORATIVE JUSTICE PROCESSES ACCOMMODATE CULTURAL DIFFERENCES WITHIN JURISDICTIONS?

A number of case studies (for example, Branken and Batley 1998; Longclaws et al 1996, Lilles in this book) have shown that it is possible to adapt restorative justice processes to different indigenous and minority cultural practices. But accommodating cultural diversity is not necessarily simple, and has not always been effectively implemented because of different power structures, perceptions, values and practices reflected within Western and indigenous systems.

In urban communities of South Australia, family group conferences for Aboriginals are little different in format from those for white Australians (Wundersitz and Hetzel 1996). However, according to Wundersitz and Hetzel, more time is spent on preparation, home visits are always used, Aboriginal coordinators use styles which vary in subtle ways from those used in non-Aboriginal conferences, and placements are set up within Aboriginal job training programmes and Aboriginal community centres. It is in the traditional communities where conferences differ most. When conferences followed customary practice, involved relevant people and were convened by a person with appropriate authority and skills, they were said to have generally received positive support from people.[1] Overall, Wundersitz and Hetzel (1996:137) concluded their commentary by remarking that "it is too soon to determine whether or not it is possible to evolve forms of conferencing which fit effectively with traditional Aboriginal culture." Harry Blagg, in this book, offers a more critical perspective and he doubts that Australian states have been successful in developing a process that is comfortable for the many different Aboriginal clients in traditional communities, given their alienation from white justice. On the other hand, Ann Skelton and Cheryl Frank's chapter highlights how customary practices are explicitly endorsed in the South African legislation where it is stated that its objectives are to promote *ubuntu*.

In New Zealand, there has been criticism that family group conferences have not been managed in ways that conform with traditional practice (Tauri, 1999). It has been suggested that the high proportion of Maori staff managing the process and the inclusion of mihi (Maori greetings) and a karakia (blessing) are little more than tokenism, and that a truly Maori process is rarely seen, despite

[1] Restorative justice principles can conflict with traditional notions of payback, physical reprisal and shaming and this tension remains unresolved.

the undisputed origins of many aspects of the conference process in traditional Maori procedures. However, a different viewpoint was expressed by Olsen et al (1995) who commented that, at times, the conference was able to transcend tokenism, particularly when the conference was held on the marae (meeting place), when all those of importance to the social group were present and when it was facilitated by an elder according to customary processes. Under these circumstances, according to one Maori observer, families were able to be strengthened and a process of renewal for the young person begun. But an important point emerges from this, and that is that families often feel that they too are victims. Restoration means for them a restoration of the right to decide for themselves as much as it involved restoration of the harm to victims. It is ironic that the family group conferences that have, perhaps, most faithfully replicated indigenous cultural practice of the Ojibway in Manitoba have had a very low acceptance by the courts of their recommendations (Longclaws et al 1996).

In contrast to family group conferences, which, although they were based in part on Maori traditional processes, evolved largely within the wider society of New Zealand, circle sentencing has evolved from within aboriginal communities directly and has almost always involved Aboriginals living on reserves or small communities in rural or remote locations (see Heino Lilles chapter in this book). For these reasons, circle sentencing has been almost wholly owned by the Aboriginal communities where it occurs and has been seen as wholly consistent with customary practice. This is especially so as the involvement of a judge may be the last step in the process where the community has previously met several times. However, here too, attendance of those who are important can be problematic, and the resources of support available to the offender may seem disproportionately large in comparison to the support available to the victim. There can also be power imbalances within aboriginal communities, and the victim may not always share the offender's culture and traditions. Nevertheless, it is seen as a process that validates traditional aboriginal processes and delivers justice to traditional communities much more so than the conventional criminal justice system.

All these accounts indicate that more time and resources are required if restorative justice practices are to truly take on traditional protocols, operate within traditional time frames and result in the provision of culturally appropriate services. But there is more at issue here; inevitably systems belong to those with whom the locus of power resides. Some redistribution of both resources and power is required for cultural difference to be validated. These issues are part of wider debate about sovereignty and self determination for indigenous peoples within the Western world.

