LEGISLATING FOR RESTORATIVE JUSTICE[1]

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Restorative justice is a growing international movement within the fields of juvenile and criminal justice. It is different from conventional justice processes in that it views crime primarily as injury (rather than primarily as lawbreaking), and the purpose of justice as healing (rather than as punishment alone). It emphasizes accountability of offenders to make amends for their actions, and focuses on providing assistance and services to the victims. Its objective is the successful reintegration of both victim and offender as productive members of safe communities.[2]

Procedurally, restorative programs value the active participation of victims, offenders and communities, often through direct encounters with each other, in an effort to identify the injustice done, the resultant harm, the proper corrective steps, and future actions that can reduce the likelihood of future offenses. The Working Party on

1. Many people offered generous advice and assistance as we researched this paper. Parts I and II are drawn from a paper presented by one of the authors at an international workshop on Drafting Juvenile Justice Legislation sponsored by the South Africa Law Commission and conducted in CapeTown, South Africa from November 4-6, 1997, and the comments and suggestions of the participants in that conference have improved this article immensely. Other generous individuals contributed information about restorative justice legislation in their jurisdictions. In particular we would like to thank David Hajjar, Ivo Aertsen, Christa Pelikan, Martin Wright, Mark Umbreit, Howard Zehr, Mark Carey, Robert Mackay, Arthur Hartmann, Michael Kilchling, Carla Verwoerd, Jaroslav Fenyk, Gerard Palk, Lawrence Smith, Raymond Corrado, Ada Pecos Melton, Beata Czarnecka-Dzialuk, Sharon Harrigfeld Hixon, Kay Pranis, Dorothea Jinnah, Bill Preston, Paul McCold, Andy Klein, Robert Schug, Marc Forget, Russ Immarigeon, Nick McGeorge, Gordon Bazemore, Todd Clear, and Jim Zion. These persons substantially improved this article, for which we are grateful; any errors in presentation or interpretation are ours.

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2. DANIEL VAN NESS AND KAREN HEETDERKS STRONG, RESTORING JUSTICE 42, 43 (1997). *See* Appendix 1 for "Four Questions About Restorative Justice."

Restorative Justice, established by the United Nations Alliance of Non Government Organizations on Crime Prevention and Criminal Justice in New York, has adopted Tony Marshall's description of restorative justice as "a process whereby the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future."[3] The Working Party added to this description a series of fundamental principles which emphasize the community-based, educational, and informal dimensions of restorative justice.[4]

The growing presence of restorative programs has led to increasing consideration of what a restorative justice system might look like. Initially, this question has addressed how restorative responses might be incorporated with conventional approaches, but increasingly it has also taken the form of exploring the extent to which restorative values might permeate the entire official and informal response to crime. One such effort was inaugurated at a conference in Leuven, Belgium on restorative justice for juveniles that concluded with a declaration on the topic.[5]

Programs identified with restorative justice can be roughly divided into two categories: those that provide restorative *processes*, and those that provide restorative *outcomes*. Examples of the former include victim offender mediation/reconciliation, family group conferences, victim-offender panels, sentencing circles, and community crime prevention. Examples of the latter include restitution, community service, victim support services, victim compensation programs, and rehabilitation programs for offenders. A fully restorative system would be characterized by both restorative processes and outcomes.

There is a close connection between restorative justice and indigenous and informal responses to crime. In some cases, this connection is direct: Family group conferences and sentencing circles have originated from indigenous practices and been incorporated in

3. Paul McCold, Working Definition, adopted May 9, 1997, Working Party on Restorative Justice of the Alliance of Non Government Organizations on Crime Prevention and Criminal Justice 1 (unpublished manuscript on file with authors).

4. *See* Appendix 2.

5. *See* Appendix 3.

criminal justice settings. In other cases, the connection is more conceptual: The practice of thinking of crime as injury and the appropriate response to crime as healing characterizes many indigenous cultures. Consequently, there has been a significant interest in restorative justice circles to learn from and to "make room for" indigenous traditions in responding to crime.[6]

Restorative justice is not without its critics. Some are concerned about the inefficiency of incorporating such relational processes in the context of the justice system.[7] Others worry that informal processes will result in significant due process violations (in particular the right to equal protection of the law, the right to be protected from cruel, inhuman and degrading treatment or punishment, the right to be presumed innocent, the right to a fair trial, and the right to assistance of counsel).[8] Still others argue that in many societies, urbanized and atomized communities are not likely to be able to play the role anticipated by a restorative justice model.[9]

Nevertheless, the world-wide acceptance of its hallmark programs—victim offender mediation/reconciliation and family group conferences—suggest that these criticisms are more likely to influence **how** restorative justice is incorporated into conventional criminal justice responses rather than **whether** they are incorporated. Since conventional criminal justice is governed by legislation, this leads directly to the issue of how to legislate for restorative justice.

This paper is divided into three parts. Section I addresses general issues that should be confronted when one considers legislating for restorative processes or outcomes. Section II reviews particular legislative approaches that have been taken in implementing restorative features in the criminal justice system. Both sections draw on legislative experience from North America, Europe, Africa and the

6. *See, e.g.*, Carol LaPrairie, *Conferencing in Aboriginal Communities in Canada: Finding Middle Ground in Criminal Justice?* 6 CRIM. L. F. 576 (1995).

7. *See, e.g.*, Andrew Ashworth, *Some Doubts About Restorative Justice*, 4 CRIM. L. F. 277 (1993).

8. ROB WHITE, *Shame and Reintegration Strategies: Individuals, State Power and Social Interests, in* FAMILY CONFERENCING AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM? 181-96 (Christine Alder & Joy Wundersitz eds., 1994)

9. *See, e.g.*, Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521 (1992).

Pacific region, parts of the world that have witnessed growth of restorative programs. Section III considers the process of enacting legislation, in particular the demands that this places on restorative justice advocates. For many years, these advocates have been attempting through writing, speaking and pilot programs to demonstrate that restorative approaches are feasible and preferable to traditional criminal justice practice. The growing acceptance of that premise means that the movement must add a legislative and public policy sophistication that will be needed to establish restorative justice as the foundation of criminal justice policy. This part is based on our personal observations during legislative and public policy work in the U.S. and abroad.

I. ISSUES CONCERNING LEGISLATING RESTORATIVE JUSTICE

Let us begin by considering some of the broader conceptual issues raised by legislating restorative justice. In this section, we will propose a series of factors that might inform the decision whether it is necessary to legislate for restorative justice, and then give a brief description of how a fully restorative model might be different from conventional models of juvenile and criminal justice.

A. Legislation and Restorative Justice

With its informal roots and emphasis on relational justice, restorative justice programs have typically developed independent of legislative mandate. Canada, for example, has seen a remarkable expansion of restorative justice programs in the last few years. At a conference in April 1997, a compendium was distributed which profiled 100 operational programs that reflected restorative justice principles.[10] A follow-up survey released the following fall, showed that in the six months since the conference, respondents had become

10. THE CHURCH COUNCIL ON JUSTICE AND CORRECTIONS, SATISFYING JUSTICE: SAFE COMMUNITY OPTIONS THAT ATTEMPT TO REPAIR HARM FROM CRIME AND REDUCE THE USE OR LENGTH OF IMPRISONMENT (1996).

aware of over 150 additional initiatives in restorative programming.[11] For the most part, this growth of interest in restor-ative justice has taken place in the absence of legislative direction.

A similar situation exists in Europe, with perhaps the most striking example being England. Dr. Martin Wright introduces a survey of well-established mediation programs in his country with the words: "Laws on victim/offender mediation in Britain are like snakes in Ireland: they do not exist."[12]

On the other hand, other countries have made use of legislation to promote restorative justice. One notable example is the development of family group conferences in New Zealand, which arose in response to a legislative mandate.[13] However, the expansion of that program into other countries typically has preceded legislative changes to specifically authorize it. Instead, criminal justice officials use existing legislative authority to initiate it.

This being the case, one might ask why there is a need for legislation at all for restorative justice programs. We suggest that there are five considerations to keep in mind in thinking about whether to legislate for restorative justice: (1) Is legislation needed to eliminate or reduce legal or systemic barriers to use of restorative programs? (2) Is legislation needed to create a legal inducement for using restorative programs? (3) Is legislation needed to provide guidance and structure for restorative programs? (4) Is legislation needed to ensure protection of the rights of offenders and victims participating in restorative programs? and (5) Is legislation needed to set out guiding principles and mechanisms for monitoring adherence to those principles?

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11. Jane Miller-Ashton and Jan Turner, Events and Initiatives Related to Restorative Justice (Recent and Upcoming): A Follow-up Survey to "Achieving Satisfying Justice: A Symposium on Implementing Restorative Models," held in Vancouver, British Columbia 1 (March 1997) (unpublished manuscript on file with authors).

12. Martin Wright, Victim/Offender Mediation in the United Kingdom: Legal Background and Practice, Paper Presented to Seminar on Mediation between Juvenile Offenders and their Victims, Organized by the Council of Europe and the Ministry of Justice of Poland and Conducted in Popowo, Poland near Warsaw (October 22-24, 1997) (unpublished manuscript on file with authors) [hereinafter Victim/Offender Mediation].

13. Children, Young Persons, and Their Families Act, 1989 (N.Z.).

1. Is legislation needed to eliminate or reduce legal or systemic barriers to use of restorative programs?

One reason to consider legislation is to eliminate or reduce legal or systemic barriers that may prevent or unnecessarily limit the use of restorative programs. Authorizing legislation would ensure that police, prosecutors, judges and correctional workers interested in using restorative programs could do so without fear of subsequent rulings that they lacked authority. In addition, attorneys, family members and community representatives could initiate the use of restorative processes knowing that the results would not be ignored at sentencing.

For example, Indiana legislation resolved the question of whether judges could include participation in victim offender mediation/ reconciliation programs in sentencing orders by explicitly including them in its definition of "community corrections programs" available to judges at sentencing.[14] In New Mexico, it was unclear whether indigenous concepts of law and justice could be used in juvenile proceedings involving Native American children. Hence, state legislators adopted language in that state's Children's Code which established the way in which such indigenous understandings might be incorporated. For example, it provides for appointment of a *guardian ad litem* to "represent and protect the cultural needs of the child."[15] The statute also imposes a duty on probation and parole services to

> contact an Indian child's tribe to consult and exchange information for the purpose of preparing a predisposition report when commitment or placement of an Indian child is contemplated or has been ordered, and indicate in the report the name of the person contacted in the Indian child's tribe and the results of the contact . . .[16]

14. IND. CODE ANN. § 11-12-8-1(5) (Michie 1992).
15. N.M. STAT. ANN. § 32A-1-7(c)(9) (Michie 1992).
16. *See id.* § 32A-2-5(B)(9).

Finally, the statute requires that "the Indian child's cultural needs shall be considered in the dispositional judgment and reasonable access to cultural practices and traditional treatment shall be provided."[17]

In some instances, legislation has been used to resolve systemic barriers, particularly the lack of availability of restorative programs. Hence, the Minnesota Community Correctional Services Act requires that "every county attorney [prosecutor] shall establish a pre-trial diversion program for offenders."[18] While there is no requirement that the programs be used, the fact that the programs must be established overcomes the systemic barrier of non-existent diversionary alternatives.