Yet other processes have been seen as restorative because they address the injustices of the past. Truth and reconciliation commissions have been mentioned in the introduction to this book and again by Ann Skelton and Cheryl Frank in their chapter. These processes have been hailed precisely because they are seen as enabling forgiveness and reconciliation in ways that allow the victims and offender to continue to live side by side within the same society where

horrific crimes were committed in the name of divisive ideologies. In the same way, the need to be respectful of and to acknowledge aboriginal wrongs of the past within restorative processes involving offenders has been seen as important in creating a sense of fairness and reintegration for groups within society that have been the victim of social injustice. In conferences in New Zealand, we have seen this conflict directly expressed by offenders' families to victims' in ways that revictimise and do little to produce restorative outcomes. Yet the failure to redress past wrongs is and remains part of the context of offending. Perhaps it is important for a society aiming to move towards a more restorative approach within the criminal justice system to also attempt to redress the wider social injustices of both the past and the present that can make offending more probable for some sectors of the community.

CONCLUSION

Can restorative justice cross cultural boundaries? The results of experiments in a variety of jurisdictions as documented in this book demonstrate that restorative justice can be successfully implemented in a variety of different countries, by a number of different cultural groups, using an array of different processes, and be driven by different theories and models of how alternative solutions can be reached. Victim offender mediation has spread rapidly throughout Western countries from a small start within religious minority communities within North America. A restorative option which was created in New Zealand and which was importantly influenced by New Zealand Maori has found a place in cultures and societies which are very different. Circle sentencing has not yet spread much beyond Canada and parts of the United States, but it has already made a major mark on the justice system of those countries. Restorative justice, which was virtually unheard of as a movement ten years ago, has now become embraced by the countries of the United Nations as a preferred option for the future resolution of criminal disputes.

In part, these developments may be because restorative justice evokes a past when the clan, the tribe, the village or the community gathered to resolve among themselves the wrongs that could otherwise threaten their cohesion. It embodies values that belong to a time when the alternative to finding a restorative process was to face dissolution as a group that could effectively protect its own members from external threats. Echoes of the same system are to be found in the Polynesian cultures throughout the Pacific, among the Aboriginal communities of South Australia, the Inuit of Northern Canada, the Ojibway of central Canada, American Indian groups in the United States, the Bantu peoples of South Africa and the Bedouin tribes of the Middle East (Defence for Children International, Palestine, personal communication).

To implement restorative justice processes, and to have maximum impact on conventional criminal justice processes, there seems little doubt that a statutory

system which applies restorative justice processes in certain mandated situations nationwide is the best option. Otherwise restorative justice processes will remain marginalised and will be selectively used on an ad hoc basis. Also, if there is not full implementation, offenders (and victims) will have unequal access to the potential benefits of restorative justice processes. The state, through full implementation, becomes the enabler. Having the more serious and persistent offenders as the primary focus of restorative justice processes also seems to be the best use of (usually) limited resources. The placement of restorative justice processes entirely and solely within the state sector is, in our view, in conflict with the critical values of restorative justice; locating the administration of restorative justice processes in an independent unit within a statutory organisation, but delegating the convening of the processes to community facilitators, to voluntary sector and/or to community based restorative justice processes seems to us to offer most potential in translating these values into practice. In this way, contexts are provided in which victims, offenders and their communities of care can make decisions about how best to deal with the offending and its aftermath.

For restorative justice processes to work well, there must be a clear articulation, understanding and endorsement of the values of restorative justice by all the people involved and a commitment to them. For some professionals (especially the judiciary and front-line police), this will require a shift from reliance on conventional criminal justice values; for others (for example, social workers and probation officers), it will require a shift from social welfare values. For some communities, this will require a shift from repressive practices. Training professionals, community convenors and community programme providers in restorative justice values is, therefore, crucial. All the professionals involved in restorative justice processes need not only to share critical restorative values but also to operate as a team. Everyone needs to be pulling in the same direction and to be willing to hand over power to the participants—victims, offenders and their communities of care. There also needs to be a statutory body charged with the responsibility for monitoring the performance of the youth justice or criminal justice system from the perspective of both victims and offenders.