The New South Wales Young Offenders Act of 1997[19] is another example of legislation designed to create an alternative (called youth justice conferences) to court proceedings for use by police, prosecutors and courts. The aims of this legislation are to enable a community-based negotiated response to offenses that emphasizes acceptance of responsibility and payment of restitution by the offender and that meets needs of both victims and offenders.[20] Although the statutory principles that guide use of the conferences include the "principle that criminal proceedings are not to be instituted against a child if there is an alternative and appropriate

17. *See id.* § 32A-2-19(C).
18. MINN. STAT. § 388.24(2) (1997).
19. Young Offenders Act, 1997 (N.S.W.).
20. The objects of this Act are:

(a) to establish a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences through the use of youth justice conferences, cautions and warnings, and

(b) to establish a scheme for the purpose of providing an efficient and direct response to the commission by children of certain offences, and

(c) to establish and use youth justice conferences to deal with alleged offenders in a way that:

(i) enables a community based negotiated response to offences involving all the affected parties, and

(ii) emphasizes restitution by the offender and the acceptance of responsibility by the offender for his or her behavior, and

(iii) meets the needs of victims and offenders.

See id. § 3.

means of dealing with the matter,"[21] the language concerning conferences is permissive ("may") rather than mandatory ("shall").[22]

2. Is legislation needed to create a legal inducement for using restorative programs?

Such an inducement does more than eliminate legal or systemic barriers to restorative programs. It encourages or forces decision-makers who might otherwise have chosen to ignore a restorative program to use it. This can be done either by creating a presumption in favor of, or by mandating, use of restorative programs. Perhaps the best-known example of this approach is found in the New Zealand Children, Young Persons, and Their Families Act of 1989.[23] Part IV of the Act deals with Youth Justice, and begins with a statement of principles which makes criminal proceedings a matter of last resort if there are alternatives available, emphasizes keeping young persons in their communities, and recognizes the interests of the victims of the offense.[24] These principles are followed with an explicit prohibition (with exceptions) of prosecution of children and young persons until a family group conference has been convened.[25]

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21. *See id.* § 7(c).
22. *See id.* §§ 35, 40.
23. Children, Young Persons, and Their Families Act, 1989 (N.Z.).
24. The Act begins as follows:

> Subject to section 5 of this Act, any court which, or person who, exercises any powers conferred by or under this Part or Part V or sections 351 to 360 of this Act shall be guided by the following principles:
>
> (a) The principle that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter. . . .
>
> (d) The principle that a child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public. . . .
>
> (g) The principle that any measures for dealing with offending by children or young persons should have due regard to the interests of any victims of that offending. . . ."

See id. § 208.

25. Specifically, the Act states:

The inducement might be expressed in more general terms. A French law enacted in 1993[26] introduced a "measure of reparation" to the victim or to the public. The law gives the prosecutor, the investigating authority or the court the option of proposing to the juvenile a particular action that would redress the harm done to the victim or community. The victim must consent, and, in cases in which charges have not been filed, the juvenile and parent/guardian must consent as well. The reparation process is monitored, with a report prepared for the prosecutor, investigating authority or the court. But the law goes beyond merely establishing a procedure: It provides that reparation is to be given the same priority in juvenile justice as rehabilitation of the juvenile. Thus, it provides a general inducement for the use of such a sanction.[27]

3. Is legislation needed to create mechanisms that provide guidance and structure for restorative programs?

Legislation can create mechanisms that provide guidance and structure for those wishing to use restorative programs, ensuring that necessary processes and resources are in place. Even when non-governmental community-based programs are available, legislation

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Where a young person is alleged to have committed an offence, and the offence is such that if the young person is charged he or she will be required pursuant to section 272 of this Act to be brought before a Youth Court then, unless the young person has been arrested, no information in respect of that offence shall be laid unless —

(a) The informant believes that the institution of criminal proceedings against the young person for that offence is required in the public interest; and

(b) Consultation in relation to the matter has taken place between —

(i) the informant, or a person acting on the informant's behalf; and

(ii) A Youth Justice Co-ordinator; and

(c) The matter has been considered by a family group conference convened under this Part of this Act.

See id. § 245(1).

26. C. PR. PEN. art. 12 (1993).

27. C. PR. PEN. art. 12-1.

may provide credibility, support and consistency to the community programs.

An example of legislation which both encourages and monitors community-based programs is the Community Corrections Act.[28] Indiana is one of a number of states which have adopted this approach. The Act's purpose is to decrease the number of offenders sent to state detention facilities by identifying a particular group of offenders who could be diverted to local programs. The state provides operating funds to county governments that prepare comprehensive local correctional plans for expanding the use of local sentencing alternatives to meet this goal. These plans must be approved by state officials, which permits the state to maintain statewide guidelines and standards while encouraging diverse local responses to particular local problems.[29]

Or the legislation may establish procedures for use of informal alternatives to court. The New Zealand Children, Young Persons, and Their Families Act of 1989, for example, provides detailed guidance for proceeding through family group conferences. Sections of this Act deal with time limits for convening the family group conference,[30] persons entitled to attend the conferences,[31] the functions of the conference,[32] the nature of the decisions, recommendations and plans that the conferences may make,[33] record-keeping,[34] and the procedure for obtaining agreement to the conference's decisions, recommendations and plans.[35]

Legislation may also provide for the use of restorative approaches by the court. The Czech Republic has established a settlement procedure under which the court may terminate criminal proceedings against an accused offender if the accused pleads guilty, has taken steps to pay back the victim, and has deposited funds for a public

28. IND. CODE ANN. § 11-12 (Michie 1992).
29. *Id.*
30. Children, Young Persons, and Their Families Act § 249, 1989 (N.Z.).
31. *See id.* § 251.
32. *See id.* § 258.
33. *See id.* §§ 260-1.
34. *See id.* §§ 262, 265, 266.
35. *See id.* §§ 263-4.

charitable purpose.[36] The legislation includes criteria for the court to consider in approving settlement, and provides for appeal by the prosecutor from the settlement order.[37]

Finally, these guidelines can clarify whether the results of the restorative process are binding on the police, prosecutor or court. It appears that in most instances, the "gatekeeper" who made the decision to send the matter to those processes will accept the result of the process. For example, in Austria there "is a very high probability, almost certainty, that a report indicating a successful conflict resolution will bring about the dismissal of the charge."[38] In most jurisdictions, however, the results are returned to the "gatekeeper" for a final determination. The Queensland Juvenile Justice Code of 1992[39] is a good example of that approach. The Code provides that the police officer may either take no action; administer a caution; refer the matter to another community conference, perhaps with a different convenor; or start a proceeding against the child.[40]

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36. Zakon c. 309 Sb (Czech Republic Penal Procedure Code, Art. 309).

37. *Id.*

38. Christa Pelikan, Justice for Juveniles in Austria: What Happens at the Courts, Paper Presented to Seminar on Mediation between Juvenile Offenders and their Victims, Organized by the Council of Europe and the Ministry of Justice of Poland, Conducted at Popowo, Poland near Warsaw 7 (October 22-24, 1997) (unpublished manuscript on file with authors).

39. Juvenile Justice Act, 1992 , (Austl.).

40. *See id.* § 18J:

(1) This section applies if —

(a) the child fails to attend the community conference as directed by the police officer; or

(b) the community conference ends without an agreement being made; or

(c) the child contravenes an agreement made at the community conference.

(2) In considering what further action is appropriate, the police officer must consider —

(a) the matters mentioned in section 19(2)["the circumstances of the alleged offence and the child's previous history known to the police officer"]; and

(b) any participation by the child in the community conference; and

(c) if an agreement was made at the conference, anything done by the child under the agreement.

(3) The police officer may —

(a) take no action; or

(b) administer a caution to the child; or

4. Is legislation needed to ensure protection of the rights of offenders and victims participating in restorative programs?

While technical procedural rights are waived by agreeing to participate in a restorative process instead of court, the fundamental human rights of the participants are not. Legislation can protect these rights by: (1) establishing guidelines governing the selection of cases for diversion, (2) monitoring the processes and outcomes of restorative programs, or (3) providing for subsequent judicial review when one of the parties objects to the outcome.

An example of the use of guidelines is the Canada Young Offenders Act[41] which rules out the use of diversion (called "alternative measures") unless a series of specified conditions are met, most of which arguably protect the procedural rights of the young person.[42] However, in addition to other problems,[43] the guidelines do not acknowledge or reflect the interests or rights of crime victims.

An example of the use of monitoring and evaluation may be extrapolated from the New Zealand Children, Young Persons, and Their Families Act of 1989, which requires that written records of the decisions, recommendations and plans of family group conferences be prepared and collected.[44] The availability of these records means that it would be possible to monitor outcomes in particular cases and overall, and to evaluate the extent to which the rights of participants are respected. Given the importance of protecting the legal and constitutional rights of participants, it may be necessary to provide

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(c) refer the offence to another community conference, with or without the same convenor; or

(d) start a proceeding against the child for the offence.

41. Young Offenders Act, R.S.C. ch. 110, (1984) (Can.) (for the wording of the conditions, *see* note 43 *infra*).

42. *See id.* § 4.

43. Curt Taylor Griffiths and Raymond R Corrado, Restorative Youth Justice in Canada: Governments, Communities and the Dynamics of Reform, Paper Presented to the Conference on Restorative Justice for Juveniles, Conducted at Leuven, Belgium 3-4 (May 12-14, 1997) (unpublished manuscript on file with authors).

44. Children, Young Persons, and Their Families Act §§ 262, 266, 1989 (N.Z.).

legislatively for such evaluation to ensure that data is collected and evaluated (see discussion on data collection problems below).

Finally, the rights and interests of all parties can be protected by providing for subsequent judicial review if one party objects to the process or outcome. For example, a young person referred by police to the Halt diversion scheme in the Netherlands is given the alternative of referring the matter to the Public Prosecution Service rather than proceeding with Halt.[45] The Czech Republic statute concerning settlement of a criminal case requires the victim's consent, without which the matter must be disposed of by the court in some other way. In addition, the Public Prosecutor is given the right to appeal, with deferring effect, a decision to accept settlement.[46]

5. Is legislation needed to set out guiding principles and mechanisms for monitoring adherence to those principles?

Programs are restorative to the extent that they reflect the principles and values of restorative justice. A community service program, for example, can be operated in a punitive, therapeutic or reparative fashion. Family group conferences can be conducted from a welfare perspective concerned primarily with the offender, or from a restorative perspective concerned with healing and reintegration of the victim, accountability and reintegration of the offender, and the safety and participation of the community.[47] Guiding principles and monitoring mechanisms increase the likelihood that programs called restorative will be restorative in fact.

An example of guiding principles can be found in a draft Community Justice Services Act for the State of Minnesota[48], which would require the state official responsible for implementation of the CJSA to develop outcome measurements that would enable

45. Halt Nederland, Information about Halt Bureaus and Halt Nederland 1-2 (1997) (unpublished manuscript on file with authors).

46. Zakon c. 309 Sb (Czech Republic Penal Procedure Code, Art. 309).

47. Martin Wright, The Development of Restorative Justice, Paper Presented to International Conference on Restorative Justice for Juveniles, conducted at Leuven, Belgium (May 12-14, 1997) (unpublished manuscript on file with authors) [hereinafter Development].

48. Draft Community Justice Services Act (draft on file with authors).

assessment of whether the goals of the act (public protection, enforcing juvenile justice orders, assisting the offender to change, aiding victim restoration, and involving the community) were actually being accomplished.[49] State funding of local programs would be dependent on their maintaining "substantial compliance with the minimum standards" as measured by these outcome measurements.[50]

As noted earlier, the New Zealand Children, Young Persons, and Their Families Act of 1989 requires the Youth Justice Coordinator to make a written record of the decisions, recommendations and plans of family group conferences.[51] These records must be maintained at the district office closest to the location of the conference.[52] If relevant data in these records were properly collected and disseminated, regular monitoring and evaluation would be expedited. However, Maxwell and Morris[53] have reported that this data is not readily available:

> There were a number of reasons for this: the failure to change the statistical categories used for recording actions in line with the new legislation and new procedures, the removal of some of the earlier data-capturing systems in the interests of economy, and delays in the development of new systems.[54]

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49. The section states:

> The commissioner shall develop, in consultation with community justice agencies, a series of outcome measurements that reflect the following goals:
> (1) protecting the public;
> (2) enforcing criminal and juvenile justice system orders and directives;
> (3) assisting the offender to change;
> (4) providing crime victim restoration; and
> (5) involving the community.

See id. §3(4).

50. *See id.* § 7(a).

51. Children, Young Persons, and Their Families Act § 262, 1989 (N.Z.).

52. *See id.* § 266.

53. Gabrielle Maxwell and Allison Morris, *Research on Family Group Conferences with Young Offenders in New Zealand, in* FAMILY GROUP CONFERENCES: PERSPECTIVES ON POLICY AND PRACTICE 88 (Joe Hudson, Allison Morris, Gabrielle Maxwell and Burt Galaway eds., 1996).

54. *Id.* at 105.

B. Models of Legislation for Restorative Justice

There are no fully operational restorative systems in operation at this date. However, there has been an increased international interest in developing such models. Work is underway in England, Belgium and the State of Minnesota (USA) to develop comprehensive models and standards. To our knowledge, only one has been completed—the Belgium model (available in the Dutch language)—and neither it nor the others have yet developed to the stage of legislative drafting.

There are a number of examples of legislation for particular restorative programs. As previously noted, however, in many instances these programs were developed under existing legislative language, or were incorporated through relatively modest amendments to existing statutes. Consequently, those statutes are not particularly instructive for purposes of drafting legislation for a restorative system.

A Restorative Justice Act would need to balance goals for the offender, the victim, and the community.[55] Exclusive or primary attention to goals related to the offender—even goals that seek the offender's restoration—upsets that balance. So Robert MacKay's critique of Scotland's Children's Hearings system (established to create "an atmosphere of full, free and unhurried discussion" leading to consensus) is correct: "the culture of the Hearing system and of social work with children is overwhelmingly treatment orientated. The key danger is therefore that restorative justice will be subsumed by a rehabilitative agenda."[56] MacKay considered this outcome even more likely in light of the fact that there is no role for the victim in the course of a hearing.[57]

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55. Mark Carey, It's Time to Amend our Community Correction Acts to Restorative Justice Acts (1995) (unpublished manuscript on file with the authors).

56. Robert E. Mackay, Restorative Justice and the Scottish Children's Justice System, Paper Presented to the International Conference on Restorative Justice for Juveniles, Conducted at Leuven, Belgium 17 (May 12-14, 1997) (unpublished manuscript on file with the authors).

57. *Id.* at 17-18.

Therefore, the question remains: What might a balanced approach look like? Several years ago, as the Government of Malta began implementing correctional reforms, it considered a possible replacement to its Prisons Act entitled the Restorative Services System Act.[58] Its basic structure may be instructive in considering how restorative provisions might be legislated. The purpose of the Restorative Services System was stated as follows:

> to contribute to community safety by assisting communities as they confront the conditions that contribute to crime; by aiding crime victims in their recovery; by exercising appropriate, secure, and humane control over criminal offenders; and by stimulating them to become productive, law-abiding members of society.[59]

It articulated rights and responsibilities of the community, victims and offenders which were to be respected by the Restorative Services System.[60] The Act also provided for creation of three divisions: the Crime Prevention Services Division, the Victim Services Division and the Correctional Services Division.[61]

The role of Crime Prevention Services was to help communities confront the conditions that cause crime. It would be organized into three departments: Community Crime Prevention Services (which would help local communities develop and implement local crime prevention strategies), Reconciliation Services (which would recruit, train and organize community-based mediators) and Evaluation Services (which would monitor and assess the effectiveness of those programs in reducing crime and increasing public safety).

The role of the Victim Services Division was to aid crime victims in their recovery. It would be organized into two departments: Victim Advocacy Services (which would provide specified assistance to crime

58. Restorative Services System Act (draft on file with the authors). It was eventually determined that legislation would be unnecessary to accomplish the reforms underway in Malta.

59. *See id.* § 4.

60. *Id.*

61. *See id.* §§ 8, 16, 23.

victims such as preparing victim impact statements, offering advice and information to individual victims, identifying public and private agencies to provide needed services, and helping victims file claims for compensation) and Victim Compensation (which would administer a victim compensation fund).

The role of the Correctional Services Division was to provide secure and humane supervision of offenders and to encourage them to reform.[62] It was comprised of three departments: Prison Services (which maintained the prison), Supervised Community Release Services (which acted as an early-release mechanism) and Therapeutic Communities (which provided specialized regimes for particular groups of prisoners).

This description is offered to illustrate the comprehensive scope a restorative response would take. This does not mean that restorative features cannot be incorporated in otherwise conventional approaches. In fact, many restorative justice programs develop and thrive in just such an environment. But a fully restorative response would look quite unconventional. For example, in approaching the issue of juvenile justice, a restorative approach would not center on the offender. Instead, it would center on the harm caused by the offenses of young people and on how to repair that harm. It would focus at least as much attention on the rights, needs, and programs available to the victims of those crimes as on the rights, needs, and programs available to offenders. It would focus at least as much attention on building community capacity to remedy the causes of those crimes as on the official governmental response to crime.

II. LEGISLATING RESTORATIVE FEATURES

Turning from the broader considerations related to restorative justice and legislation, we will now offer ideas from international practice that might serve as models for reflecting a restorative

62. Because this Act was drafted to replace a statute that dealt exclusively with prisoners, the Correctional Services Division was not given responsibilities for offenders serving community-based sentences such as probation.

framework in four general areas: diversion, court procedures, sentencing, and post-sentencing supervision.

A. Diversion in a Restorative Framework

Diversion is the process by which offenders are removed from conventional court processes into alternative programs. By definition, then, it is an offender-based concept, and most diversion programs have been developed to aid the offender and/or ease burdens on the criminal justice system. However, it is possible to create diversion procedures that include victim consultation, reparation and (if there is interest) mediation with the offender.[63] Diversion usually requires an admission of guilt from the offender and is accompanied by a requirement to complete certain conditions. It may take place at virtually any stage in the justice process, including arrest, prosecution, adjudication, sentencing and post-sentencing phases. If the conditions are met, the result may be suspension or dismissal of the formal court proceedings.

In a restorative framework, diversion may be not only to a particular *program* (the equivalent of a sentence such as community service or some form of treatment), but to a non-adjudicatory *process* (such as victim offender mediation/reconciliation, family group conferencing, or indigenous or popular justice dispute resolution mechanisms). In the latter case, the resulting disposition is sometimes brought before the official or body who made the decision to divert for its review and approval.

1. Diversion by Police as an Alternative to Arrest

Informal diversion by police is a common practice in many nations and some forms do not need be legislated. However, some statutory diversion can be provided for by adopting a cautioning or other similar scheme. The following examples may be instructive.

The Thames Valley Police in England use four levels of cautioning: "an Instant Caution, for minor offenses; a Restorative

63. Wright, Victim/Offender Mediation, *supra* note 12, at 6.

Caution, after consulting the victim; a Restorative Conference, when the victim wishes, before the caution, to have a face-to-face meeting with the offender and the latter agrees; and a Community Conference, where victims can make a positive contribution to the outcome."[64] One of the significant distinguishing characteristics between levels is who (aside from the police) is involved and the degree of their involvement.

The New South Wales Young Offenders Act of 1997[65] distinguishes between cautions and youth justice conferences, although the offenses for which both can be given are identical, as are the criteria to be considered by the investigating official (in the case of cautions) or youth specialist (in the case of youth justice conferences).[66] It is clear, however, from the statute that youth justice conferences are a "higher level" of diversion, such that cases where cautioning might be used can be referred to a specialist youth officer for a youth justice conference when the investigating officer is "of the opinion that the victim has suffered substantial harm or that the circumstances of the victim are such that it is appropriate to do so . . . even though the offense does not involve any degree of violence or is not of a serious nature."[67]

2. Diversion Prior to Charge Decision

Even after arrest, prosecutors could establish a "referral" procedure that would assess accused persons and direct them to

64. *Id.* at 7.

65. Young Offenders Act, 1997 (N.S.W.).

66. The Act reads:

In considering whether it is appropriate to deal with a matter by conference, a specialist youth officer is to consider the following:

(a) the seriousness of the offence,

(b) the degree of violence involved in the offence,

(c) the harm caused to any victim,

(d) the number and nature of any offences committed by the child and the number of times the child has been dealt with under this Act,

(e) any other matter the official thinks appropriate in the circumstances.

See id. § 37(3).

67. *See id.* § 20(4).

appropriate programs, to restorative processes, to criminal court, or to other available alternatives. Three questions raised in this connection were: (a) How should this procedure be shaped legislatively?, (b) Who should be involved in the referral process?, and (c) To what extent should details regarding diversion programs be included in proposed legislation?

One approach is to give general authority to the prosecutor and provide little or no guidance about procedures or consultation with others. The German Juvenile Justice Act[68], enacted in 1990, permits prosecutors on their own authority to dismiss cases "for the reasons of reduced culpability, or after the juvenile offender has reached a settlement with the victim or if he had at least made efforts to do so." Further, with the agreement of the court, the prosecutor can dismiss the case outright and impose a mediation or compensation order.[69]

Similarly, in Austria, the prosecutor has the authority to divert a matter to mediation (referred to as "out of court offense compensation"), and may do so after obtaining recommendations from the social worker who is responsible for conducting the mediation.[70] In most cases, the social worker and prosecutor work closely enough together that there is a regular exchange of information and perceptions concerning the kinds of cases most suited to this form of diversion. Juvenile justice legislation places mediation and other informal interventions midway between outright dismissal of charges with no intervention on one hand and formal sanctions on the other. Seventy percent of all juveniles receive the outright dismissal, 12 to 13 percent receive formal sanctions, and the rest receive informal responses, most especially mediation.[71]

A second approach establishes the goals of diversion and designates responsibility for particular implementation of those goals,

68. *Jugendgerichtsgesetz (JGG)*, §§ 47, 45(3)(10), no. 7 (1990).

69. Arthur Hartmann and Michael Kilchling, The Development of Victim/Offender Mediation in the German Juvenile Justice System from the Legal and Criminological Point of View, Revised and Combined Version of Two Papers Presented at the International Conference on Restorative Justice for Juveniles, Conducted at Leuven, Belgium 4-6 (May 12-14, 1997) (unpublished manuscript on file with the authors).

70. Pelikan, *supra* note 38, at 6.

71. *Id.*

but does not legislate particular processes. This permits overall consistency as well as flexibility in implementation. As noted earlier, the Minnesota Community Correctional Services Act requires prosecutors to establish pre-trial diversion programs.[72] These programs are designed and operated to further the goals of the Act (provide a restorative justice response to offenders, reduce costs and caseloads of the juvenile justice system, reduce recidivism, increase restitution collection, increase the alternatives available to the justice system, and develop culturally-specific programming).[73]

A third approach is to provide greater procedural detail, either through legislation or regulations. The Halt scheme in the Netherlands is a diversionary response to property crimes committed by young people.[74] Since 1995, the scheme has had a statutory basis: police may use it as an alternative to a simple warning, which is used for less serious property offenses. Regulations promulgated under the law establish detailed procedures for use of the program.[75]

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72. MINN. STAT. § 388.24(2) (1996).