A number of best practice issues emerge from what we have said. These include:

—preparing (ideally face to face) victims, offenders and their communities of care for the meeting (not only about the procedures to be followed in the meetings, but also about the range of emotions they may experience);
—providing victims, offenders and their communities of care with information about realistic options for dealing with the offence, about available community programmes and about any other resources they might need (for example, there is little point in encouraging victims to participate to obtain reparation when in reality few offenders can offer this);
—consulting all the parties about who should attend, about what procedures should be followed, and about a suitable time and venue for the meeting to

ensure maximum attendance (for example, there is no point in ringing key participants at the last minute to tell them that a meeting has been arranged for a particular time);

—developing safe procedures that are respectful of all involved and which do not set out to blame or shame offenders, victims, or their communities of care so that all parties feel able to participate freely and openly (for example, certain participants may need to be encouraged to contribute and others may need to be silenced for a while to make space for the contributions of others);[2]

—treating what is said in the meeting as confidential and privileged (otherwise communication will not be open and free);[3]

—communicating the views of any key participants (such as victims or members of the community of care) who are not present;

—allowing all the time that is needed for decisions to be reached;[4]

—developing processes which encourage offenders to feel empathy for victims (by encouraging victims to tell their story and how they feel) and which enable victims to have some understanding of the offender's situation (for example, the offender's experience of victimisation);

—creating an environment in which some reconciliation is possible if the parties wish this (for example, by encouraging not only the offender to apologise but also, where appropriate, the victim to make clear their acceptance of the apology);

—ensuring both offenders' and victims' rights are safeguarded (for example, by offering legal advice to offenders prior to making an admission and prior to agreeing to the outcome or by training facilitators to follow procedural and due process safeguards);

—working towards agreed outcomes which make amends to victims to the extent that this is possible, hold offenders accountable in meaningful ways, and address the reasons for the offending (for example, through apologies, reparation, community work, training programmes, counselling and so on);

—reviewing and monitoring outcomes by allocating specific responsibilities to specific individuals and by identifying clear time frames for completion of the agreed outcomes;

[2] Concerns have been expressed about power imbalances between the young and the old, between victims and offenders and between children and parents. However, in practice restorative processes appear to achieve consensus decision making which involves all concerned participants.

[3] Concerns have been expressed about the balance between privacy and publicity. Those involved with restorative process have come to recognise that some of the patterns of privacy surrounding problems within families need to be broken if offenders and their families are to be provided with support. But questions can still be asked about how wide "the circle of knowledge" should be, especially when involving the wider group in how best to deal with the offending. Conferences have tended to have a more limited number of participants than circles which tend to take place within relatively small close communities bound by the same social norms.

[4] In this respect, circles tend to take longer than family group conferences and victim offender mediation. To some extent, the amount of time taken also reflects the cultural traditions of those involved. For example, Maori and Pacific family group conferences in New Zealand take longer when traditional protocols are followed (Olsen et al, 1995) and circles based on aboriginal traditions are often even longer and may also involve multiple meetings.

—following up on what was agreed to at the meeting;
—providing feedback to both victims and professionals about the completion of agreed tasks and, where these are not completed, providing information on what steps are to be taken; and
—providing ongoing support for both offenders and victims.

It goes without saying that secure and adequate funding must be provided for both the restorative justice process and for programmes and services to which offenders and victims can be referred (such as good victim support services, programmes to address drug and alcohol use and anger management, the provision of job training and so on). The state has clear responsibilities here. Restorative justice is not a panacea. It will not by itself reduce crime, prevent offending, or build communities. But restorative justice clearly has the potential to achieve these in ways that conventional criminal justice processes cannot.

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