73. Section 388.24(2) states:

The program must be designed and operated to further the following goals:

(1) to provide eligible offenders with an alternative to adjudication that emphasizes restorative justice;

(2) to reduce the costs and caseload burdens on juvenile courts and the juvenile justice system;

(3) to minimize recidivism among diverted offenders;

(4) to promote the collection of restitution to the victim of the offender's crime;

(5) to develop responsible alternatives to the juvenile justice system for eligible offenders; and

(6) to develop collaborative use of demonstrated successful culturally specific programming, where appropriate.

See id.

74. Alma van Hees, Halt: Early Prevention and Repression; Recent Developments and Research, Paper Presented to the XIIth International Workshop on Research into Juvenile Criminology: Early Detection, Prevention and Intervention, Conducted at Noordwijkerhout (June 18-20, 1997) (unpublished manuscript on file with the authors).

75. *Id.* at 2.

3. Diversion After a Charge Has Been Filed

The authority to divert a case once charges have been filed appears to depend, at least in part, on the legal tradition of the country. In continental legal systems, the judge may be given authority to divert; in common law traditions, this power continues to rest in the prosecutor. In Germany, the judge may dismiss a case either during pre-trial stages or during the course of court proceedings. The criteria used by judges in making this determination are the same as those considered by prosecutors prior to the charging decision. If the judge diverts during the pre-trial stage, there is no trial; if during the course of court proceedings, there is no sentencing. In either event there is no criminal record.[76]

4. Diversion After Conviction

A matter may be diverted, even after conviction, to restorative processes where the sentence may be shaped. A case might be referred, for example, to a family group conference, victim offender mediation/reconciliation program, or other restorative process. If this resulted in the vacancy or suspension of the conviction, it would constitute a diversion alternative even after conviction.

One way to accomplish this would be to provide for a delay in sentencing for a period of time after the young person has been convicted, with conditions imposed on the young person during the period of suspension. One of those conditions could be good-faith participation in a restorative process. If conditions were met the court's satisfaction, then the charges would be dismissed. This provision for delayed or suspended sentencing is common in the United States. An example can be found in the laws of the State of Virginia, which permits the judge to defer disposition, place the juvenile on probation with whatever conditions the court orders, and on completion, to dismiss the case and discharge the young person without a finding of guilt.[77]

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76. Hartmann and Kilchling, *supra* note 69, at *JGG* §§ 47, 45 (1)-(3)(10), no. 7.

77. The Virginia statute reads:

Another approach is to explicitly provide for referral by the court to a restorative process after conviction but prior to sentencing, and further to provide that if the process is successful, the case will be dismissed without a recorded conviction. This is essentially the approach taken by the Queensland Juvenile Justice Act of 1992, although as noted later, the court applying the act may also order the case returned for sentencing after the community conference.[78]

If a juvenile is found to be delinquent . . . the juvenile court or the circuit court may make any of the following orders of disposition for his supervision, care and rehabilitation:

. . .

5. Without entering a judgment of guilty and with the consent of the juvenile and his attorney, defer disposition of the delinquency charge for a period not to exceed twelve months and place the juvenile on probation under such conditions and limitations as the court may prescribe. Upon fulfillment of the terms and conditions, the court shall discharge the juvenile and dismiss the proceedings against him. Discharge and dismissal under these provisions shall be without adjudication of guilt.

. .

VA. STAT. § 16.1-278.8 (1998).

78. Part of the Act states:

119A. (1) This section applies if a finding of guilt for an offence is made against a child before a court.

(2) The court may refer the offence to a community conference, if —

(a) the victim consents, if there was a victim of the offence; and

(b) the court considers —

(i) the offence may be appropriately dealt with by a community conference without the court making a sentence order; or

(ii) referral to a community conference would help the court in making an appropriate sentence order; and

(c) the court considers a community conference convenor will be available for the community conference.

(3) On making the referral the court may —

(a) give directions it considers appropriate to the child, the convenor of the conference and anyone else who may participate in the conference; and

(b) adjourn the proceeding for the offence.

119B. (1) This section applies if a community conference agreement is made on referral by a court that considered the offence may be appropriately dealt with by a community conference without the court making a sentence order.

(2) The community conference convenor must give notice to the court's proper officer that the agreement was made.

5. Diversion Selection Criteria and Procedures

If diversion legislation is used, such legislation should address the selection criteria and procedures for determining which cases will be diverted. Four alternative methods of doing this are: (a) permissive language setting out diversion alternatives; (b) mandatory consideration by a court of whether a case should be diverted; (c) legislative directives for when diversion is mandatory, discretionary or prohibited; and (d) detailed guidelines to police, probation officers, prosecutors and other officers in the form of standing orders or regulations promulgated under the legislation.

The decision concerning which of these (or alternative) options should be adopted will be based in part on how the legislation prioritizes diversion. If diversion is highly valued, then its consideration is more likely to be required in a broad range of cases. The problem with making such a determination is that unless it is clear what the diversion alternatives are, it is difficult to judge whether those alternatives are preferable to court processes. Unless one contemplates a court process which is so detrimental to young people that any alternative is preferable, the decision about use of a diversionary alternative needs to be based on guiding principles.

In a restorative framework, informal processes are highly valued because of the opportunities they give for direct and meaningful encounter between the parties. Assuming that a young person admits guilt, that the victim, offender and other involved parties agree to participate, and that the young person does not appear to pose an unreasonable risk to the safety of the community, diversion into processes such as victim offender mediation/reconciliation, family

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(3) A notice under subsection (2)

(a) brings the court proceeding for the offence to an end; and

(b) the child is then not liable to be further prosecuted for the offence.

(4) On the giving of the notice, the child is taken to have been found guilty by the court of the offence without a conviction being recorded.

Juvenile Justice Act §§ 119A-B, 1992 , (Austl.).

group conferences, sentencing circles and other restorative justice processes would be considered preferable to the more formal adjudicative processes of juvenile court. This suggests three selection criteria which would foreclose diversion into restorative justice processes: failure of the young person to admit responsibility, failure of the necessary parties to agree to participate, and high likelihood of an unacceptable risk to public safety.

The Czech Republic statute authorizing settlement of criminal matters establishes criteria and conditions, including: a plea of guilty from the accused, payment (or steps toward payment) of restitution, deposit of a donation for a public charity by the accused, and agreement of the accused and victim. The judge is instructed to consider the nature and seriousness of the offense, the extent of damage to public interest, and the circumstances of the accused.[79]

If the selection criteria do not rule out diversion into a restorative justice process, the question then becomes whether such processes are available. Unless they are universally available, it is difficult to make diversion mandatory or presumptive. On the other hand, if diversion is mandatory or presumptive, there is a greater incentive to make such processes available. One solution might be to require courts to conduct regular inquiries (perhaps every six months) into the

79. The Czech statute reads:

(1) If the accused pleads guilty before the court as a response to the charges for which he is being prosecuted, pays the damages caused by his offence to the aggrieved party, or takes the necessary steps to pay them, or makes a redress in some other ways for the loss caused by the offence, and he deposits a sum of money at the court's account with an identified beneficiary to be used for public benefit, provided that the redress is not clearly disproportional to the seriousness of the offence, the Court may, with the approval of the accused and the aggrieved party, decide to approve settlement, if the court has no justified doubts about the statements of the accused and considers that method sufficient for dealing with the case.

(2) In its decision, the Court will take into account the nature and seriousness of the offence committed, the extent the offence was damaging to the public interest, and the personality of the accused, his private life and financial status.

(3) The Court may decide to approve the settlement only if the charges brought against the accused carry a prison sentence of a maximum of five years.

(4) The Public Prosecutor may appeal, with a deferring effect, against the decision made in accordance with par. (1).

Zakon c. 309 Sb (Czech Republic Penal Procedure Code, Art. 309).

restorative justice processes available within the court's jurisdiction.[80] This would place an affirmative duty on the court to seek such processes, and would offer an incentive to communities and nonprofit organizations to establish such processes. The legislation could then require judges to consider diversion in every instance, and provide that when selection criteria do not rule out diversion and a restorative justice process is available.

6. Protection of Due Process Rights and Equality of Access

Diversion presupposes an admission by the accused, and it invokes a procedure that is by definition without the formal procedural protections of a court of law. An innocent person, or a person with legal defenses, may admit responsibility and accept diversion in order to avoid the uncertainty of a trial. While this is not overt coercion, it raises due process concerns because it circumvents a legal procedure that might have resulted in acquittal. In addition, diversion programs may not be equally available to all persons, either because of differences in urban and rural areas, or because of discrimination on the basis of race, gender or age. Programs which are on their face available to all may be in fact available only to some either because of the biases of the decision-makers or the availability or lack of availability of diversion programs in different parts of the country.

As to the first issue—protecting due process rights—there are a number of measures that can be taken. One is to protect the accused's rights as they decide whether to agree to diversion in the first place. As noted above, the Canada Young Offenders Act rules out the use of diversion (called "alternative measures") unless a series of specified conditions are met including advising accused persons of their right to speak with a lawyer.[81] Another is to provide that a person may at any

80. Such a provision would be analogous to the Minnesota requirement, discussed in *supra* notes 72 and 73 and accompanying text, that prosecutors develop diversion programs.

81. The Canadian statute reads:

(1) Alternative measures may be used to deal with a young person alleged to have committed an offence instead of judicial proceedings under this Act only if

time suspend the diversionary alternative and have the matter returned to the courts. A third is to provide for regular monitoring of cases to determine whether they result in fair and equitable treatment.

As to the second issue—equal access to diversionary programs—it may be that mandatory language can reduce the disparity that is feared, provided that steps are taken to ensure that programs are actually available. The mandatory language of the New Zealand Children, Young Persons and Their Families Act of 1989 concerning diversion to family group conferences reduces the opportunities for discretion to be exercised in such a way that equal access is violated.[82] However, this is another reason why monitoring and evaluation of cases is vitally important.

7. Role of the Victim in the Diversion Decision

Before a matter involving an accused person is referred to a restorative justice process, such as family group conferencing or victim offender mediation/reconciliation, the victim will have been

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(a) the measures are part of a program of alternative measures authorized by the Attorney General or his delegate or authorized by a person, or a person within a class of persons, designated by the Lieutenant Governor in Council of the province;
(b) the person who is considering whether to use such measures is satisfied that they would be appropriate, having regard to the needs of the young person and the interests of society;
(c) the young person, having been informed of the alternative measures, fully and freely consents to participate therein;
(d) the young person has, before consenting to participate in the alternative measures, been advised of his right to be represented by counsel and been given a reasonable opportunity to consult with counsel;
(e) the young person accepts responsibility for the act or omission that forms the basis of the offence that he is alleged to have committed;
(f) there is, in the opinion of the Attorney General or his agent, sufficient evidence to proceed with the prosecution of the offence; and
(g) the prosecution of the offence is not in any way barred at law.
(2) Alternative measures shall not be used to deal with a young person alleged to have committed an offence if the young person
(a) denies his participation or involvement in the commission of the offence; or
(b) expresses his wish to have any charge against him dealt with by the youth court.

Young Offenders Act, R.S.C. ch. 110, (1984) (Can.).

82. Children, Young Persons and Their Families Act § 245, 1989 (N.Z.).

approached and have agreed to participate in that process. In the event that the referral is to alternative proceedings which are focused on the accused, the decision to refer should, if possible, be made after consultation with the victim.

If the victim disagrees with diversion, this should not prevent the official from referring the case, but the position of the victim should be considered along with other considerations. Of course, if the victim does not agree to participate in a restorative justice process that requires victim involvement, those processes will be unavailable to the official making the referral decision. The absence of the victim might, in appropriate situations, be compensated for by using surrogate victims or victim panels.

In some countries, the victim plays a determinative role in the selection of particular diversionary options. The French "measure of reparation," for example, requires the victim's consent in all cases.[83] In other countries, the victim's position is not determinative. In Germany, for example, the prosecutor can dismiss a case on a showing that the juvenile offender made efforts to reach a settlement with the victim, even if those efforts were unsuccessful.[84]

B. Court Procedures in a Restorative Framework

Restorative processes value direct participation by the affected parties, encounter between those parties, reparation for the harm caused, and eventual reintegration of victim and offender as contributing members of the community. Traditional criminal court procedures tend to value the use of professionals (judges, lawyers, prosecutors, probation officers, etc.), the dominant role of the judge, and either punishment or treatment of the offender. Juvenile court procedures in most countries are more like criminal court processes than restorative processes, although they tend to be less formal and place a higher value on treatment than their criminal court counterparts.

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83. C. PR. PEN. 12-1.

84. Hartmann and Kilchling, *supra* note 69, *citing JGG* §§ 45 (1)-(2).

There is a clash of values, then, when comparing restorative and court procedures. This does not mean that court procedures cannot become more inclusive for the parties involved in the process, more focused on direct participation by those parties, more responsive to the need to incorporate reparation in the final sanction, and more attentive to the eventual reintegration of both victim and offender into the community. It does mean, however, that there will be limits to which court procedures will be able to incorporate those reforms.

1. The Court Role of the Victim in a Restorative Framework

In a restorative process, the victim's interests are far more central than in contemporary criminal proceedings. A number of jurisdictions have adopted legislation which sets out the procedural rights that victims have during the course of criminal or juvenile proceedings. An interesting example is found in Indiana, where the victim must be offered an opportunity to participate in a victim offender mediation/reconciliation program if one exists.[85] The victim is not required to participate, but the offer must be made. The significant limitation to this "victim right" is that there is no requirement that the victim offender mediation/reconciliation program be available.[86]

85. IND. CODE § 33-14-10-5 (1990).

86. The Indiana statute reads:

(a) The prosecuting attorney or the victim assistance program shall do the following:

. . .

(7) In a county having a victim-offender reconciliation program (VORP), provide an opportunity for a victim, if the accused person or the offender agrees, to:

(A) meet with the accused person or the offender in a safe, controlled environment;

(B) give to the accused person or the offender, either orally or in writing, a summary of the financial, emotional, and physical effects of the offense on the victim and the victim's family; and

(C) negotiate a restitution agreement to be submitted to the sentencing court for damages incurred by the victim as a result of the offense. . . .

(b) If a victim participates in a victim-offender reconciliation program (VORP) under subsection (a)(7), the victim shall execute a waiver releasing:

2. The Role of Probation Officers in a Restorative Framework

There appears to be a divergence of opinion as to whether victim offender mediation/reconciliation and other restorative processes are best carried out by independent agencies or by these probation officers or social workers. In Austria, the Probation Assistance Association provides social work assistance to offenders and is also responsible for assisting the victim and offender in mediation, which ranges in form from face-to-face meetings to a kind of shuttle diplomacy.[87] This does introduce some role conflict, as the social worker's task is to help both arrive at a resolution and to be attentive to the offender's needs.[88]

The Czech Republic is in the process of establishing a Probation and Mediation Service, whose task would be comparable to that of the Probation Assistance Association in Austria. According to Jaroslav Fenyk, the potential role conflict would be resolved by interpreting the role of the mediator as a particular component part of the overall probation responsibility, rather than as an independent responsibility.[89]

Mediation in England is carried out by independent agencies, rather than by correctional officials. This is viewed as an important asset by Martin Wright, who observes that because mediation should benefit both victim and offender, the mediation service should be

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(1) the prosecuting attorney responsible for the victim assistance program; and

(2) the victim assistance program;

from civil and criminal liability for actions taken by the victim, an accused person, or an offender as a result of participation by the victim, the accused person, or the offender in a victim-offender reconciliation program (VORP).

(c) A victim is not required to participate in a victim-offender reconciliation program (VORP) under subsection (a)(7).

See id.

87. Pelikan, *supra* note 38, at 7.

88. *Id.*

89. Jaroslav Fenyk, Concept of the Probation and Mediation Service in the Czech Republic, Paper Presented to the Committee of Experts on Mediation in Penal Matters, at Strasbourg (March 5-7, 1997) (unpublished manuscript on file with the authors).

independent and not part of an existing structure dedicated to addressing the needs of either offenders or victims.[90]

C. Sentencing in a Restorative Framework

As noted earlier, restorative justice programs may be categorized as processes or outcomes. We have considered restorative processes in the sections on diversion and on court procedures. In this section, we deal with both restorative processes and outcomes. Victim offender mediation/reconciliation and other restorative processes may be used as part of the sentencing process itself, either by having the court order the offender to participate in such processes or by making that available as part of a pre-sentence report prepared by the probation service or other agency.

Restorative outcomes may also be used, with or without restorative processes. A fully restorative system will incorporate both, but even when adjudication is necessary, the sentence imposed can be one which achieves restorative purposes. Because restorative justice focuses on the harm caused by crime (and which in some cases leads to criminal behavior), a restorative response addresses the need to repair that harm. This results in an emphasis on restitution and steps toward reintegration of the offender and victim into the community.

1. Restorative Processes in Sentencing

In many jurisdictions, judges may use victim offender mediation/ reconciliation and other restorative processes as a means of determining the particular sentence or as part of the sentence. Presently, the use of such processes would typically occur in situations where the accused young person previously denied personal responsibility or asserted legal defenses. Once the factual and legal issues of guilt have been resolved, the young people may be willing to participate in a restorative process.

90. Wright, Victim/Offender Mediation, *supra* note 12, at 13.

The use of restorative processes at this stage in the process increases the need to guard against coercion. Accused persons may choose to participate in a "voluntary" process in an effort to receive a reduced sentence for the offenses of which they have already been convicted. Those individuals who are ordered to make an attempt to settle with their victim as a condition of sentence are clearly being coerced.

German law permits the use of mediation as a part of the sentence. The accused may be ordered to engage in "efforts to reach a settlement with the victim," to make compensation payments or apologize to the victim, or to do any or all of those in order to obtain a suspended prison sentence or an early release on parole.[91] The Queensland Juvenile Justice Code of 1992 has a similar provision under which the Court may, after guilt has been determined, refer a matter to a community conference to "help the court in making an appropriate sentence order."[92] The statute requires the judge to consider the community conference recommendations, but does not bind the judge to follow them.[93]

2. Issues Concerning Restitution

Restitution, perhaps the most obvious restorative sanction, raises a number of conceptual and practical issues. Among the conceptual

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91. Hartmann and Kilchling, *supra* note 69, *citing JGG* §§ 23, 15, 57.

92. Juvenile Justice Code § 119A(2)(b)(ii), 1992 (Austl.).

93. Another part of the Australian law reads:

> (1) This section applies if a community conference agreement is made on referral by a court because the court considered referral to a community conference would help the court in making an appropriate sentence order for the offence.
>
> (2) In making a sentence order for the offence, the court must consider --
>
> (a) the child's participation in the community conference; and
>
> (b) the agreement; and
>
> (c) anything done by the child under the agreement; and
>
> (d) a convenor's report under section 18E(6).
>
> (3) A court may impose a requirement on the child under the sentence order or in addition to the sentence order, even if the requirement is also a requirement of the agreement.

Id. at § 119D.

issues are: (a) What harms will be repaired?, (b) Which victims will be considered?, and (c) On what basis—seriousness of harm or seriousness of behavior resulting in harm—will restitution be ordered? Among the practical issues are: (a) How should the amount of restitution be determined?, (b) In what forms can restitution be made?, and (c) How can unwarranted disparity based on differing economic circumstances of offenders and victims be avoided?

In general and given the division of criminal and civil law, conceptual issues are answered modestly. Harms are generally limited to immediate and direct injuries that can be easily quantified, such as replacement or repair of property or medical injuries. Not included are indirect costs or costs more difficult to quantify, such as pain and suffering or loss of companionship. Victims are limited to direct victims, although community service is sometimes offered as a means of repaying an indirect harm to the surrounding community. Both seriousness of harm and seriousness of behavior are treated as limitations on the amount of reparation that may be ordered, with statutory limits on restitution or community service established for particular kinds of harm and provisions that restitution be limited to the actual cost to the victim if less than the statutory limit.[94]

Answers to the practical issues are also addressed in ways that reflect the need for speedy processing of the criminal case. The restitution amount is determined based on actual costs to the victim, or in some cases, on the basis of schedules provided to judges. Restitution takes the form of return of property when relevant, monetary payment to the victim, in-kind services to the victim, or symbolic reparation. Disparity may be addressed by blending state compensation with offender restitution and requiring that the restitution amount be determined based on a formula that takes into consideration the daily income of the offender. If the amount of harm to the victim is greater than the restitution ordered, the victim can apply for state compensation. If the amount of harm to the victim is

94. VAN NESS AND STRONG, *supra* note 2, at 45-64.

less than the restitution ordered, the surplus will be placed into the state compensation fund.[95]

Virginia's restitution statute is typical of many laws concerning restitution.[96] Under it, restitution is discretionary to the judge and is limited to the actual value of the property either at the time of the offense or the time of sentencing (whichever is greater). Restitution may also be made by return of the property to its owner. The statute also provides for civil remedies in the event restitution payments are not completed by the offender.[97] Similarly, the reparation provision in the New Zealand Children, Young Persons, and Their Families Act of 1989 limits the sum ordered to be paid to "the cost of replacement or (as the case may require) the cost of repair, and shall not include any loss or damage of a consequential nature."[98]

3. Issues Concerning Fines

Fines are a thorny issue from a restorative perspective. This is partially due to the inability of many offenders to pay, but more importantly because payment of a fine (which benefits the state) may make it less likely that the offender will be able to pay victim restitution. Some jurisdictions have therefore adopted restitution and excluded fines. This seems to be the approach taken by the German

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95. Daniel Van Ness, Legal Issues of Restorative Justice, Paper Presented to the International Conference on Restorative Justice for Juveniles, Conducted at Leuven, Belgium (May 12-14, 1997) (unpublished manuscript on file with the authors).

96. VA. CODE § 19.2-305.2 (1998).

97. The new Virginia statute reads:

> A. The court, when ordering restitution pursuant to § 19.2-305.1, may require that such defendant, in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offence (i) return the property to the owner or (ii) if return of the property is impractical or impossible, pay an amount equal to the greater of the value of the property at the time of the offence or the value of the property at the time of sentencing.
>
> B. An order of restitution may be docketed as provided in § 8.01-446 when so ordered by the court or upon written request of the victim and may be enforced by a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

See id.

98. Children, Young Persons, and Their Families Act § 287, 1989 (N.Z.).

Juvenile Justice Act, which has no provision for fines. Restitution may be ordered, but the only non-restitutionary monetary sanction that may be used is an order to pay a certain amount to a public welfare institution.[99]

4. Issues Concerning Community Service

From a restorative perspective, community service sanctions may be a useful alternative for decision-makers to consider in either judicial or restorative processes. However, there are a number of issues to keep in mind when imposing such sanctions. First, any community service expectation of the young person should be as closely related as possible to the particular offense and to the harm resulting from that offense to the general community. As noted previously, the Halt diversion program in The Netherlands uses community service sanctions.[100] It is reparative in focus, in that the young person and Halt staff meet and determine particular activities that will "sort out what you've done wrong." Examples include returning or paying for stolen goods, cleaning their graffiti off walls and repairing or paying for their vandalism damage.[101] The visibly close connection between the community service and the offense makes it more likely that the young person and the community will understand that it is in fact "sorting out what you've done wrong" and not simply punitive.

Second, community service assignments need to respect the offender. This means, among other things, that they should take into consideration the individual's age. While there is no particular reason why children, even under age fifteen, could not be expected to perform community service, the service required should reflect the age and abilities of the child. Furthermore, the community service should not be carried out in such a way that it demeans or endangers the individual's well-being. In some jurisdictions, community service orders are carried out in a very conspicuous fashion, with the workers expected to wear highly visible uniforms as they perform demeaning

99. Hartmann and Kilchling, *supra* note 69, *citing JGG* § 15, no.4.
100. van Hees, *supra* note 74, at 1.
101. *Id.*

work. These orders may serve a retributive function, but from a restorative perspective they offer little that is constructive.

Third, community service assignments address a more intangible injury than the direct injury to direct victims. Therefore, they should be secondary in importance to restitution and other actions that provide redress to direct victims. Zimbabwe's community service legislation permits community service as an alternative to the payment of a fine or imprisonment, which suggests that its role is understood to address more indirect and generalized "injuries" caused by crime.[102]

Finally, community service assignments can be a way to incorporate community participation in the administration of the sanction. In Zimbabwe, for example, the adult community service program has been administered by a non-governmental organization, Prison Fellowship Zimbabwe.

5. Evidence of Previous Diversion

Should evidence of a previous pre-trial diversion be admitted at sentencing in a subsequent trial? The argument in favor of allowing such evidence is that it would give diversionary sanctions some "teeth." The problem, however, is that although the previous diversion was predicated on the offender admitting responsibility, it is not a previous conviction.

The SACRO Reparation and Mediation Scheme in Scotland operates under authority of the Crown prerogative, and hence does not need legislation. The prosecutor has agreed that if a case is prosecuted after a medication attempt either unsuccessful or the resulting agreement is not kept, the prosecutor will not refer to the

102. The Zimbabwe law reads:
Subject to this section, a court which imposes a sentence of a fine upon an offender may do either or both of the following --
(a) impose, as an alternative punishment to the fine, a sentence of imprisonment of any duration within the limits of the court's punitive jurisdiction;
(b) permit the offender, as an alternative to paying the fine, to render such community service as may be specified by the court.

Zimbabwe Criminal Procedure and Evidence Act § 347(1); *See also* § 350A.

mediation attempts in any subsequent court proceedings.[103] The New Zealand Children, Young Persons, and Their Families Act of 1989 prohibits evidence of warnings and police cautions from being introduced in criminal proceedings.[104] Similarly, the Act prohibits introduction of statements or other information that may be disclosed in the course of a family group conference.[105]

Prohibiting introduction in court of evidence of prior diversion is not the same as expunging that information so that it cannot be considered for any purpose in the future. As noted previously, under prosecutorial regulations which govern the Halt scheme in the Netherlands, young people are given warnings only once, and thereafter are referred to Halt.[106] Except for in unusual situations, they can be referred to Halt only twice, and at least a year must have passed between the first and second referrals.[107] The Labour Government in England has proposed a modified version of this approach: a young person could be reprimanded once only, and subsequently would receive either a Final Warning or be prosecuted. If two or more years have passed since the first Final Warning, a second Final Warning could be issued.[108]

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103. SUSAN R. MOODY & ROBERT E. MACKAY, GREEN'S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION IN SCOTLAND 19 (1995).

104. A portion of the New Zealand statute reads:

> Where, in respect of any offence alleged or admitted or proved to have been committed by a child or young person, a warning or formal Police caution is given to that child or young person pursuant to section 210 or section 211 of this Act, --
> (a) No information relating to that warning or that caution shall be disclosed, other than on behalf of the defense, in any criminal proceedings against that child or young person;
> (b) No evidence of that offence shall be admissible, on behalf of the prosecution, in any criminal proceedings against that child or young person for any other offence.

Children, Young Persons, and Their Families Act § 213, 1989 (N.Z.).

105. The New Zealand Act further reads:

> (1) No evidence shall be admissible in any Court, or before any person acting judicially, of any information, statement, or admission disclosed or made in the course of a family group conference. . . .

See id. at § 37.

106. van Hees, *supra* note 74, at 3.

107. *Id.*

108. Wright, Victim/Offender Mediation, *supra* note 12, at 3-4.

D. Post-sentence Supervision in a Restorative Framework

Effective restorative justice programs place a high value on careful monitoring of subsequent performance of the negotiated agreement. Although studies have shown that restitution is more likely to be paid when it results from victim offender mediation/reconciliation than when it is imposed by a judge in sentencing,[109] successful completion is not automatic. Furthermore, the failure of the offender to keep an agreement with the victim and others is considered to be a serious matter. Not only has the victim been "let down" again, but the offender has failed to keep trust.

This failure, however, need not result in the matter being referred to the court. It could be addressed in follow-up meetings with the family group conference, in order for the offender to offer explanations and for the group to determine whether a modified agreement would be in order, or whether the matter should simply be referred to the court for disposition. The New Zealand Children, Young Persons, and Their Families Act of 1989 provides that a family group conference may reconvene on the Youth Justice Coordinator's motion or at the request of at least two members of the conference in order to review its decisions, recommendations and plans.[110]

Most jurisdictions, however, provide for judicial enforcement of restorative measures. For example, France's "measure of reparation", when ordered by a court, must be supervised by a person or a public agency authorized to do so, and when the reparative measure is fully implemented, the judge must be notified by written report from the supervising authority.[111]

III. TRANSITIONING TO LEGISLATE FOR RESTORATIVE JUSTICE

> When I got to Congress, I didn't know that [Speaker of the House Newt Gingrich] was as big as he was. It shocked me,

109. Mark Umbreit and Mike Niemeyer, *Victim offender Mediation: From the Margins Toward the Mainstream, in* 1996 PERSPECTIVES 28 (1996).

110. Children, Young Persons, and Their Families Act § 270, 1989 (N.Z.).

111. C. PR. PEN. § 12-1.

> because people were around him all the time and he was huge. And right away, it was apparent to me the guy was a rock star. I didn't know he hit that big, but it was a hit, you know, and Mary, my wife, claims that becoming a star is not good, overnight especially. It messes up your psyche. And she's right, you know. It's too fast of a transition. And if you don't handle it properly, it can overcome you and overwhelm you and you can make a lot of mistakes.
>
> . . .
>
> So I went over and I set myself up, saying, "Look, I'm not trying to impose on your life, but you're a rock star now, and if I may say so, it's like having your first hit record. And it's very important that you understand that a lot of things are going to change in your life now. . . . You're going to go from defense to offense, and you're going to have to think a different way and move on now in life in a different manner."
>
> former Congressman Sonny Bono[112]

Restorative justice is now increasingly accepted and practiced in communities around the United States. Genesee County in New York has established it as the underlying philosophy of their justice system. Minnesota has established an office to coordinate and develop restorative programs throughout their state. Vermont has adopted restorative justice principles as its guiding principles. Ohio's community corrections program has adopted restorative values as the cornerstones of its community justice program. Restorative justice has now become a frequent topic of discussion at professional conferences, and the federal Justice Department has sponsored conferences, seminars and teleconferences on the topic.

Restorative justice is no longer an abstract idea. Increasingly, professionals in the justice system are adapting restorative models to fit their own justice structures. While these pockets of restorative

112. Congressman Sonny Bono, from his interview on the Tim Russert Show, CNBC News, April 27, 1997.

justice are far from the norm in justice programs, it is clear that restorative advocates are no longer complete outsiders. This should encourage those who have long promoted restorative principles, but it also poses a challenge to them as well. For just as Newt Gingrich's strategies and conduct had to change when he moved from a combative insurgent as the minority leader in the House to national leader as its Speaker, so the strategies and tactics of restorative advocates must change.

There are five key areas in which restorative advocates may need to make transitions in order to firmly establish restorative values in the justice process: in *advocacy* to move from agitators to architects, in *funding* to move from the margins to the mainstream, in *programs* to move from prototypes to full-scale production, in *vision* to move from aspiration to analysis, and in *politics* to move from skepticism to sophistication.

A. Advocacy: From Agitators to Architects

A decade ago, it was sufficient to simply contrast restorative processes with "retributive" justice. The challenge at that time was to gain attention and credibility for an idea so audacious that it was greeted with skepticism: that it is possible for victims to be healed, for offenders to repent, for relationships to be reconciled. The claim was not that this always happened, but that it *could* happen, and that this should change the way we think about crime. As victim offender reconciliation programs spread, and as they began handling even the most serious crimes, this basic premise began to attract interest. This interest has increased further with the growing use of family group conferences, which include not only the victim and offender but their families and key community members in the process of "making things right." Other programs, such as sentencing circles, adapted from justice processes of other cultures and places, have added further credibility to the restorative movement.

Gone are the days when the task was solely to raise an abstract theoretical premise, or to seek minimal funding for pilot programs at the margin of the justice process. Now the time has come to take

advantage of growing interest and support to firmly establish restorative practices as the foundation of the criminal justice system of the future. To do that, advocates must move from being agitators -- persons whose job is to raise questions about and undermine current approaches—to being architects—persons who can construct new programs and systems capable of dealing with the overwhelming challenges all criminal justice practitioners face today.

B. Funding: From Marginal to Mainstream

As restorative justice has become more popular, small grants have become available for demonstration projects. As it attracts even more attention, the amount of available funding will (and should) increase. But this presents the danger that savvy program administrators with their inside knowledge of writing grants (and their desire for more dollars) will wrap their current programs in a thin layer of restorative jargon, and obtain funding for programs which are not restorative at all.

Pat Nolan faced such a situation as a member of the California State Assembly when legislation he sponsored to establish "enterprise zones" in California was implemented. The Department of Commerce was to oversee and publicize the program which offered tax incentives and regulatory relief to residents and businesses in depressed inner city areas. Enterprise zones were supposed to be a bold alternative to urban re-development, encouraging local residents and businesses to invest and expand in the inner city, instead of moving them out to make room for large corporations lured into the cities with huge tax breaks.

Unfortunately, the Department of Commerce was used to publicize redevelopment incentives to large businesses, and it packaged the enterprise zones as part of that program. Marketing was directed towards large corporations outside the zones, and there were no marketing strategies to publicize the incentives to residents and small businesses in the zones. What was intended as a bold plan for making capitalism work for inner city residents became simply another scheme to subsidize big businesses.

The same fate could befall restorative justice programs unless we are prepared to make sure the same old programs are not just repackaged in restorative justice wrapping. Criminal justice systems have seen many fads come and go and still remain largely unchanged through them all. Many professionals in the criminal justice field look on restorative justice as just another in this long line of fads.

C. Programs: From Prototype to Production

It is one thing to run a successful model program. It is another thing altogether to expand that program so that it is replicated widely without losing its restorative character. Neither task is easy, and success at one does not guarantee success at the other. A prototype may never go into production. Nolan saw this happen to a restorative program during his tenure in the California State Assembly. He was impressed with a local juvenile court program which formed community groups to evaluate juveniles convicted of crimes before sentencing. The Juvenile Justice Connection Project (JJCP) brought together the offender, their parents, clergy, and representatives of several local agencies, including police, schools, courts, child welfare, and health departments. The group evaluated each juvenile assigned to them by the court to determine which factors might be contributing to their bad conduct. If they were chronically absent, their truant officer was included. If they couldn't read, local optometrists performed free eye exams. If they needed glasses, the local Lions Club donated them. If they were gang members, plastic surgeons volunteered to remove their tattoos.

As a result, the judge had a complete plan for the rehabilitation of the juvenile, worked out by all the parties, before issuing a sentence. This program achieved considerable success in helping these youngsters turn their lives around. The results were so impressive that Nolan was able to convince his colleagues to provide funding to replicate the JJCP in five communities throughout California. Every one of the replications flopped.

We can learn several lessons from this experience. First, the leadership and philosophy behind a program are more important than

its structure. One of the principle reasons JJCP was successful was the vision and energy of Judge Irwin Nebron, who had conceived of and developed the program. Replicating the structure of JJCP was easy; replicating Judge Nebron's leadership was not and the programs failed.

Second, if funded programs are to be truly restorative, the persons making the grants should be knowledgeable and enthusiastic about the philosophy of restorative justice. In looking back on how JJCP funding was administered, it appears that the grants were viewed as a way to direct extra money to friendly insiders rather than as a means of building a novel program.

Third, groups which had been working with juveniles viewed JJCP as a threat to their funding. Pasadena was one of the cities selected for replication. Nolan was delighted with this because Pasadena was in his Assembly district: however, he was later surprised to receive angry phone calls from board members of the Pasadena United Way complaining that JJCP threatened their juvenile program. Their program did not provide the collaborative evaluation that JJCP did, but they were afraid that they would lose the funds sent to JJCP.

D. Vision: From Aspiration to Analysis

Vision is motivating and challenging. A hallmark of restorative justice is that it has elicited aspiration and hope in persons touched by crime and criminal justice. Aspiration—the desire for something to be better—is an important feature of restorative justice. But it is not all. When restorative justice theorists succeed in having one of their programs adopted, whether by administrative directive or through legislation, it is imperative that they monitor its implementation to make certain that it is restorative in practice as well as in theory. Otherwise, it may be implemented in ways which are quite retributive.

A good example is the manner in which the restitution provision of California's Victims' Bill of Rights was implemented. Nolan was one of the earliest supporters of the initiative; he was surprised to find that its restitution provision allowed the Attorney General to

determine how it would be implemented. At the time, neither Paul Gann nor Nolan realized how this would eventually eviscerate the restorative aspect of the restitution provision. Restitution is, by definition, payment to the victim by someone who has caused injury. However, in California the system established by the Attorney General collects payments from all offenders, even those for whom no victim has been identified, and places the payments into a general fund for victims. There is no link between the offenders' payments and their victims' reimbursements. In fact, this system would more properly be called a fine instead of restitution.

Had supporters of the Victim Bill of Rights paid closer attention to its implementation, they could have insured that a true restitution program was implemented. Offenders would have known that their payments were paying for the harm they had done, and victims would have had the satisfaction of receiving some recompense from the persons who had harmed them.

When a restorative program is adopted, it is important that there be a systematic analysis to ensure that it remains faithful to the vision of restorative justice principles. The program's impact on the lives of victims, offenders and community should be evaluated, with an eye to using the findings to realign the vision and practice of restorative justice. Such analysis serves to keep restorative justice theorists in contact with the people who are actually doing the work, reduces the likelihood that non-restorative programs or features will be overlooked because of the "restorative" label, and will increase the likelihood that systemic obstacles are taken seriously.

Analysis can also help identify new model restorative programs which could be replicated, and locate practitioners of restorative justice who could assist other professionals interested in implementing restorative programs in their courts and jurisdictions. This cadre of credible restorative advocates "inside" the system, with hands-on experience operating restorative programs, can become a pool of talent from which executives and legislators seeking to implement restorative justice can draw.

E. Politics: From Skeptical to Sophisticated

Recognizing the power of individuals within the system to ensure restorative outcomes should remind us that the opposite may happen as well. The best designed program can be undermined by a public, a bureaucracy, or a political leadership which does not understand, or which does not accept, restorative justice values. This is particularly true as government bureaucracies struggle for funding and personnel: intentionally or unintentionally, administrators may end up taking their current operations and clothing them in the language of restorative justice.

That is why it is essential that a cadre of proven restorative justice practitioners be available to take charge of these programs and to assume political and public leadership roles. These may be people who themselves have worked in the current system and have solid professional reputations, who understand the strengths and limitations of the bureaucracies and political power and are not intimidated by it. Otherwise, the inertia of the current system will devour them and cause good restorative programs to disappear in the miasma of current programming.

As the restorative justice movement develops such a cadre of practitioners who are developing, funding and operating restorative programs, those restorative advocates outside the "system" will need to become politically sophisticated as well. Otherwise, there will be unnecessary tension within the movement as restorative justice practitioners begin to attain positions of responsibility within the system. Should restorative advocates outside the system compliment officials who are making the system more restorative, even if they are doing non-restorative things as well? Does it matter whether the non-restorative practices are a matter of policy set by superiors? Should outside advocates work primarily through friendly officials, or should they take steps to influence others as well?

When public officials try to pass off retributive practices as restorative, they should be called to task. But intentional deception is less likely than inadvertent harmful decisions made by busy people removed from the results of those decisions. The problem for

restorative justice advocates outside the system is that even unintended consequences can be dire for the individual victims and offenders experiencing them. Further, sloppily run "restorative" programs can tarnish the reputation of the movement and its members. How can restorative advocates in and out of the system maintain the course?

One approach is to develop disciplines to maintain focus while making the necessary transitions described above:[113]

1. *Gain support for restorative justice.* Constant education efforts within the general public and the criminal justice system are essential. Do not assume that the existence of restorative programs means that public, political and justice system leaders understand or support it.

2. *Develop credible coalitions.* Broad-based support is invaluable in promoting and developing restorative justice. It increases the likelihood that restorative programs will be well-designed, and once designed will be credible.

3. *Pursue strategic goals.* The more focused the coalitions can be in their objectives, the more likely that they will succeed. If those objectives are strategic, then success in reaching them is more likely to mean that a shift to a more restorative response has indeed taken place.

4. *Revisit the vision.* Analysis of programs should be done not only in terms of their program objectives, but also in terms of their relationship to the vision of restorative justice. Similarly, analysis of advocacy strategies can be evaluated in terms of their success and their congruence with restorative values.

5. *Evaluate for impact.* At some point, one must ask whether the programs and values that are adopted have in fact moved the community into a new way of thinking about crime. Evaluation is an important step in making that assessment, and in helping establish new strategic goals and tactics.

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113. *See* VAN NESS AND STRONG, *supra* note 2, at 156-72 (for further discussion of these disciplines).

6. Realign vision and practice. The links between vision and practice are not unilateral. Practice is not a passive substance which vision measures and critiques. Sometimes practice helps shape the vision more fully, either by challenging pre-existing assumptions or by pointing to new possibilities. Regular realignment helps practitioners understand and respond to the tension or discrepancies that may exist between the two.

7. Stay connected. Sometimes the different roles taken by restorative advocates reduces the likelihood that they will interact. This in turn increases the possibilities for misunderstanding and mistrust, or at least for confusion and cross-purposes. Staying in touch with others interested in implementing restorative justice is an important discipline.

8. Take obstacles seriously. It is tempting to ignore certain obstacles because they appear to be intractable, but this is a self-defeating strategy since obstacles do not disappear simply because they are ignored. Obstacles that cannot be removed may be incorporated into strategic plans by considering how to minimize them or avoid them, or by determining that neither is a feasible option and that it is better to pursue different restorative initiatives which will not confront those barriers.

IV. CONCLUSION

Restorative justice initiatives do not necessarily require legislative action. There are times, however, when legislation is both useful and feasible: when it is needed to overcome legal or systemic barriers to restorative programs, when it creates a legal inducement for justice officials to use those programs, when it is important to guide and structure the operation and evaluation of restorative programs, and when it is required to protect the rights of offenders and victims who participate.

In this article, we have reviewed existing statutes in countries which are using restorative programs in their justice systems. We have organized this legislation into four general categories: diversion, court procedures, sentencing, and post-sentence supervision.

Organizing existing and proposed legislation in this way follows the typical progression of a case through traditional criminal justice processes. As restorative programs become more central to criminal justice, other categories may become more helpful.

The increasing credibility of restorative justice means that its advocates must become even more skillful at negotiating the political process. We have suggested that this will require a transition in how those proponents think and behave in their advocacy, funding, programs, vision and political sophistication. Those who have been challenging their justice systems to "think differently" about crime now need to think differently about themselves and their roles. Their success in doing so may determine whether the final result of "legislating for restorative justice" is simply more legislation, or is indeed a justice system that restores victims, offenders and communities.***

*** For additional resources that discuss the topic of this article, *see* Quinney, Richard, *The Way of Peace: On Crime, Suffering, and Service, in* CRIMINOLOGY AS PEACEMAKING (Harold Pepinsky and Richard Quinney, eds., 1991).

APPENDIX 1[114]

FOUR QUESTIONS ABOUT RESTORATIVE JUSTICE

1. What is restorative justice?

- It is a *different way of thinking* about crime and our response to it.
- It focuses on the *harm caused by crime*: repairing the harm done to victims and reducing future harm by preventing crime.
- It requires offenders to take *responsibility* for their actions and for the harm they have caused.
- It seeks *redress* for victims, *recompense* by offenders, and *reintegration* of both within the community.
- It is achieved through a *cooperative effort* by communities and the government.

2. How is restorative justice different from what we do now?

- It *views criminal acts more comprehensively*: rather than defining crime only as lawbreaking, it recognizes that offenders harm victims, communities and even themselves.
- It *involves more parties*: rather than giving key roles only to government and the offender, it includes victims and communities as well.
- It *measures success differently*: rather than measuring how much punishment has been inflicted, it measures how much harm has been repaired or prevented.
- It recognizes the importance of *community involvement and initiative* in responding to and reducing crime, rather than leaving the problem of crime to the government alone.

3. How does restorative justice respond to crime?

- It emphasizes *victim recovery* through redress, vindication and healing.
- It emphasizes *recompense by the offender* through reparation, fair treatment and habilitation.
- It establishes processes through which parties are able to *discover the truth* about what happened and the harms that resulted, to *identify the injustices* involved, and to *agree on future actions* to address those harms.
- It establishes evaluation processes through which the community and government may consider whether *new strategies to prevent crime* are needed.

114. *See* VAN NESS, DANIEL & KAREN HEETDERKS STRONG, RESTORING JUSTICE

4. How does restorative justice seek to prevent crime?

- It builds on the *strengths of community and the government.* The community can build peace through strong, inclusive and righteous relationships; the government can bring order through fair, effective and parsimonious use of force.
- It emphasizes the need to *repair past harms* in order to prepare for the future.
- It seeks to *reconcile* offenders with those they have harmed.
- It helps communities learn to *reintegrate* victims and offenders.

(1997).

APPENDIX 2

RESTORATIVE JUSTICE FUNDAMENTAL PRINCIPLES

drafted by Ron Claassen
revised May 1996 UN Alliance of NGOs Working Party of Restorative Justice

1. Crime is primarily an offense against human relationships and secondarily a violation of a law (since laws are written to protect safety and fairness in human relationships).

2. Restorative Justice recognizes that crime (violation of persons and relationships) is wrong and should not occur and also recognizes that after it does there are dangers and opportunities. The danger is that the community, victim(s), and/or offender emerge from the response further alienated, more damaged, disrespected, disempowered, feeling less safe and less cooperative with society. The opportunity is that injustice is recognized, the equity is restored (restitution and grace), and the future is clarified so that participants are safer, more respectful, and more empowered and cooperative with each other and society.

3. Restorative Justice is a process to "make things as right as possible" which includes: attending needs created by the offense such as safety and repair of injuries, relationships and physical damage resulting from the offense; and , attending to needs related to the cause of the offense (addictions, lack of social or employment skills or resources, lack of moral or ethical base, etc.).

4. The primary victim(s) of a crime is/are the one(s) most impacted by the offense. The secondary victims are others impacted by the crime and might include family members, friends, witnesses, criminal justice officials community, etc.

5. As soon as immediate victim, community and offender safety concerns are satisfied, Restorative Justice views the situation as a teachable moment for the offender; an opportunity to encourage the offender to learn new ways of acting and being in community.

6. Restorative Justice prefers responding to the crime at the earliest point possible and with the maximum amount of voluntary cooperation and minimum coercion, since healing in relationships and new learning are voluntary and cooperative processes.

7. Restorative Justice prefers that most crimes are handled using a cooperative structure including those impacted by the offense as a community to provide support and accountability. This might include primary and secondary victims and family (or substitutes if they choose not to participate), the offender and family, community representatives, government representatives, faith community representatives, school representatives, etc.

8. Restorative Justice recognizes that not all offenders will choose to be cooperative. Therefore there is a need for outside authority to make decisions for the offender who is not cooperative. The actions of the authorities and the consequences imposed should be tested by whether they are reasonable, restorative, and respectful (for victim[s], offender, and community).

9. Restorative Justice prefers that offenders who pose significant safety risks and are not yet cooperative be placed in settings where the emphasis is on safety, values, ethics, responsibility, accountability, and civility. They should be exposed to the impact of their crime(s) on victims, invited to learn empathy, and offered learning opportunities to become equipped with skills to be a productive member of society. They should continually be invited (not coerced) to become cooperative with the community and be given the opportunity to demonstrate this in appropriate settings as soon as possible.

10. Restorative Justice requires follow-up and accountability structures utilizing the natural community as much as possible, since keeping agreements is the key to building a trusting community.

11. Restorative Justice recognizes and encourages the role of community institutions, including the religious/faith community, in teaching and establishing the moral and ethical standards which build up the community.

APPENDIX 3

DECLARATION OF LEUVEN

ON THE ADVISABILITY OF PROMOTING THE RESTORATIVE APPROACH TO JUVENILE CRIME

made on the occasion of the first International Conference on 'Restorative Justice for Juveniles. Potentialities, Risks and Problems for Research', Leuven, May 12-14, 1997

This declaration has been accepted on May 13th, 1997 by the participants in the business meeting of the International Network for Research on Restorative Justice for Juveniles, among whom prominent scholars and practitioners Gordon Bazemore, John Braithwaite, Ezzat Fattah, Uberto Gatti, Susan Guarino-Ghezzi, Russ Immarigeon, Janet Jackson, Hans-Juergen Kerner, Rob MacKay, Paul McCold, Mara Schiff, Klaus Sessar, Jean Trépanier, Mark Umbreit, Peter van der Laan, Daniel Van Ness, Ann Warner-Roberts, Elmar Weitekamp, Martin Wright, Lode Walgrave. In spite of differences in approach and in emphasis, the participants agreed that the text can be considered as a common ground for further elaboration.

The same declaration was discussed at the closing session of the Conference on 'Restorative Justice for Juveniles. Potentialities, Risks and Problems for Research', Leuven (Belgium), May 14th, 1997. The main points of discussion were:

- *whether restorative justice is to be advanced as a form of diversion from the traditional justice system or as a fully fledged alternative aimed at replacing this system*
- *whether also some kinds of imposed sanctions can be considered as a part of restorative justice*
- *whether the concept of restorative justice also include the justice system*
- *how the relation is between restoration and rehabilitation of the offender*
- *whether the same propositions could be advanced for adults also.*

INTRODUCTION

The aim of this public statement is
(1) to emphasize the belief of a substantial part of the scientific world in the potential of restorative justice for offering a constructive response to crime,

(2) to encourage political leaders and governmental officials to inform themselves thoroughly about the concept of restorative justice and necessary system changes required to implement the concept properly,
(3) to stimulate legal authorities to widen the opportunities for implementing restorative responses to crime, to promote experimenting with new goals and forms of restorative responses to crime, and to encourage policy debate and scientific research.

The declaration takes into consideration the several international conventions, rules and recommendations issued in recent years by international bodies, in particular the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules, 1985), the United Nations Declaration of basic principles of Justice for Victims of Crime and Abuse of Power (1985), the United Nations Convention on the Rights of the Child (1989), the United Nations Minimum Rules for the Protection of Minors Deprived of their Liberty (1990), the Recommendations of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedures (R85/11, 1985), with regard to the Social Reactions to Juvenile Crime (R 87/20, 1987) and on Assistance to Victims and the Prevention of Victimisation (R87/21, 1987, and the European Convention on the Compensation of Victims of Violent Crimes (1984).

The declaration is based especially upon the growing amount of practical experience and scientific research, commented and published in many countries, of which an important part, especially concerning juveniles, has been presented and discussed at the first 'International Conference on Restorative Justice for Juveniles', Leuven, May 12-14, 1997.

THE POTENTIAL

1. All over the world, initiatives are being taken that can be covered by the term "restorative justice." They lead to an increasing belief of many scientific scholars that restorative justice can evolve towards being a serious alternative in responding to crime. The aim of the restorative approach is to restore the harm done to victims and to contribute to peace in the community and safety in society. To achieve this, a process is set up "whereby 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 implications for the future"(T. Marshall).

2. The initial success of the approach as documented by scientific research has led to a growing confidence in its potential. The great majority of the restorative obligations are well accomplished by the offenders. Most participating victims experience a greater degree of satisfaction than those who are involved in more traditional judicial procedures. Offenders generally have less difficulty in understanding the restorative obligations than they have with regard to the punitive

or rehabilitative responses. Outcomes in terms of recidivism seem to be positive, though further research is needed to establish this more firmly. When informed realistically about its possibilities, the majority of the public appears to prefer restorative responses to crime.

3. No decisive limits concerning the feasibility of restorative justice have yet been observed. Many victims of serious offences are also willing to cooperate in restorative processes. Serious offenders can and regularly do comply with restorative obligations. No more threats to public safety have been observed as a result of the restorative experiments than have been caused by any other traditional sanctions or measures.

4. The restorative response to crime is based on a socio-ethical approach which stresses the responsibilities of the parties to find a constructive solution to the crime conflict. The approach therefore offers the potential for more peacekeeping in society as a whole.

5. Optimism concerning initial restorative responses to crime leads to a more general concept of restorative justice. The wider potentialities of restorative justice appear to be very promising though more research is needed to further explore these potentialities.

6. Given that much of the experimentation has been carried out with juveniles and given that public opinion as well as legal authorities generally accept more openness in their reaction to juvenile offending, the following propositions are advanced for the restorative response to juvenile offending.

TEN PROPOSITIONS

1.

(11) Crime should not be considered as a transgression of a public rule or as an infringement of an abstract juridico-moral order but should, in the first place, be dealt with as a harm to victims, a threat to peace and safety in community and a challenge for public order in society.

(12) Reactions to crime should contribute towards the decrease of this harm, threats and challenges. The purely retributive response to crime not only increases the total amount of suffering in society, but is also insufficient to meet victims' needs, promotes conflict in community and seldom promotes public safety. The tendency towards more punitive responses to juvenile crime is therefore counter-productive.

(13) Reactions to crime should consider in full the accountability of the offender, including his obligation to contribute to the restoration of the harm and peace, and his entitlement to enjoy all rights to which all members of the society are entitled. A purely rehabilitative response is often not advisable as it can circumvent the possible accountability of the offender and it may not offer an adequate framework

for legal safeguards. It is therefore important that the rehabilitative approach to offenders is voluntary and not judicially enforced.

2.

(21) The main function of social reaction to crime is not to punish, but to contribute to conditions that promote restoration of the harm caused by the offence. It is therefore called restorative justice.

(22) All kinds of harm are susceptible to restoration, including the material, physical, psychological, and relational injuries to individual victims, losses in the quality of relational and social life in the community and declines in the public order in society.

3.

The role of public authorities in the reaction to an offence needs to be limited to

- contributing to the conditions for restorative responses to crime,
- safeguarding the correctness of procedures and the respect for individual legal rights,
- imposing judicial coercion, in situations where voluntary restorative actions do not succeed and a response to the crime is considered to be necessary,
- organizing judicial procedures in situations where the crime and the public reactions to it are of such a nature that a purely informal voluntary regulation appears insufficient.

4.

(41) The victim has the right to freely choose whether or not to participate in a restorative justice process. The possibility of such a process should always be offered to him or her in a realistic way. If the victim accepts, he or she should have the opportunity to express completely his or her grievances and to make the full account of any injuries and losses sustained. A refusal to cooperate should not hamper the victims' possibility for indemnity through judicial procedures.

(42) The offender cannot be involved in any voluntary restorative process unless he or she freely accepts the accountability for the harm caused by the offence.

(43) If the victim refuses to cooperate in a restorative process, the offender should nevertheless in the first place be involved in some form of restorative responses, such as contributions to victim-funds and/or community service.

(44) The realization of a restorative process with the particular victim may not complete the restorative reaction, if the community itself is a party concerned. The offender may be obliged to complete a community service, functioning as a symbolic or actual restoration of the harm done to community.

5.

(51) Within the rules of due process and proportionality and in so far it does not obstruct the restorative response itself, the action towards young offenders should maximally contribute to competency building and reintegration.

(52) The implementation of a restorative process, whether from within or without the judicial system, should not limit the availability of voluntary treatment, assistance and support to the juvenile offender and/or his family from agencies operating outside the judicial system.

6.
If concerns for public safety are judged to necessitate the incapacitation of an offender, the offender should nevertheless be stimulated to undertake restorative actions from within his or her place of confinement. These actions can take the form of offering apologies, participating in a mediation program, and/or accomplishing services to the benefit of the victim, a victim-fund or the community.

7.
(71) Every public coercive intervention, whether or not it is aimed at restorative goals, should only be taken by a judicial instance, according to clear procedural rules.
(72) The outcome of any restorative process should not transgress a maximum which should be in proportion to the seriousness of the harm that has been caused and to the responsibility and the capacities of the offender.

8.
Authorities should make serious efforts to facilitate restorative responses to juvenile crime. These include
(81) remodeling the juvenile justice system in order to enhance the opportunities for restorative responses in and outside the system,
(82) providing the necessary agencies in communities which are equipped to carry out these actions,
(83) promoting the development of adequate methodologies for sound implementation of restorative processes,
(84) creating opportunities for education and training of staff who will be responsible for implementing restorative processes,
(85) promoting scientific research and reflection on restorative justice issues.

9.
In concert with practitioners, scientific research on restorative justice has to
(91) provide scientific feedback on the processes and outcomes of ongoing experiments and practices, and to make suggestions for new experiments,
(92) construct theories which can lead to deeper insight into the ongoing processes, collate the separate practices into a coherent framework and increase the innovative appeal of the restorative approach,
(93) contribute to the development of adequate methodologies for implementation of the restorative processes,
(94) investigate the cultural and structural contexts currently operating in the judicial system, the community and in society, which together determine the

existing opportunities for restorative justice, and to reflect upon possible ways of improving this,
(95) develop reflection on the socio-ethical basis of restorative justice,
(96) examine the legal context of restorative justice and to make clear in how far legal safeguards are respected.

10.
Although the propositions advanced above focus primarily on responses to juvenile offending only, similar considerations may very well apply to adult offending also.

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